

Après Enlargement

**Legal and Political Responses
in Central and Eastern Europe**

edited by

Wojciech Sadurski

Jacques Ziller

Karolina Žurek



European University Institute

Robert Schuman Centre
for advanced studies

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Florence, Italy

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Acknowledgements

The process of enlargement of the European Union (EU) that culminated in the admission of ten new Member States on 1 May 2004, has been watched with great interest, by analysts and scholars alike, as perhaps the most important event in the history of European integration to date. With no disrespect to Malta and Cyprus, it is probably fair to say that most attention was paid to the accession of eight member states from Central and Eastern Europe, with two others (Bulgaria and Romania) hoping to accede in the near future. This is also the focus of this volume. While we are aware of (and are ourselves involved in) longer-term scholarly projects describing and evaluating the effects of this enlargement, our intention here was to present an interim, short- to mid-term analysis of the enlargement's effects exactly one year after the formal day of accession. To this end we asked a number of scholars in law, political science and (to a lesser degree) economics, many of whom are affiliated with the European University Institute (EUI) in Florence, but also coming from the new Member States, to draw up a report card of the 2004 enlargement in the areas of their competence. The papers commissioned were then discussed at a workshop convened at the EUI on 29–30 April 2005, and the chapters included in this volume reflect more refined versions of the original papers, rewritten as a result of the workshop discussions.

This is not the first time the EUI has taken an interest in this EU enlargement. It has been one of the top research priorities both of the Robert Schuman Centre for Advanced Studies and of the four Departments of the Institute. Two of the three co-editors of the volume (and convenors of the workshop) have been involved in related projects, and the workshop held in April 2005 followed two other successful workshops held at the European University Institute which also resulted in publications: 'Europeanisation of Constitutional Law in the Light of the Constitution for Europe' convened by Jacques Ziller in May 2003 (J. Ziller [ed.], *L'eupéanisation des droits constitutionnels à la lumière de la constitution pour l'Europe – The Europeanisation of Constitutional Law in the Light of the Constitution for Europe*, Paris: L'Harmattan, 2003), and 'Implications of Enlargement for the Rule of Law and Constitutionalism in Post-communist Legal Orders' convened by Wojciech Sadurski in November 2003 (W. Sadurski, A. Czarnota and M. Krygier [eds], *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, Dordrecht: Springer Scientific, forthcoming 2006).

This volume can be seen as bringing the two threads of these earlier projects together: the Europeanisation approach represented in the former workshop, and the democratisation-impact approach represented by the latter, to study the immediate effects of accession, and to try to project more medium- and long-term trends in this area.

The convening of the May 2005 workshop and the publication of this volume were made possible by a number of institutions and persons. Institutionally, we are grateful to the Robert Schuman Centre of Advanced Studies, to the Department of Law and the Department of Social and Political Sciences at the EUI, to the Centre for Europe of the University of Warsaw, and to the European Centre Natolin for financial and other help. We wish to express our gratitude to a number of people who assisted in organizing the workshop, in particular to Annick Bulckaen, and those who helped us edit the contents of this volume and nurse it through to publication, including Patrycja Dabrowska, Cormac MacAmhlaigh, Mel Marquis, and in particular, Clare Tame.

This volume also benefited also from the important comments made during the workshop by some scholars who have not written separate chapters in this book but whose contribution to the discussion should be acknowledged here because they helped our authors refine and revise their arguments. In particular, we should mention the critical contributions by Laszlo Bruszt, Władysław Czapliński, Bruno De Witte, Gwendolyn Sasse, Philippe C. Schmitter, Mirosław Wyrzykowski and Jan Zielonka.

*Wojciech Sadurski,
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Preface

It is now over a decade and a half since the political map of Europe changed fundamentally with the collapse of communism in Central and Eastern Europe. It was inevitable, and indeed wholly appropriate, that the European Union (EU) would be under challenge to make its contribution in anchoring the consequential processes of transformation across the continent. Indeed it was a challenge on all fronts for both the 'old' west Europeans and the 'new' central and eastern Europeans. At the centre of the EU's response was the decision to set in train a policy of enlargement that would enable countries from Central and Eastern Europe to take their place as full members of the EU. Thus, much of the past decade has been spent on the rigours, the achievements and sometimes the frustrations of the 'pre-accession' process. This policy of eastern enlargement was partially achieved in May 2004 with the accession of eight of the countries from Central and Eastern Europe, along with Cyprus and Malta. The policy remains incomplete pending the planned accession of Bulgaria and Romania and further accession negotiations with other European countries.

For those of us who have followed these developments this process of enlargement is of immense importance. Yet it is also vital that we understand in depth 'post-accession', namely the consequences of enlargement, both because they affect polities, economies, and societies across Europe, and because they provide a crucial part of the context in which we have to set the future development of the EU and its neighbourhood. Moreover, some of the uncertainties about these consequences are feeding into the signals of public disquiet about the European integration process.

This timely volume makes a valuable contribution to a better understanding of the enlargement process, both as regards those countries which entered the EU in 2004 and as regards those waiting in the wings. The volume focuses in particular on the patterns of legal, institutional and constitutional change and locates these in the context of some of the substantive policy issues on the collective European agenda. The authors offer us a range of keen insights into these questions. Their contributions shed light not only on a particular critical juncture for the EU and all of its members but also on the underlying dynamics of transformation in contemporary Europe.

Many individuals and partners have worked together to bring this volume to fruition as a joint enterprise between the Department of Law, the Department of Social and Political Sciences and the Robert Schuman Centre for Advanced Studies at the European University Institute in Florence and also the Centre for Europe at the University of Warsaw and the European Centre in Natolin. Our grateful thanks and appreciation go to them all.

Helen Wallace

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Part 1

Constitutional Law and Constitutional Cultures in the New Member States in the Wake of Accession

Chapter 1

Introduction:

The Law and Institutions of New Member States in Year One

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I. Introduction

On 1 May 2004 eight new Member States from Central and Eastern Europe (CEE) became full members of the European Union.¹ EU law formally became binding in these countries and European law acquired precedence over national laws; national institutions became ‘European’ institutions, and, in particular, domestic, ‘ordinary’ courts became in a very real sense ‘European’ courts. They were of course ‘European’ before, by virtue of belonging to the institutional systems of countries geographically located in Europe, but as of 1 May 2004 they also became ‘European’ in the strict sense of belonging to an institutional system intimately connecting them to the European Court of Justice with the newly acquired powers to request a preliminary ruling from the ECJ. They became legally invested with the power and duty to apply European law in precedence to national law, irrespective of their experience or training in the former. All this occurred overnight, as of the first hour of 1 May 2004. Or did it?

II. Path dependence

Real changes do not occur overnight, they are never full and complete, and they are preceded by lengthy processes which lead up to what merely appears to be a

¹ The May 2004 enlargement also included Cyprus and Malta, but these two new Member States remain outside the scope of this volume.

total change. They are anchored in earlier processes and are significantly path-dependent. In this case, the 'path' includes two significant processes: the democratisation of states emerging from authoritarian Communist rule; and 'Europeanisation', understood as a progressive integration of their political and economic structures into larger, pan-European structures. Both processes are accompanied by the adoption (through various mechanisms) of norms generally perceived as 'European'.

Both processes have received rich and diverse treatment in scholarly literature; what is less satisfactory (although some occasional work has been carried out on it) is the study of the relationship between these two processes. While I do not intend to explore this relationship here some general remarks are important for the discussion of the pedigree of legal and institutional changes which occurred on 1 May 2004. Democratisation was both in an important tension and in a mutually reinforcing synergy with the Europeanisation of CEE states, and seeing these two sides of the relationship helps highlight the nature of the 'path dependence' referred to here.

The grounds for the claim about the *positive* reinforcement of democratisation and Europeanisation are clear. An important (perhaps *the* most important) motive for bringing the post-communist countries into the sphere of European norms (initially within the Council of Europe (CoE) and its related institutions, most notably the Venice Commission but subsequently also into the European Community and the EU) was to consolidate democracy in these countries in transition from Communism to something else. The motive was to make sure that this 'something else' had a democratic face, preferably in a liberal-parliamentary-democratic form as is known to Western Europe. Certainly, there is no single European democratic template: Western Europe knows monarchies and republics, federations and unitary states, parliamentary and presidential systems, proportional and majoritarian models of elections, parliamentary systems constrained by robust review by constitutional courts and models of (virtually) unrestrained parliamentary omnipotence, etc. But all these distinctions pale into insignificance when compared to the models represented by the 'really existing socialism' from which the CEE states have just emerged, as well as to the uncertain contours of the nationalistic authoritarianism to which, some of them at least, seemed to have been heading. Thus, the 'promotion of democracy' was part and parcel of the concern that many Western European players felt towards the other half of Europe, which was hardly separable from other fundamental motives for Europeanisation: the concern for geopolitical stability, the wish to enlarge and liberalise economic markets, and so forth. Karen E. Smith is right to

conclude that “[T]here has been a consensus in the West that democratization in Eastern Europe should be supported and promoted, and that the final goal is that of consolidating democracy throughout the region”.² And as I have claimed elsewhere, these Western objectives resonated with many citizens and political actors in the candidate states for whom one of the main (if not *the* main) motive for accession was to see the newly gained democracy strengthened and made more resilient against authoritarian, undemocratic tendencies.³

But there has also been a significant *tension* between the two processes: Europeanisation and democratisation. This is apparent when we reflect upon the very notion of ‘democracy promotion’: there is something inherently dubious, perhaps even contradictory, in the contention that democracy can be imposed from the outside. Naturally, no-one speaks of the ‘imposition’ of democracy but the very logic of ‘conditionality’, whether in the CoE context, or in the context of EU accession, signified the sanctions (in the form of refusal to admit to the club) in the case of non-acceptance (and then, non-enforcement) of the norms viewed as the common rules of the game. Conditionality was therefore a form of soft coercion, at least under a hypothesis that the alternative of non-accession was (and is) an extremely unattractive scenario for any Central European state, as has been evidenced by the common, and almost unexceptional, rush to join pan-European structures.

I, for one, have never been scandalised by this ‘imposition of democracy’ because I have known all along that the democratic norms ‘imposed’ on CEE states resonate deeply with the widespread needs and preferences of the people in these countries, irrespective of how the political classes transform these needs and preferences into their programmes and discourses. So when Jan Zielonka concluded—correctly, in my view—that “it appears that democracy in East Europe is to a significant extent foreign made”⁴ (with all the necessary caveats about the importance of domestic factors on democracy building), I see it as a statement of fact rather than an expression of outrage. The problem, though, was determining whether what was being imposed *was* indeed democracy. As many

² K. E. Smith, ‘Western Actors and the Promotion of Democracy’, in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe*, vol. 2 (Oxford University Press: Oxford, 2001), p. 33.

³ W. Sadurski, ‘Accession’s Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe’, *European Law Journal* (2004) 10/4: 371.

⁴ J. Zielonka, ‘Conclusions: Foreign Made Democracy’, in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe* (2001: 511).

observers have noted, the ultimate concern of the European Commission in judging the distance that separate the candidate states from full compliance with the *acquis* (including with the political *acquis*, symbolised though not really codified through the so-called Copenhagen criteria)⁵ was often much more about the managerial and technocratic efficiency of the administration on candidate states than about transparency, accountability and representation. And even if they were genuinely concerned with democracy as an important and independent criterion of eligibility to accede to the EU, the very process of ‘top-down’ diffusion of European norms could not but erode the participatory democratic processes in the candidate states.

Both these points have already received a careful and convincing support in the academic work on EU enlargement. As far as the first point is concerned, that EU officials responsible for the enlargement often privileged managerial efficiency criteria over democratic accountability of domestic institutions—consider Gwendolyn Sasse’s study of the process of monitoring by the Commission of the progress of candidate states towards the accession. As Sasse observes, the explicit intention of the Commission’s annual reports was to review the rate at which a country was adopting the *acquis*, rather than the actual political and social conditions of a given country. Thus, “from the very beginning the emphasis was not on the monitoring of the broadly stated normative conditions of the political Copenhagen criterion, which does not directly translate into specific chapters of the *acquis*”.⁶ She also observes that there was a certain anti-critical bias written into the reports process, as the avowed EU’s priority was to maintain the enlargement process already set in motion by that time, and harsh criticism was not seen as conducive to this process.⁷ Elsewhere, Sasse and her two co-authors observe that,

[t]here is an inherent tension, if not in practice a contradiction, between the EU’s accession objectives [...] of building institutional capacity in arenas necessary for the market and improving the ‘absorption’ capacity (that is, the capacity to apply for and spend EU funds appropriately) of

⁵ European Council held in Copenhagen 21–22 June 1993 established as the conditions for EU membership, *inter alia*, ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities...’, Presidency Conclusions, par. 7 A (iii), available on-line at: <http://ue.eu.int/>.

⁶ G. Sasse, ‘EU Conditionality and Minority Rights in Central and Eastern Europe’, Discussion Paper presented at the European Forum, Robert Schuman Centre for Advanced Studies at the European University Institute, Florence, 15 April 2004, p. 8.

⁷ *Ibid.*, pp. 8–9.

states, and the consolidation of democratic accountability over state decision-making in these nascent democracies.⁸

Furthermore, on the part of the individual old Member States the approaches might have been diverse: Gordon Crawford suggested, for instance, that the UK saw political democratisation in Central and Eastern Europe more as a means to economic development, with the consequent increased opportunities for the West for investment and trade, than as a valuable goal in itself.⁹

Regarding the second point, the fact that the very process of adjustment of domestic law to the EU *acquis* has been marked by erosion of democratic procedures is an issue which has been reasonably well explored in the literature.¹⁰ Enactment of EU-related laws was often fast-tracked, with little or no serious parliamentary discussions, and with the executive controlling the process throughout. This was perhaps no bad thing, given the notorious inefficiency and incompetence of parliamentary institutions in post-communist states, and was arguably the only way to ensure that the enormous body of EU law was transposed into domestic legislation. It would, however, be hypocritical to pretend that the process was the quintessence of democracy: it strengthened the executive bodies over their parliamentary equivalents, a secretive procedure over fully transparent ones, and the quick-fix pace of decision-making over comprehensive deliberation. The ultimate goal of winning accession rights gave the executive more power to by-pass parliament and to justify the centralisation of decision-making by the emergency-like circumstances. In the end, there was a deep paradox in the accession process: while the goal of accession was (partly at least) defended on democracy-related grounds, the very process of negotiating and managing the accession was quite undemocratic.

III. Bad habits?

Despite this, and despite a strong path-dependence of the accession, on 1 May 2004 there *was* a fundamental change: the conditionality expired, and the

⁸ J. Hughes, G. Sasse and C. Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe: The Myth of Conditionality* (Houndmills: Palgrave Macmillan, 2004), p. 23.

⁹ G. Crawford, *Promoting Democracy, Human Rights and Good Governance through Development Aid* (Leeds: Leeds University Press, 1996), cited in K. E. Smith, 'Western Actors and the Promotion of Democracy', in J. Zielonka and A. Pravda (2001: 35, n. 8).

¹⁰ See, in particular, the work of H. Grabbe, e.g. 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* (2001) 8/6: 1013.

candidate states were transformed into new Member States. The point of the previous remarks was to raise the question of how much of what happened after 1 May can be traced back, and explained by reference to, the pre-accession period marked as it was by conditionality and its characteristics.

Again, the issue of conditionality has received excellent research coverage, and there appears to be an important body of opinion that the attitudes surrounding the pre-accession conditionality-focused process establish the sort of habits of both the old Member States and the candidates which are harmful for the efficient integration into the Union.¹¹ There is clearly a paradox here: while the whole point of the accession process is to induce a candidate state to be a member in good standing, the structural characteristics of the process render equality between old and new Member States unlikely, thereby making the easy integration of new members into the old structure improbable.

These bad habits have their roots in the basic asymmetry of candidate countries and the old Member States (or the Union) in the pre-accession period; as Hughes, Sasse and Gordon correctly observe,

[o]ne of the key defining characteristics of the concept of conditionality is that it operates in an environment of power asymmetry between dominant and subordinate actor(s). Furthermore, the domestication of donor norms through aid conditionality has tended to override and marginalize local knowledge and supplant rival models as they are necessarily presented as 'inferior'.¹²

It is nevertheless natural that the old Member States harbour a deep suspicion of the candidates and their 'local knowledge'. The reasons for this suspicion are obvious: the thinness of tradition of the rule of law, widespread corruption, and an under-paid and under-qualified public administration, all of which are unlikely to generate the respect for new partners from the East. But even apart from this knowledge of new partners, the very structure of conditionality places the rulers of the club in the situation where they could tell the candidates 'take it or leave it' without any qualms. (Indeed, it was precisely the asymmetry not just of

¹¹ Of the rich literature on this subject I should mention M. A. Vachudova's, *Europe Undivided: Democracy, Leverage & Integration After Communism* (Oxford: Oxford University Press, 2005). Another scholar who has made an excellent contribution to this field is A. Wiener, see for example, 'Finality vs. Enlargement: Constitutive Practices and Opposing Rationales in the Reconstruction of Europe', *Jean Monnet Working Paper* 2002/8; available at: <<http://www.jeanmonnetprogram.org/>>.

¹² J. Hughes, G. Sasse and C. Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe: The Myth of Conditionality* (2004: 14).

powers, but also of *interests* in which the candidate states have higher interest in joining than the EU has in expanding, which has rendered the non-admission threat more credible, and the conditionality process more efficient).¹³ The conditionality-focused process turns the candidates into passive recipients of the norms, and the Union into an authoritative enforcer and interpreter of the latter. So while on the part of the Union—the officials of the Commission and of the national governments of old Member States—there is an understandable sense of distrust towards the applicants, on the part of the latter there is an understandable feeling of being dominated. There is no room for a conversation, but only for commands; and where there should be discussion, there is an impersonal testing of the applicants: ticking-off the checklist, as symbolised by the annual Commission Reports on the candidate states' progress towards accession. At the end of the day, both parties in this protracted process are socialised into adopting the habits of asymmetry of power, inequality and distrust.

Can anything good arise from such long established habits on the day when the candidates are transformed into Member States? Can the magic moment of accession mark a sudden rupture with these habits of mind? To be bold I should state that these habits include, on the one hand, a lack of trust in the newcomers who may turn out to be obnoxious, under-skilled and tainted by their unsavoury past and, the anxiety about being reduced to a status of second-class member, on the other. Prior to accession some scholars speculated that it was very unlikely that the habits of mind, acquired in the process of conditionality, would contaminate the relationship between the old and new Member States making it impossible for a modicum of mutual trust to emerge. Francesca Bignami has argued that developing such trust and cooperation among regulators of old and new Member States will be difficult, and therefore, that the conditions for mutually beneficial cooperation will not be achieved:

In the immediate aftermath of enlargement, as thousands of old and new regulators begin administering the common market as equals, without reciprocity and trust, they may very well choose defection over cooperation, thus, through the downward spiral predicted by game

¹³ In the words of Milana Vachudova, "The relationship of 'asymmetric interdependence' ... made the conditionality of the EU's pre-accession process credible: while the EU depended but little on economic or political ties with any particular candidate, East European states depended on integration with the EU for their economic survival and eventual prosperity", M. A. Vachudova, *Europe Undivided: Democracy, Leverage & Integration After Communism* (2005: 109).

theorists, compromising regulatory cooperation and the reality of a common market for years to come.¹⁴

Over a year after the events of May 2004, have these pessimistic predictions been vindicated? And can they be generalised on legal and institutional spaces of cooperation within the enlarged EU? The question probably does not allow a clear categorical answer. The behaviour of new MEPs from new Member States, for example, has not been marked by a sense of inferiority. It is nevertheless interesting to see how the authors in this volume detect the degree of mutual trust in the patterns of conduct of political and, more specifically, legal players at the national and European level. It is also worth mentioning the opinion of Andras Sajó who reports that the willingness to engage in 'cooperative constitutionalism' on the part of the Hungarian Constitutional Court has been rather low.¹⁵ When discussing a decision of the Hungarian Constitutional Court of 25 May 2004 (to which I will return below) Sajó claimed that the Court failed to engage in a pattern of 'cooperative constitutionalism' which would admittedly require accepting a certain guiding role from the ECJ. (Note, however, that the interpretation provided by Renate Uitz in this volume is somewhat different, as she sees the Hungarian Court's decision as a case of 'the justices avoidance of the issue of supremacy altogether'). Could this, perhaps, be seen as one aspect of the legacy of distrust developed in the lead-up to accession?

IV. Institutional challenges and responses

It would, however, be both unfair and myopic to attribute all possible defects in the induction of the new Member States into the Union to the structural characteristics of the pre-accession process, and in particular, to conditionality. No doubt, such defects (to the extent to which they have occurred) are mainly rooted in the weakness of state institutions of the new Member States. Citizens of these states cannot all be wrong—and all the opinion polls indicate that the national institutions in CEE states enjoy very little status and support. In contrast to many of the older Member States (in particular the Scandinavian states) where public opinion usually credits its own national institutions with more trustworthiness than the EU institutions, in CEE the prevailing pattern is to trust 'Brussels' more than national institutions of Prague, Budapest or Warsaw. And no

¹⁴ F. Bignami, 'The Challenge of Cooperative Regulatory Relations after Enlargement', in G. A. Bermann and K. Pistor (eds.), *Law and Governance in an Enlarged European Union* (Oxford: Hart, 2004), p. 99.

¹⁵ See text to notes 29–30 *infra*.

wonder: the national and local administration, courts, parliamentarians, etc. are usually badly qualified, prone to corruption, highly politicised and so forth. Can such defective institutions defective now perform properly as 'European institutions'?

I have deliberately sharpened the way this question is phrased, wording it more as a caricature than as a bona fide discussion, but the point is nevertheless real. It takes a lot of time and resources to bring a tax office or a district court in Warsaw to the level of competence and integrity of an office or a court in Stockholm (although, were we to bring Rome or Athens into the picture, the contrast would admittedly be less striking). One has to be sensitive to the context, and one must not generalise too much. More importantly, one has to consider separately different types of institutions because they do not necessarily display the same patterns. In particular, three types of institutions are important for our analysis: legislatures, the judiciary, and constitutional courts.

Parliaments

To date, we probably do not have sufficient material to see how, if at all, the national parliaments of CEE states have been transformed, for better or for worse, by accession. Judging by past behaviour, they more or less meekly accepted a reduced role for adopting a 'European legislation' in the period leading up to accession. As mentioned earlier, this was based on the generally accepted argument about the need to adopt the *acquis* in the most rapid and efficient way possible: the *acquis* (and the consequent task of adapting the national legislation to European norms) was seen as a 'take it or leave it' affair, with little room for discussion or exceptions, thus making the concerted involvement of parliamentary bodies rather pointless; they were also ultimately less informed about the arcane details of European law and policies which were presented to them as a matter of technical knowledge rather than political choices. The question now is whether the habits acquired in that process will persist in the future? And one very big question is how they will react to the enhanced role of national parliaments in accordance with the various protocols and declarations that the EU has been adopting (the Maastricht Treaty and beyond) on the role of national parliaments in the European Union? Here one can only speculate, and I will not venture any hypotheses on my own. What is obvious is that political scientists and constitutional lawyers alike will be keenly observing the (often unruly and anarchistic) CEE parliaments responding to the double, Janus-faced challenge: on the one hand, a greatly enhanced legislative role of national executives (through their role in the law-making at Brussels level), and on the

other, the role conferred on the national parliaments in the context of the application of the principle of subsidiarity since the Treaty of Amsterdam. It is worth noting that this role would have been further enhanced by the Constitutional Treaty with its Protocol on the application of the principles of subsidiarity and proportionality where an 'early-warning system' involving national parliaments would have monitored how the principle of subsidiarity is applied. At present the only formal channel for national parliaments to access the EU law-making process is through the political control of their own governments even though the trend in the EU certainly is to enhance the link between national parliaments and the EU legislative *fora*. Whether this trend will be embraced and taken advantage of by the parliaments in CEE states is a matter of great importance for their future role.

Courts

The second group of players are the ordinary (as opposed to constitutional) courts. These courts became, sometimes *sans le savoir*, fully-fledged Community law courts entrusted with the task of applying, interpreting and enforcing European Community law in the spheres covered by the *acquis communautaire*. Through the system of preliminary reference they became integrated into what Joseph Weiler called "a unitary system of judicial review".¹⁶ Are they up to the task? And are they likely to proudly take advantage of the potential empowerment brought upon them by Europeanisation of the law of their countries?

There are many sceptics who doubt that these courts are willing and able to perform the tasks of active and creative enforcers of European law. Zdenek Kühn claims that among most courts of CEE states a "textual positivism" prevails, related as it is to the "legislative optimism [which] has produced an atmosphere where ordinary judges and lawyers generally overemphasize the impact of legal transplants made by the legislature on the one hand, while they seriously understate their own role in that process".¹⁷ As a result, the ordinary courts in these countries are badly equipped to play a proper role as European judges in constant dialogue with the ECJ. By way of example he cites the use of the principle of proportionality in the scrutiny of quantitative restrictions on imports and exports; nevertheless, "[c]onsidering the fact that post-communist judiciaries are not experienced in the use of such policy principles like the principle of

¹⁶ J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p. 27.

¹⁷ Z. Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions', *German Law Journal* (2005) 6/3: 568.

proportionality, one might expect that they will face even more serious obstacles than those already encountered by the judiciaries of the old Member States”.¹⁸

His thesis is highly plausible: the courts of CEE states, with their combined Marxist and positivist pedigree, are used as black-letter, positivist statutory interpretation thereby applying ‘mechanical jurisprudence’ and fearing ventures into more contextual, evaluative, creative interpretation. Unfortunately, it is precisely a more open and less dogmatic approach which is required from European courts engaged in a conversation with the courts at different levels, including with the ECJ. Perhaps Kühn is right, although in all fairness we do not have any empirical evidence on how these courts have undertaken their role post-1 May 2004. On a more optimistic note, we have seen examples of ‘ordinary’ courts in the CEE enthusiastically adopting the role of interpreting local law in the light of EU law, even before 1 May 2004, and also of gradually harmonising domestic law with EU law. Kühn himself gave the examples of the ‘Euro-friendly approach’ by a Czech ‘ordinary’ court—the High Court in Olomouc—which back in 1996 proclaimed that it was not a mistake for the public authorities to interpret Czech antitrust law consistently with ECJ case law and with the European Commission’s decisions.¹⁹ Similar cases of an anticipated Euro-friendliness can be found among ‘ordinary’ courts of other CEE states, although, as Kühn has shown elsewhere, both in the Czech Republic and in Slovakia EU law had rarely been ‘brought into play’ as an ‘interpretational tool’, and on balance, an ‘anti-European approach’ had prevailed prior to accession.²⁰

Constitutional courts

The darlings of Western liberal academic literature on post-communist constitutionalism, constitutional courts in the region have been credited with a special contribution to the defence of the rule of law, human rights and democracy in the post-communist transition. Invested with broad powers of abstract and concrete review, these courts have been active in invalidating the laws that have not (in their view) passed constitutional muster. Whether the enthusiasm of outside observers has been fully justified is a question that need not be considered here.²¹ What is beyond doubt, however, is that these courts have

¹⁸ Ibid., p. 578, footnote omitted.

¹⁹ Ibid., pp. 566–67.

²⁰ Z. Kühn, ‘Application of European Law in Central European Candidate Countries’, *European Law Review* (2003) 28/4: 554.

²¹ See W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005).

now established themselves as powerful players in the constitutional-political game in CEE countries, which in turn warrants the question of how they will respond to the challenges posed by accession to the EU is fully warranted. In particular, it is worth asking whether, and to what extent, in the decisions regarding the primacy of EU law over the national legal order (including the national constitutional order) these courts will follow their concerns about national sovereignty, and thus ultimately slow down the process of aligning their national legal orders with that of the EU.

The pre-accession history in this regard does not give any clear bases for easy predictions. On the one hand, there were some important cases displaying a degree of 'Euro-friendliness' on the part of some of the constitutional courts in the region. On the other hand, there have been less encouraging signals. In a well-known decision of 25 June 1998, the Hungarian Constitutional Court (arguably the most activist and powerful of the courts in the region, and indeed in the world) found unconstitutional a rule of the Hungarian law implementing the Europe Agreement. The Hungarian Constitutional Court's decision of 1998 regarding the Europe Agreement, in which it held that the *acquis* had no direct effect before accession or its explicit implementation by national statutes, and in which it, in effect, dictated the need for constitutional amendment preceding accession.²² And while one has to be careful in attaching any particular predictive value to that old decision (after all, it explicitly referred to the pre-accession legal situation), at least one Hungarian legal scholar has argued on the basis of the analysis of this decision, that the Hungarian Court may well continue to imitate the German Constitutional Court, and "thereby develop a conflictual relationship with the Community legal system after accession".²³

But there have also been different approaches. Back in 2001, the Czech Constitutional Court established the relevance of Community law to the interpretation of Czech law (three years prior to the formal accession) by claiming, in an admirably Euro-friendly manner, that Community law has as its sources general legal principles which are based in European constitutional traditions and general European legal culture.²⁴

²² Decision 30/1998 (VI.25) 25 June 1998 III.I, discussed in J. Volkai, 'The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions', *Harvard Jean Monnet Working Paper*, 1999/8: 9; available at: <http://www.jeanmonnetprogram.org/papers/>.

²³ *Ibid.*, p. 31.

²⁴ Decision No. 5/2001, discussed by Z. Kühn, 'Application of European Law in Central European Candidate Countries', *European Law Review* (2003) 28/4: 553.

In the wake of accession, one could also detect the mixed signals sent to us by various constitutional courts of the region. The Polish Constitutional Court has pronounced, on several occasions, its view on the compatibility of European law with Polish Constitution. Almost immediately after accession, on 31 May 2004 it rescued the law on elections to the European Parliament (EP) from the constitutional challenge to the right of foreigners (citizens of other EU Member States) to participate in the EP elections in Poland.²⁵ Most recently, it has pronounced twice on important constitutional questions at the intersection of the EU law and the national constitutional law: on the European Arrest Warrant, deeming it unconstitutional under a clear rule of Polish Constitution against any extradition of a Polish citizen²⁶ (but, in a Salomonic judgment, delaying the enforcement of the judgment of incompatibility by eighteen months);²⁷ and even more importantly, on the constitutionality of the Treaty of Accession.²⁸ The latter decision is of key importance: while the Tribunal established the compatibility of the Treaty of Accession with the Constitution, in the process it has announced a clear and rather unambiguously sounding primacy of Polish Constitution over EU law. It also questioned the absolute priority of the interpretation of the Community law by the ECJ by stating that the interpretation must not transcend the limits of powers conferred upon the ECJ by Member States. But the general tenor of the decision is the one of minimising the clash between the Community and national legal orders.

In a somewhat different vein, in a decision of 25 May 2004 the Hungarian Constitutional Court invalidated several provisions of the law on agricultural surplus stocks, a law which was meant to implement a Commission Regulation of 2003, thereby sending a message of adopting stern constitutional vigilance towards legislation implementing EU law. This decision is discussed at length in this volume by Renate Uitz. Elsewhere, Professor Uitz's colleague from Central European University in Budapest, Andras Sajó had expressed the view that the decision is significant from the point of view of discerning the Court's approach to the supremacy of EU law. By adopting a rights-protective requirement to test the EU law by standards of Hungarian rights constitutionalism, the Court 'shied away from EU supremacy' and embarked upon the process of learning

²⁵ Decision K 15/04, 31 May 2004, *Z.U. OTK* 2004 / 5A / 47.

²⁶ Art. 55 of Polish Constitution, as published in *Dziennik Ustaw* (1997), No. 78, Item 483, available from the Polish Parliament's website at: <http://www.sejm.gov.pl/>.

²⁷ Decision P 1/05, 27 April 2005, *Z.U. OTK* 2005 / 4A / 42.

²⁸ Decision K 18/04, 11 May 2005, *Z.U. OTK* 2005 / 5A / 49.

cooperative constitutionalism ‘the hard way’.²⁹ The Court has displayed a degree of ambivalence towards the principle of EU law supremacy, to say the least: “[t]his precedent enables the Court to stick to its role of ultimate guarantor of constitutionality even in areas of contested state (national) sovereignty”,³⁰ concluded Sajó.

From these early signs it is still impossible to predict whether a clear and stable pattern will emerge. That is, whether the constitutional courts of the region will present themselves as guardians of national sovereignty and constitutional rights, or whether they will defer to the supremacy of the EU law *vis-à-vis* the national legal system, including the national constitutional system. With regard to the decisions of the Hungarian and Polish constitutional courts mentioned above, it appears that they will indeed insist on their own authority to interpret the national constitutions as the limits on the EU law and the competences of EU institutions. It is significant that the decision of the Hungarian Constitutional Court of 25 May 2004 was ultimately a rights-based challenged to EU norms: it had as one of its most important grounds the appeal to non-retroactivity as an important constitutional guarantee of constitutional rights under the Hungarian constitutional order. In this sense, it echoed earlier decisions taken by its Western European counterparts, in particular of the German Constitutional Court, which had appealed to the standards of protection of rights guaranteed by the German Basic Law as the grounds for limiting the transfer of sovereign rights of the Federal Republic to the Community. It may well be that this announces that the road upon which the CEE constitutional courts entered which will make them follow *Solange-I* and the subsequent decisions in Germany and other EU Member States expressing reservations about unconditional supremacy of the EU law over national constitutional law. The courts in CEE states are likely to follow this path of reserving themselves the right to declare EU law invalid if it contradicts the fundamental constitutional principles of rights protection in their own states: this is, after all, what their counterparts in Germany, Italy, France and Denmark have done in the past. Indeed, one could perhaps claim that these courts of new Member States have a right to go over, and sort out in their own manner, the difficult and inconclusive questions raised by the clash of the EU law’s supremacy with the primacy of the national constitution over any other law within a given

²⁹ A. Sajó, ‘Learning Cooperative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy’, *Zeitschrift für Staats- und Europawissenschaften* (2004) 2/3: 351–71.

³⁰ *Ibid.*, p. 370.

state—the questions that the Western European highest courts have been arguing over and solving in *their* own ways for decades.

This old question has indeed acquired ‘a new salience’ with enlargement as acknowledged by an author of an interesting recent contribution to this old debate.³¹ But one can note a disturbing irony of this development, should it take place. It would be truly ironic, if not perverse, if the constitutional courts of the very countries which entered the EU precisely to consolidate their democracy and human rights protection were to erect barriers to legal integration or, to put it more bluntly, to the primacy of EU law over their constitutional orders. This, due to their distrust of the standards of rights protection by the EU law could establish them as the guardians of how far EU integration could go without threatening the protection of constitutional rights in their countries! An additional irony would be that the initial resistance of the German (and Italian) constitutional courts, dating back to the early 1970s, has now been overcome on the basis that, with the development of the fundamental rights protection within the EU (in particular, through the ECJ jurisprudence), the protection of rights at the EU level is now deemed by these courts to be equivalent to the national constitutional level. So the entering of the CEE constitutional courts into the same scene with a claim that *they* now have to protect their citizens from the erosion of their rights protection, the erosion consequent on the putative supremacy of EU law over the national *constitutional* orders, may seem highly implausible.

This may not be such a big problem after all; the principle of supremacy is not absolute, but specifies that each law is supreme within its own sphere of competence.³² This, however, merely transforms the question into the problem of who has the final decision as to the delimitation of spheres of competence between the EU law and the national legal order (a ‘*Kompetenz-Kompetenz*’ problem so well rehearsed in the EU law scholarship). The collision between a constitutional court of a Member State and the ECJ cannot be easily avoided, especially if the former characterises a matter which seems, at first blush, to belong to Community law in terms of fundamental rights (precisely as the Hungarian Court did in its case on surplus stocks and the right against the retroactivity of law).

Whether or not this occurs, it is clear that accession will give the constitutional courts of new Member States some extra opportunities to establish themselves as

³¹ M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional supremacy in Europe before and after the Constitutional Treaty’, *European Law Journal* (2005) 11/3: 265.

³² J. H. H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999), p. 21, n. 26.

even more powerful players in the domestic political game. This is not just by virtue of being able to judge the constitutionality of EU law, but also because of the authority to signal the need to amend the national constitution which is, in itself, a significant political power even if exercised with subtlety and no explicit order addressed to the constitution-maker.³³ Conversely, however, they will face a stronger rival in the ordinary courts which will be able to claim an enhanced role by obtaining a direct link with the ECJ. This may, as Kühn hypothesises,³⁴ be detrimental to the undue ‘centralisation’ of constitutional adjudication in CEE states in which the constitutional courts so far have successfully usurped a monopoly on announcing the constitutional wisdom.³⁵ The Europeanisation of ordinary courts may upset this monopoly, and this may well be a good thing. But, as the saying goes, whether or not it actually happens, only time will tell.

³³ See the Polish Constitutional Court’s Decision P 1/05 on European Arrest Warrant where the instruction about the need to change the constitutional provision on extradition whilst not explicit, was unmistakable.

³⁴ Z. Kühn, ‘The Application of European Law in the New Member States: Several (Early) Predictions’, *German Law Journal* (2005) 6/3: 576.

³⁵ See W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), 19–25.

Chapter 2

European Hopes and National Fears:

The Czech Constitutional System, Europe's Legacy, Nationalist 'Politics of Identity' and New Tensions

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I. Introduction

This chapter addresses the impact of the depoliticalised¹ European Union and its current constitutional/public law policies on political conflicts, the post-accession revitalisation of a 'politics of identity', and possible shifts in the balance of constitutional power in the Czech Republic. It focuses on the Union's universalistic discourse of humanity and legality and the Czech responses to the Union's political integration and constitution-making, including the split and destabilisation of the executive branch of constitutional power. It reveals the tension between the universalistic moral discourse of former president, Václav Havel, and the anti-EU, national identity-based rhetoric of his successor, Václav Klaus, which profoundly changed the political and constitutional realities of the Czech Republic in the early 2000s. The risks and consequences of this change are discussed in the concluding section.

II. The post-accession 'politics of identity' and democracy

On the eve of the EU enlargement in May 2004, the President of the Czech Republic Václav Klaus was climbing Mount Blaník accompanied by his political

¹ In this chapter I have used the English translation of Carl Schmitt's concept of '*Depolitisierung*' ('depoliticalisation'), although some authors prefer to translate the concept as 'depoliticisation'. See C. Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996).

allies and a few sympathisers. This mountain plays a crucial symbolic role in the modern history of the Czech nation because of the legend of the Czech knights-protectors who sleep inside the mountain, ready to wake up and protect Czech lands at times of political and military crisis. The march of Czech Eurosceptics led by Václav Klaus reached its climax at midnight of 1 May 2004, the date of the Czech Republic's entry into the European Union, when the President of the country gave a speech on the summit of the mountain warning against the loss of Czech national identity and political sovereignty.

On the same day, the gardens of the Senate of the Czech Republic were opened to the public to celebrate this political event and its importance for the Czech nation. Beer was free and a delegation of members of the German Parliament queued up behind a group homeless people from Prague for a celebratory pint of Czech lager. The free distribution of goods overshadowed the identity differences of the people visiting the Senate gardens. One of the state's supreme constitutional bodies was celebrating EU accession as a great political achievement, despite the fact that it would limit the sovereignty of the Czech Republic.

These two pictures illustrate the political conflicts and dilemmas arising after the Czech Republic's entry into the European Union. Before 1 May 2004, all efforts concentrated on the successful admission of the Czech Republic to the Union. It was, paradoxically, Václav Klaus himself who, as Prime Minister, submitted the EU membership application on 17 January 1996. The potential benefits of EU membership dominated the Czech political scene and in the late 1990s and early 2000s Parliament was virtually changed into a legislative machine enacting laws required by the EU accession conditions. At the same time, the 'politics of identity' gradually became part of mainstream political debates and two overtly anti-EU forces emerged—the unreconstructed neo-Stalinist Communist Party and a group of conservative Eurosceptics within the Civic Democratic Party (*Občanská demokratická strana*, ODS) led by Václav Klaus who was elected President on 28 February 2003.

Since the presidential election, 'Europe' has become a major constitutional and political controversy in the Czech Republic. Although President Klaus did not have any constitutional power to halt the process of EU accession, he nevertheless regularly commented on the issue as part of a campaign prior to the enlargement referendum in June 2003 in which 77.3% of those who voted (55.2%) supported the Czech Republic's EU membership. After 1 May 2004, he became a vociferous critic of the Union, and especially of the draft Constitutional Treaty.

The President's ideological position is marginal both in the EU and the national context, but represents a forcefully argued sceptical voice which attracts some attention from the Czech electorate. The EU is regularly criticised for dismantling national sovereignty and democratic decision-making and deliberately weakening Czech national identity. The call for a politics of identity may yet prove popular, although to date public opinion surveys and polls indicate that Czech citizens do not consider the Constitutional Treaty and democratic deficit serious problems, and trust EU political institutions more than their national institutions and politicians.²

Nevertheless, public opinion is always shaky and the reliability of surveys varies. The difference between the views of the Czech public and the President's position is less important than the kind of politics defended by Václav Klaus during his first two years in office and its possible constitutional implications. It therefore is necessary to analyse the Union's political and constitutional effects as regards identity politics. Against this background, it should subsequently be easier to understand recent *de facto* institutional shifts in the Czech constitutional system of checks and balances, especially the growing role of the President.

III. The *depoliticalised* Union and the rule of law

The fact that Czech public opinion trusts EU institutions more than national ones is determined, apart from other influences, by the *depoliticalised* identity of the Union. The EU is perceived as a completely lacking in the sort of polemical and

² See Eurobarometer, *The Future Constitutional Treaty*, Special Report No. 214, March 2005, p. 18. According to the survey, 39% of the Czech population is in favour of the Constitutional Treaty while 20% opposed it. Although the percentage in favour is less than for the EU in general (49%), and the Czech Republic is certainly one of the less enthusiastic countries as regards EU constitution-making, it would be misleading to associate the view of the general public with that of the President. Similarly, according to Eurobarometer, *Comparative Highlights Report*, May 2004, 42% of the Czech public tend to trust the European Union against 31% of those tending not to trust it (the EU average was a 41/41% ratio, with the old Member States having a 42/42% ratio and new Member States a 40/37% ratio). As regards the European Commission, figures show that 35% Czechs tend to trust it while 44% do not. These figures are comparable with the level of trust in national institutions and even show a surplus when compared, for instance, with the Czech government. According to a report by the Centre for Empirical Research, *Trendy*, No. 11/2004, November 2004, 42% of the Czech public tended to trust the Chamber of Deputies, only 20% tended to trust the Senate and 25% trusted the Prime Minister in summer 2004. According to the same Centre's report in September 2004, 54% of Czechs trusted the European Parliament, 52% the European Commission, but only 24% trusted the Czech Euro-Commissioner.

conflict-ridden clashes of power which characterise national political institutions. Its public law institutions are not established on the concepts of *polemos* or *hostis*,³ but instead draw on universalistic values and identity.⁴

Although Carl Schmitt's friend/enemy distinction should not be taken in its existential meaning and one has to be aware of its possible political consequences, it is analytically valuable and illuminates the structural preconditions, achievements and limits of the European Union's political and legal systems. As Schmitt argued, moralistic politics and economic regulation of the liberal rule of law seek to marginalise the political concepts of battle and enemy. Taken from this perspective, the EU's emerging public law system is undoubtedly founded on demilitarised and depoliticalised concepts and thus represents a coherent doctrine of liberal thought of this kind. Like other liberal doctrines, the Union's law typically moves between ethics (moral and intellectual commitments in politics) and economics (free trade) and thus, using Schmitt's controversial concepts of political and legal theory, attempts "to annihilate the political as a domain of conquering power and repression".⁵

The EU's strategy of establishing a system of permanent negotiations and compromise and substituting political struggles by legal procedures is certainly driven by the Union's goal to make national and international politics *safe*, a prospect which is categorically rejected by Schmitt. The Union's politics of compromise may be only temporary, occasional and can never be decisive in the sense of ultimate sovereignty. However, the depoliticalisation of the EU's political domain and its transformation to neutral public law procedures clearly has some political significance and positive implications.⁶ Against Schmitt's concept of the political it may be argued that the EU emerged historically as a depoliticising, yet profoundly political, response to the unprecedented politics of local and universal genocide, extremely aggressive regionalisms, socially discriminatory regimes and politically violent totalitarian ideologies.

The most recent and complex example of the problems and limits of this depoliticalised public law machine, was the European Convention drafting the EU's Constitutional Treaty. Although the Convention originally claimed to be

³ See C. Schmitt, *The Concept of the Political* (1996: 46–7).

⁴ See especially, the Preamble of the Constitutional Treaty and the EU slogan 'United in diversity'.

⁵ C. Schmitt, *The Concept of the Political* (1996: 71).

⁶ Schmitt is himself aware of this political function of liberalism and its tendency to neutralise and depoliticalise. See C. Schmitt, *The Concept of the Political* (1996: 69).

following in the footsteps of the two hundred year-old US constitution-making process, the final proposal resembled anything but a democratic constitution of a single united people willing to build and share political institutions, make them democratically accountable and representative, and found this constitutional unity on an abstract political solidarity. The final proposal looks rather like another EU treaty worded in the spirit of international law. Instead of a pluralist political entity incorporating the principle of federal statehood, the proposed entity is a hybrid between an international law and state-like organisation. Once again, the depoliticalised logic of legality overshadowed the (im)possibility of a political act constituting the democratic political entity and its nation.

IV. The *depoliticalised* Union and its effects in post-communist Europe

Despite the problematic effects of the European constitution-making experience, in the 1990s the Union's universalistic identity based on the rule of law and constitutional democracy turned out to be very useful for the post-communist EU accession countries. It was remarkably successful as a strategy to contain Central European ethno-nationalism. The EU membership aspirations of individual countries helped to neutralise tensions in the area of ethnic and national minority rights and the official nationalist propaganda of some CEE governments. The most persuasive example of the Union's successful involvement in the region's ethnic and national minority policies was the Balladur Plan of 1995, which was an outcome of the first Joint Action of the EU Common Foreign and Security Policy (CFSP). It resulted in an international treaty between Hungary and Slovakia⁷ after a period of extremist exchanges, conflicts at the level of international diplomacy, and escalation of ethnic tensions by the nationalist governments of József Antall, in Hungary and Vladimír Mečiar in Slovakia in the 1990s. The entire plan was part of the EU idea of preventative diplomacy and regional stability facilitated by bilateral agreements on ethnic minorities.

Furthermore, the rule of law-driven universalistic identity also facilitated the adoption of the principles of liberal constitutionalism and the rule of law in the accession countries during the period of their constitutional and legal transformations. The rule of law was contrasted with the battlefield of everyday politics, corruption, power struggles, confrontations, and instability. The EU

⁷ The Treaty of the Republic of Hungary and the Slovak Republic on Good Neighbourliness and Friendly Cooperation, signed in Paris on 19 March 1995; available at: <http://www.htmh.hu/>.

accession process incorporating the harmonisation of the post-communist Central European and the EU legal systems was commonly interpreted as an imposed check and external balance of post-communist internal law and politics.

The limitation on the power of Czech and other Central European politicians at the nation-state level by the EU was popular because of the common public distrust of post-communist political elites and because of EU membership aspirations. The goal of 'a return to Europe' was, indeed, significantly supported by pragmatic economic reasons and a vague sense of common European identity which, nevertheless, should not be mistaken for the notion of abstract European solidarity so crucially missing in the EU constitution-making process and recent attempts at further political integration of the Union. In general, the Central European 'return to Europe' had similar economic motives like German unification in 1990. However, they obviously could not be accompanied by the same 'one *Volk*' drive of a politics of identity, nationalist solidarity, and its communitarian ethno-ideological background. Apart from many other political and social phenomena, the EU enlargement thus clearly illustrated a difference between the ethno-cultural politics of identity still existing at the nation-state level and the more general and abstract European identity construed as both a supplement and an antidote to an ethno-nationalist politics of identity.

V. Europe and the Kantian legacy

Contemporary social and political scholars on both the political right and left often describe Europe as 'Kantian' and contrast it with the 'Hobbesian' United States. While Robert Kagan perceives Kantianism as evidence of Europe's decline,⁸ left-wing European scholars such as Jürgen Habermas⁹ and Zygmunt Bauman perceive it as Europe's universal legacy and, apart from current US foreign policy, contrast it with the dark 'Herderian' tradition of modern ethnic nationalism. Contradicting Kagan's defence of Hobbesian US foreign policy, Bauman asserts that "Europe is well prepared if not to *lead*, then most certainly to *show* the way from the Hobbesian planet to the Kantian 'universal unification of the human species'".¹⁰

⁸ See R. Kagan, *Power and Paradise: America and Europe in the New World Order* (London: Atlantic Books, 2004).

⁹ See J. Habermas, *The Postnational Constellation* (Cambridge: Polity Press, 2001).

¹⁰ Z. Bauman, *Europe: An Unfinished Adventure* (Cambridge: Polity Press, 2004), p. 40.

Bauman reflects on the fact that Europe has never had fixed borders and successfully transgressed all attempts to anchor its identity to a particular space and time.¹¹ Similarly, Václav Havel says:

[T]he history of Europe is, in fact, the history of a constant searching and reshaping of its internal structures and the relationship of its parts. Today, if we talk about a single European civilization or about common European values, history, traditions, and destiny, what we are referring to is more the fruit of this tendency toward integration than its cause.¹²

According to these views, Europe is an unfinished adventure and European civilisation has spread to the furthest parts of the planet making it a truly global and interconnected space. Globalisation is a consequence of European expansion and the export of its universalistic culture. It implies the destructive global spread of industrial waste and political domination, yet it also advocates a peaceful and hospitable world of universal humanity and respect for difference and otherness.

Europe's Kantian legacy means that European civilisation can internalise differences and is therefore both 'a transgressive civilization' and 'a civilisation of transgression'.¹³ It has unbound contradictory forces of globalisation and made its social institutions and political values planetary. While these universalistic values have been responsible for some of Europe's worst 'civilisational' atrocities, they are still the only available framework for the contemporary globalised world of humankind. Europe's identity may have 'the other' as its necessary component,¹⁴ yet this 'otherness' is possible due to the legacy of Kant's '*allgemeine Vereinigung der Menschheit*', and the Enlightenment notions of equality, rule of law, human reason and solidarity.¹⁵

VI. Political morality and a 'Charter of European Identity'

The problem of Europe's identity clearly has a political dimension and stretches well beyond calls for the European Union's 'constitutional patriotism' which emerged during the recent constitution-making process in the EU. Bauman's

¹¹ Ibid., pp. 5–7.

¹² V. Havel, speech in the European Parliament, Strasbourg, 8 March 1994, p. 1, available at: <http://www.vaclavhavel.cz/>.

¹³ This is Krzysztof Pomian's concept used by Zygmunt Bauman. See K. Pomian, 'Europe et ses frontières', in K. Pomian, *L'Europe retrouvée* (Neuchâtel: Editions de la Baconnière, 1992), quoted in Z. Bauman, *Europe: An Unfinished Adventure* (2004: 7).

¹⁴ Z. Bauman, *Europe: An Unfinished Adventure* (2004: 41).

¹⁵ Ibid., p. 16.

concept of Europe as an unfinished and unfinishable adventure rules out its reduction to an act of constitution-making. Europe's identity cannot be contained by the incomprehensible language of legality which, due to its power of fixation of words and political institutions, would bring the whole adventure to its fatal end. The Union's political decisions cannot be constantly obscured by an epistemological community of EU legal and administrative experts. As Bauman puts it:

[I]f the Maastricht Treaty, or the Accession Treaty that followed it, is the contemporary equivalent of the Declaration of the Rights of Man and of the Citizen, the American Declaration of Independence or the Communist Manifesto, then there seems little hope left for the next instalment of the European adventure. More specifically, for Europe retaining its fate/vocation of being the global yeast of shared global history...¹⁶

Europe and the European Union in its institutionalised form have to address urgent problems, crises and tasks of global dimensions and therefore cannot be restricted to public law discourse. Václav Havel, then President of the Czech Republic, proposed 'A Charter of European Identity' in his speech to the European Parliament on 8 March 1994. Europe was supposed to be identified as a community of values such as tolerance, humanity and fraternity which historically facilitated the establishment of democracy, freedom and political responsibility. The Charter,

[w]ould clearly define the ideas on which it [The EU] is founded, its meaning and the values it intends to embody. Clearly, the basis of such a charter could be nothing other than a definitive moral code for European citizens. All those hundreds of pages of agreements on which the European Union is founded would thus be brought under the umbrella of a single, crystal-clear and universally understandable political document.¹⁷

According to these views, the identity of Europe and the European Union ought to be construed in a moralistic and cultural manner which would follow two distinct streams of modern European thought: the Kantian universalistic discourse of humanity and the traditional respect for tolerance and diversity recently formulated, for instance, by the moral theories and philosophies of Emmanuel Lévinas and Hans-Georg Gadamer. Analysing the politically constructed character of collective identities, Jürgen Habermas commented that these identities "[c]an

¹⁶ Ibid., p. 24.

¹⁷ V. Havel, speech to the European Parliament, Strasbourg, 8 March 1994, p. 3.

only unify the heterogeneous. Citizens who share a common political life also are others to one another, and each is entitled to *remain* an Other”¹⁸

However, there is a specific and dangerous paradox of political modernity involved in this universalistic discourse of ‘Europe as humanity’: subjecting the emerging EU’s legality and constitutionalism to the ‘community of values’ would turn the Union’s institutions into a kind of non-political society based on “an ideological humanitarian conception of humanity”.¹⁹ Universal humanity as such cannot have any enemies and therefore constitutes a politically asymmetrical counter-concept.²⁰ Those opposed to the political institutions claiming the voice of humanity would need to be classified as disturbers and enemies of humanity. It may sound paradoxical and look unlikely but the spectre of modern revolutionary terror speaking the language of universal reason and ‘enlightened’ humanity seems to keep haunting all modern democracies and their supra-national organisations.

Instead of stretching a universalistic moral legitimization of Europe, the depoliticalised Union is currently in urgent need of injecting more politics including conflicts, deliberations, public mobilisation of both support and opposition to its constitution-making and institutional transformation. Its laws and institutions are too rich in terms of legalised decision-making and too poor when it comes to the concept of conflict-based and government/opposition structured democratic politics. In other words, the Union needs less law and more politics. This need is the opposite of what Central European countries including the Czech Republic needed during the EU accession process in the 1990s: these post-communist countries had been short of institutions of the constitutional state and the liberal rule of law and therefore needed more law and less conflict-driven politics.

VII. Nationalism revisited: Europe *repoliticalised*?

The need for more politics to face the Union’s universalistic identity involves a risk of recreating ethnic solidarity and nationalism in Europe. Translated to the Union’s unique discourse, Europe would have only one special kind of enemy—Eurosceptics opposed to its political and universal humanitarian projects. The battle of Euroenthusiasts against Eurosceptics of all kinds is

¹⁸ J. Habermas, *The Postnational Constellation: political essays* (Cambridge: Polity Press, 2001), p. 19.

¹⁹ C. Schmitt, *The Concept of the Political* (1996: 71–2).

²⁰ C. Schmitt, ‘The Legal World Revolution’, *Telos* (1987) 72 (Summer): 88.

fought in both the EU and Member State institutions. However, the overall depoliticalisation of the European Union supplemented by the universalistic moral concept of European identity eventually devolves political conflicts and clashes with the nation-state level and even facilitates a populist backlash against the EU as such. The commonly discussed democratic deficit of the Union is in fact part of a more general deficit of the political which is caused by allocating ever-greater powers to the Union's institutions without adequate political accountability and democratisation.

The Union's deficit of the political combined with universal humanitarian legitimacy has a potentially far-reaching and damaging effect at the nation-state level: it rehabilitates nationalism and a nationalist politics of identity as part of the democratic political discourse. Similarly, as in the nineteenth century, nationalism becomes the guardian of democracy and nation-state democratic institutions are made part of the modern nationalist illusion according to which democracy is a reflection of national culture and even the spirit of a nation (*Volksgeist*).

It is clear that the populist right and left in many Member States have benefited enormously from the never-ending and unrestrained process of EU integration which lacks adequate democratic accountability. Politicians like Jörg Haider and Jean-Marie Le Pen would not do so well without Euroenthusiasts such as Romano Prodi, Joschka Fischer and Jose-Luis Rodriguez Zapatero. Moreover, these populists count on the EU's democratic deficit and, similar to the nationalists of the nineteenth century, claim that democracy must be defended at the national level against the Union as a supranational entity. They often successfully use the Euroenthusiasts/Eurosceptics conflict dimension in the otherwise depoliticalised European domain and make 'Europe' subject to the political debates and conflicts arising at the nation-state level. The depoliticalised EU is tragically *repoliticalised* and made the subject of nationalist propaganda at the level of its Member States.

Emphasising the Union's indisputable democratic deficit, contemporary nationalists instead point to the simple fact that the EU lacks that kind of abstract collective solidarity which was produced among citizens of nation-states during the nineteenth century. A nationalist sense of collective belonging has been important for individuals to identify with one another as both members of the same pre-political ethnicity and citizens of the democratic nation-state. Two centuries ago, democracy and nationalism established a dangerous, yet often successfully functioning pact which still inspires nationalist critics of the European Union—a political entity without any solid collective identity.

Contemporary nationalists can pretend to act as the only ‘true democrats’ because they still exploit the modern complex process of inventing the nation which could play “the role of a catalyst in the transformation of the early modern state into a democratic republic”.²¹ They have accommodated the democratic doctrine of the identity between the state and its people, yet define the people in pre-political categories of history, spontaneity, ethnic autonomy, and organic development. The nationalist doctrine of pre-political identity successfully manipulates the key modern political conception according to which all democratic arguments logically depend on a set of identities, such as that of governed and governing, sovereign and subject, the representative legislator and the represented, and the state and its laws. In modern democracies, political minorities agree to the laws legislated by those in the majority on the basis of a more general and abstract solidarity of the people who, by the majoritarian procedure of democratic vote, constantly determine the specific content of its general will.

To paraphrase Rousseau, being part of a political minority means misunderstanding the meaning of the general will.²² Nationalists fortify this fragile democratic framework with the notion of the ethnic, historical and cultural bonds of a nation, and thus subject democracy to nationalist ideology and political goals. As a result it is often difficult to distinguish between ruthless nationalists exploiting the EU’s inability to create abstract solidarity based on civic bonds, and committed sceptical democrats reflecting the political fact that modern democracies can be successfully built only at the nation-state level and attempts to transcend this political limitation have, so far, resulted in the significant weakening of democratic legitimacy and accountability.

VIII. European constitution-making and its political limits

The European constitution-making process did not inspire the desired awakening of the European public sphere and abstract civic solidarity between different nations of the Union. Instead, it highlighted the weaknesses of the divided sovereignty doctrine which has dominated EU public law discourse for the last two decades. For instance, the Constitutional Treaty did not resolve the *Kompetenz-Kompetenz* issue of the division of competences between Member

²¹ J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity Press, 1999), p. 111.

²² J. J. Rousseau, *The Social Contract* (Harmondsworth: Penguin, 1968), Book. IV, chap. 2, sec. 8.

States and the Union which is so essential for any constitution-making process aimed at polity-building at the same time. For instance, Roger Errera, an honorary member of the French Council of the State, concludes that it cannot be a clear cut issue and that the very notion of shared competences, of subsidiarity, means “the main colour is grey and not black and white”.²³

The effective polity-like functioning of the Union would require the European Court of Justice to be the ultimate arbiter of the extent of the Union’s competences and of the validity of its acts. Although some scholars argue that national judges will eventually have to submit questions of the limits of the Union’s competences to the ECJ without any competence to decide whether or not European law is valid and that the ECJ should be empowered to annul inconsistent national law,²⁴ the dominant view is that the divided sovereignty doctrine behind the *Kompetenz-Kompetenz* issue will remain a problem of communication between the Union’s judiciary and national courts which would and should “seek to work together in a spirit of mutual respect and cooperation”.²⁵

This and other outcomes of the Convention’s constitution-making clearly indicate the absence of a constitutional rule and the continuation of the current practice of *ad hoc* judicial reasoning and decision-making which can hardly provide a solid constitutional and legal framework for the Union and its Member States and certainly cannot inspire a formative political act of constituting the European public sphere which is the first precondition of building the European polity. According to the Draft Treaty, European integration would continue to be pushed by the judicial and legal ‘epistemological community’ on a discretionary basis and without adequate political deliberation.

Instead of one European public sphere, the Union currently has a number of different overlapping public issues which resonate differently in individual Member States. The weakness of the EU as a political body is illustrated by national referenda on the Constitutional Treaty’s draft: while the President of France calls it, in a rather chauvinistically aggressive mode, a document protecting French political values and defending the European welfare state

²³ House of Lords, European Union Committee, *The Future Role of the European Court of Justice: Report with Evidence*, 6th Report of Session 2003/4: 24–5, 45.

²⁴ Ibid., see especially remarks made by Professor I. Pernice and Professor H. F. Koeck, p. 21.

²⁵ House of Lords, European Union Committee, *The Future Role of the European Court of Justice: Report with Evidence*, p. 27.

against “the ultra-liberal current, an Anglo-Saxon, Atlanticist kind of Europe”,²⁶ the Prime Minister of the United Kingdom defends the Treaty as a text guaranteeing national sovereignty and the economic flexibility of the prosperous British society and “protecting the UK’s vetoes on economic policy, defence and foreign affairs”.²⁷

These contradictions only signify both the absence of the European public sphere and that the politics of the nation-state persists in debates on European issues. The constitution-making process did not result in the diminution of the paradoxes of European politics and the transformation of the Union to a polity-based, profoundly democratised, political structure.

IX. Is the European Union a Soviet-style danger?

The problems and perplexities accompanying the current EU constitution-making process have been criticised from many different perspectives. A number of European law experts and politicians quite understandably fear that the current constitutional vagueness may become future political chaos. At the same time, this genuine and often justified fear is exploited by various Eurosceptic nationalists who, under the veil of criticism of the European Constitutional Treaty, are in fact questioning the very concept of the Union’s integration. Recent post-accession developments in the Czech Republic even reveal that the national politics of identity critical of the very notion of EU integration can have a significant impact on the constitutional conflicts between the different branches of state power and support attempts to revise the whole system of constitutional checks and balances.

Empowered by the ‘politics of identity’ argument and the absence of the Union’s democratic legitimacy, the President of the Czech Republic launched a long-term campaign against the European Union’s Constitutional Treaty and ever-deepening political integration soon after he was elected to his office in February 2003. The nature of the campaign is illustrated, for instance, by Václav Klaus’ interview for *Time* magazine in March 2005. When asked about the prospect of a stronger European Union, he replied:

[F]or me, the developments in the EU are really dangerous with regard to moving out of a free society [...] For us, the European Union reminds us of COMECON [Moscow’s organization for economic control of the Soviet bloc]... Not ideologically, but structurally, [the EU] is very similar

²⁶ See BBC News Online, 14 April 2005, available at: <http://news.bbc.co.uk/>.

²⁷ See BBC News Online, 18 May 2005, available at: <http://news.bbc.co.uk/>.

[to COMECON]. The decisions are made not in your own country. For us who lived through the communist era, this is an issue...²⁸

Just a week before the *Time* interview, the President of the Czech Republic made similar statements to the German daily *Frankfurter Allgemeine Zeitung*. He also emphasised the fact that democracy may exist only within the nation-state framework which, nevertheless, should not be perceived as an 'ethnically clean' entity.²⁹

One can clearly see the difference between the language and arguments employed by former President, Václav Havel, and the political language introduced to Czech and European politics by his successor Václav Klaus. Havel's cosmopolitan statement records that he does not:

[p]erceive the European Union as a monstrous superstate in which the autonomy of all the various nations, states, ethnic groups, cultures, and regions of Europe would gradually be dissolved. On the contrary, I see it as the systematic creation of a space that allows the autonomous components of Europe to develop freely and in their own way in an environment of lasting security and mutually beneficial cooperation based on principles of democracy, respect for human rights, civil society, and an open market economy.³⁰

This looks very strange and distant from the current dominating political discourse on Europe in the Czech Republic. Instead of a 'Charter for Europe', one can instead detect a fear of the Union and its identification with anti-democratic political tendencies. President Klaus constantly repeats that democracy cannot exist outside the nation-state and that any attempts to extend democratic procedures to supra-national levels are doomed to failure as the authoritarian regulatory politics of the powerful against the powerless. According to Klaus, cultural differences have fundamental political consequences and the fact that the Irish, Spaniards, Danes and Greeks have profoundly different cultural traditions effectively rules out any chance of setting up a functioning political entity.³¹

The President of the Czech Republic warns against the behaviour of 'the authors' of the Constitutional Treaty and their malicious intentions when he states that the entire constitution-making project is caused,

²⁸ *Time*, 21 March 2005.

²⁹ *Frankfurter Allgemeine Zeitung*, 15 March 2005, p. 5.

³⁰ See V. Havel, speech in the European Parliament, Strasbourg, 8 March 1994, p. 1.

³¹ *Frankfurter Allgemeine Zeitung*, p. 5.

[b]y their very narrow-minded ... interests, their belief in the possibility to assert oneself in today's over-bureaucratized pan-European state and in its many institutions (which, unlike the institutions of individual states, have the privilege that they are remote from authentic civic control). Because all these people know well that their 'constitutional treaty' is deliberately unclear, deliberately diffuse, deliberately inconsistent. That is why it hides many matters. Therefore certain things remain unsaid or not fully expounded.³²

In order to confront these authoritarian Euro-‘masterminds’, Klaus campaigns against the EU even with the help of Anthony Coughlan’s critical pamphlet on the Constitutional Treaty published by the ethno-nationalist National Platform³³ and summarises his opposition in ten points in which he says, *inter alia*, that:

1. The European Union will become a state and will have all the fundamental features of a state. [...] 2. In this newly established state of a federalist type, current Member States will still be called states, but in reality they will be mere regions or provinces by their competences. [...] 3. The constitution of the EU state will be superior to the constitutions of the Member States. The entire Union’s legal order will also have primacy over the legal order of the Member States. [...] 7. The Member States will only be able to exercise those competences [...] left to them under the EU Constitution, not the other way round, which was the original idea of European integration. Derived (secondary) EU legal acts will be superior to the original (primary) legal acts of the Member States. The primary and the secondary are being inverted.³⁴

This combination of straightforward mistakes, misleading statements and accusations about the Union should not be immediately dismissed as the eccentric position of a pretentious politician who would like to achieve the international recognition of his predecessor and knows that he can only draw attention as ‘the cheekiest’ and not the internationally ‘most respected’ head of the Czech Republic as a new EU Member State. Klaus’ return to the ‘politics of identity’ is directly used as an ideological instrument to confront political

³² Quoted from V. Klaus, Foreword to the CEP publication *Shall We Say Our Yes or No to the European Constitution*, available at: <http://www.klaus.cz/>.

³³ See A. Coughlan, ‘An Analysis of the Constitution that makes the EU into a State’, The National Platform EU Research and Information Centre; the Czech translation published in *Řekneme své ANO nebo NE evropské ústavě* (*Shall We Say Our Yes or No to the European Constitution*), (Prague: CEP, 2005).

³⁴ V. Klaus, Foreword to the CEP publication *Shall We Say Our Yes or No to the European Constitution?*

opponents at the national level. The whole ideological manoeuvre may have profound consequences for the Czech political and constitutional system and therefore has to be seriously analysed as a political tactic which fundamentally splits the whole system of the executive power of the Czech constitutional system.

Understanding political conflicts and the current constitutional tension within the executive branch therefore requires an analysis of the emergence of the politics of identity, adopted by the conservative right-wing Civic Democratic Party of which President Klaus was a leader until 2002. Václav Klaus may claim that he does not defend the concept of the ethnic nation-state, yet his political campaigning gives a different picture. In this respect, the President's 'MontyPythonesque' address on the top of Mount Blaník on 1 May 2004 is less significant than his controversial statements during the 1998 general election campaign which virtually transformed the conservative liberal programme of his party into a nationalist one.³⁵ The Civic Democratic Party gradually wiped out the right-wing populist and nationalist parties from the Czech political map in the late 1990s, and increasingly accommodated nationalist and Eurosceptic rhetoric, such as during the enactment of legislation for the European arrest warrant in August 2004 when Klaus unsuccessfully vetoed the proposed law.³⁶

In his speech to mark the 14th anniversary of the 'velvet revolution' in 2003, President Klaus produced an alternative explanation of the events according to which the whole revolution was inspired by the nation's passive resistance and political actors such as dissidents did not play a substantial role in it. In Czech history according to Klaus, the nation as a whole beat the communist power because it did not trust it while dissidents were supposedly an elitist isolated group of utopian and conceited political romantics. This concept of the nation as a whole making history was subsequently included in the President's commentary in October 2004 that the nation should stop 'dealing with its communist past' because it was a divisive issue. This comment should not be interpreted as if it were just the farcical return of former Czechoslovak President Gustav Husák's

³⁵ For details and comparisons with the rise of ethno-nationalism in other CEECs see, P. Tychtl 'Nothing But Nation', *Central European Review* (1999) 1/10; available at: <<http://www.ce-review.org/>>.

³⁶ The President's main constitutional argument was based on *The Charter of Fundamental Rights and Freedoms*' provision according to which a citizen of the Czech Republic cannot be forced to leave the country. See, United Press International, 'Czech President Vetoes Euro Arrest Warrant', 24 August 2004, available at: <http://www.washtimes.com/>. Subsequently, Civic Democratic Party MPs complained to the Constitutional Court and initiated a review of the constitutionality of the Euro-warrant law.

enforced ‘policy of forgetting’ during the repressive period of communist ‘normalisation’ of the 1970s. Unlike Husák, Klaus’ aim is to foster the organic unity of the Czech nation and act as its ultimate political representative and speaker, occupying the public discourse by the figure of a sovereign ‘we’.³⁷

From an ideological perspective, Václav Klaus may invoke modern liberal thought, such as that of Friedrich von Hayek, yet he speaks in an increasingly nationalist and illiberal voice. He prefers the pseudo-romantic discourse of autonomous national powers, self-governance, the dignity of specific history, and ‘the unique legacy of our ancestors’ to the liberal rational discourse. According to him, the nation-state is ‘just it, just right, just appropriate’ for democracy and the European integration process ought to be ‘evolutionary’ and ‘natural’ and reject the existing politics of ‘social engineering’ and ‘constructivism’.³⁸

X. The executive branch of constitutional power: cohabitation or confrontation?

The Czech constitutional system is based on the principles of republican parliamentarianism. This means that the government is appointed by a President, but must also ask the Chamber of Deputies for a vote of confidence and is accountable to this chamber.³⁹ The constitutional powers of the President are limited and a number of their acts have to be authorised by government. Article 63, pars. 1–2, specifies the President’s powers, whose constitutional validity depends on the consent of the Prime Minister or a member of the government authorised by the Prime Minister. In particular, the President; represents the state with respect to other countries, negotiates and ratifies international treaties, is supreme commander of the armed forces, receives the heads of diplomatic missions, appoints and recalls the heads of diplomatic missions, calls elections to the Chamber of Deputies and the Senate, appoints and promotes generals, awards and bestows state decorations, appoints judges, and is empowered to grant amnesties.

³⁷ The use of ‘we’ in the presentation of President Klaus’ personal views is a noticeable feature of his recent speeches, interviews, and addresses. It is also employed in part of his address ‘Překonejme minulost přítomností’ (‘Let Us Overcome the Past by the Present’), delivered on the 86th anniversary of the establishment of Czechoslovakia, 28 Oct. 2004.

³⁸ V. Klaus, ‘Integration or Unification of Europe: Notes for the Berlin Speech’, President’s speech delivered at the European Forum, Berlin, 20 Nov. 2004, available at: <http://www.klaus.cz/>.

³⁹ See Article 68, par. 1 and Article 71 of the Constitution of the Czech Republic.

A common myth that the President is a merely symbolic figurehead of the State does not correspond to the constitutional reality of the Czech Republic. The President is always a key player during the formation of government because s/he is entirely free to choose any politician as Prime Minister, and subsequently approves preliminary ministerial appointments made by the Prime Minister. Although the President cannot personally form the cabinet, s/he can technically control Ministers of Government on a daily basis. Despite the existing constitutional conventions and the established practice of non-intervention, the Czech President can be extremely activist under Article 64, which reads:

- (1) The President of the Republic may attend meetings of both chambers of the Parliament, their committees and commissions. He or she shall be given the floor on request.
- (2) The President of the Republic may attend meetings of the Government, ask for reports from the Government and its members, and discuss with the Government or its members matters which are under their jurisdiction.

These provisions could technically put the President in charge of daily governmental politics. Under existing constitutional convention, however, this provision would be interpreted restrictively and none of the previous presidents have used it in order to achieve full control of the executive. Nonetheless, President Klaus has been testing this constitutional territory and has, so far, proved to be extraordinarily interventionist. For instance, while President Havel used his veto power fourteen times during the whole period of the Zeman government (1998–2002), President Klaus vetoed sixteen acts of legislation during his first two years in office.⁴⁰

Since his election as President, Klaus has also made robust use of his other constitutional powers to dominate the executive branch. This strategy has been made easy because of the slender Parliamentary majority held by the social-democratic government in the Chamber of Deputies (101 out of a total of 200 MPs). In the last two years, the weak centre left coalition government was involved in numerous confrontations with the overtly right-wing President, many of them touching on the EU political agenda. The President has been a systematic critic of Cyril Svoboda, Minister of Foreign Affairs, and has formulated his criticisms against the background of ideology and party politics.

⁴⁰ See 'Česko se v poslední době ... nachází na šikmé ploše' ('Czechia has been recently ... on a slippery slope'), an interview with Václav Klaus in the newspaper *MF Dnes*, 26 Feb. 2005, p. A/7.

The veto policy applied to the Euro-warrant legislation was part of the President's general attack on the European policy of the Czech government which focused on the process of the ratification of the EU's Constitutional Treaty. Giving in to the sustained pressure of President Klaus, the then Prime Minister, Vladimír Špidla, decided in spring 2004 that the Czech Republic, after approving EU accession in a referendum, would vote on the Treaty in another referendum. This was a risky strategic decision taken to release pressure from the weak '101 coalition' government, but it also provided ammunition to the political conservative opposition and made the EU Constitutional Treaty an intrinsic part of the Czech political battlefield.

Unlike some other new Member States, such as Hungary and Lithuania, the Czech Republic's political scene is divided on the issue of the Treaty: while the mainstream left-wing Social Democratic Party and the centrist Christian Democratic Union along with the Union of Freedom support the Constitutional Treaty, the conservative Civic Democratic Party is opposed to it (although not unanimously and the pro-European wing within the Civic Democratic Party was gaining political ground as the Constitutional Treaty's ratification process was becoming a main political issue and public polls from April 2005 suggested that the Civic Democratic Party might be losing its traditionally pro-European electorate due to its anti-European position).⁴¹ Although not empowered by any constitutional prerogative, President Klaus even submitted a query to the Constitutional Court asking whether the government's approval of the EU Constitutional Treaty did not contradict the Czech Constitution because of the Treaty's limitation on national sovereignty. The Chief Justice of the Constitutional Court replied in a private letter saying that the whole question was premature and therefore irrelevant from the point of view of constitutionality because the ratification process had not, yet, reached the President's office.

The unpopularity of subsequent coalition governments led by social democratic prime ministers since the general election in 2002 and traditional Czech suspicion of any foreign power would make the referendum outcome an open issue although EU polls indicate that, so far, the Czech public supports the Constitutional Treaty.⁴² Nevertheless, coalition government parties have been

⁴¹ According to information leaked from a confidential ODS survey, the party could lose between 3–5% of votes due to its Eurosceptic position. For further details, see 'ODS mění přístup k EU' ('The Civic Democratic Party Changes its Attitude towards the EU'), *Lidové noviny*, 19 April 2005.

⁴² See Eurobarometer, *The Future Constitutional Treaty, Special Report*, pp. 15–35. In this respect, the interesting fact is that only 19% of the Czech population would definitely

significantly weakened and do not campaign on the EU ticket for fear that the Union 'does not sell' very well with Czech voters. Similarly to other Member States, the EU Constitutional Treaty has been the subject of political campaigning at national level, yet has hardly contributed to any 'political transgression' from the national political discourse to the European one. European politics thus continues to exist merely as one of the many issues of the national politics of individual EU Member States.

XI. Conclusion: 'Euro-crisis', constitutional choices and prospects for a 'politics of identity'

The Czech Euro-crisis, steered by the President and dominated by a revived nationalist politics of identity, contributes to the further weakening of the government as the most important pillar of the executive branch and its sidelining by various presidential initiatives and interventions.⁴³ From the perspective of likely political developments, such as a landslide victory for the Civic Democratic Party in the general election to the Chamber of Deputies and in the subsequent Senate by-elections in 2006,⁴⁴ the greatest danger for the Czech constitutional system is that it will become dominated by one (Civic Democratic) party which might result in the overall domination of the executive power of government by the President's office.

participate in a referendum that would be organised to ratify the text of the Treaty. This figure, the lowest of all EU Member States, indicates that the problem of a democratic deficit should be addressed both at the EU and nation-state levels. It certainly stretches beyond the institutional framework of Czech national politics and represents a traditional, long-term cultural pattern of distrust in public authorities and the absence of a social interest in politics. For further data, see p. 33.

⁴³ One of the most recent interventions was the President's refusal to appoint judges listed by the Ministry of Justice under the age of thirty, despite the fact that this presidential power is subject to the government's authorisation (and the President's appointment therefore arguably does not have a constitutive effect), and there was no other ground for the President's refusal other than the age of the judges. Supported by the Judicial Council of the Czech Republic, 32 apprentices submitted a complaint to the Constitutional Court on 13 May 2005. See, for instance, Czech News Agency, 'Čekatelé podali ústavní stížnost na Klause' (Apprentice judges submitted a constitutional complaint against Klaus), 13 May 2005; available at: <http://www.zpravy.centrum.cz/>.

⁴⁴ The public survey of the Centre for Empirical Research of March 2005 reports the following support: Civic Democratic Party 35.5%; Communist Party of Bohemia and Moravia 17.9%; Social Democratic Party 13.3%; Christian Democratic Union 9.4%; Green Party 2.7%; Union of Freedom 2.1%; Independent Movement 2.0%; available at: <http://www.stem.cz/>.

Apart from this scenario, there is an even greater risk of attempts to fully redesign the existing constitutional system and make it more convenient for the dominant Civic Democratic Party—attempts well known from the 1998–2002 period of the ‘opposition treaty’ between the Civic Democratic Party and the Czech Social Democratic Party which was in government during that time. President Klaus thus might well succeed with his repeated calls for a constitutional change of the electoral system and the implementation of majority vote instead of the existing system of proportional representation.⁴⁵

Furthermore, presidential power would almost certainly be extended as indicated in the mysterious, ‘anonymously’ proposed, amendment of the Constitution in September 2004. Under this proposal, approved by the Chamber of Deputies’ committee for constitutional affairs,⁴⁶ several amendments had been suggested by right-wing MPs which would have fundamentally changed some presidential powers. In particular, the proposed amendments would grant the President the power to dismiss Chief Justices and Deputy Chief Justices of the Supreme Court and the Constitutional Court. Apart from this blunt infringement of judicial independence, the President would have become stronger in respect of his control of the Czech National Bank and the Supreme Control (Audit) Office. It was only the severe public criticism and the lack of political majority which blocked the constitutional amendments in the Chamber of Deputies in October 2004. However, current Czech political constellations indicate that there might be more political will to implement these changes after the next general election.

Should the Czech constitutional system be transformed into a *semi-presidential republican model*, the executive branch will certainly be dominated by the anti-EU President, and a weak government would be politically forced to cooperate with the President by virtue of a strictly textual reading of Article 64 of the Constitution. The Czech Republic would consequently have the most powerful

⁴⁵ The current electoral system is regulated by Article 18 of the Constitution of the Czech Republic which reads: “(1) Elections to the Chamber of Deputies shall be held by secret ballot on the basis of universal, equal and direct suffrage and under the principles of proportional representation. (2) Elections to the Senate shall be held by secret ballot on the basis of universal, equal and direct suffrage and under the principles of the majority system”. For the history of President Klaus’ attempts to change the electoral system, see J. Přibáň, ‘Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System’, in W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer, 2002), pp. 389–91.

⁴⁶ See *Committee for Constitutional Affairs of the Chamber of Deputies of the Parliament of the Czech Republic*, Report No. 125, Sept. 2004; available in Czech at: <http://www.psp.cz/>.

president in Central Europe and become constitutionally closer to the French constitutional model. Nevertheless, in terms of its European outlook, the Republic would be too radical even for traditionally Eurosceptic Denmark, Ireland, Sweden, or the United Kingdom, and become marginalised due to its national identity-oriented politics of the executive branch under the President's leadership.

Chapter 3

EU Law and the Hungarian Constitutional Court:

Lessons of the First Post-accession Encounter*

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I. Introduction

Less than four weeks after Hungary's accession to the European Union, at the request of the President of the Republic, the Hungarian Constitutional Court invalidated several provisions of a bill seeking to impose restrictions and fines, on the day of Hungary's EU accession, on owners of agricultural surplus stocks.¹ According to the Constitutional Court the rules did not allow 'due time' for subjects to learn their legal duties and also imposed legal obligations retroactively, thus violating legal certainty and the rule of law protected in Article 2(1) of the Hungarian Constitution. This flat announcement becomes somewhat more interesting when one considers that the rules impugned in the Hungarian bill were identical to transitional measures adopted in a series of regulations issued by the European Commission in late 2003 and early 2004 in anticipation of accession on 1 May 2004.²

* This chapter owes a great deal to the patience and expertise of Petra Jeney, a long-time friend. Unless indicated, all translations from the Hungarian are by the author.

¹ Decision 17/2004 (V. 25.) AB decision.

² See European Commission Regulation (EC) 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2003] OJ L 293, as amended by Regulation (EC) 230/2004 of 11 Feb.

Following some introductory remarks, the first part of this chapter demonstrates why the decision of the Hungarian Constitutional Court does not reveal much about the reception of EU law in Hungary following accession. Instead, the Constitutional Court's attitude in the case might be perceived as an indicator of constitutional developments shaping the role of the Constitutional Court in the operation of the legal system of a new EU Member State in the long run. The second part of the chapter explores potential trajectories of the relationship between ordinary courts and the Constitutional Court in a new Member State. Based on experiences in Hungary as well as in other jurisdictions, I suggest, that while the Hungarian Constitutional Court might decide to save itself the trouble of dealing with EU law, in the course of fulfilling its ordinary duties under national law, Hungarian constitutional justices are likely to indirectly affect the operation of EU law far more than they would have initially foreseen.

Since the political branches did not manage to properly distribute the competences related to EU membership among themselves before accession,³ it may fall to the Constitutional Court to dole out the bargaining chips of the other branches with regard to post-accession decision-making processes. Furthermore, constitutional jurisprudence might assist the political branches in selecting priorities in the mass of EU decisions to be made. The decisions of the Constitutional Court may also effectively shape the arguments to be made by the representatives of the Hungarian government of the day in various European decision-making processes and in the course of transposing or implementing EU law in Hungary. While these tasks do not seem to entail anything more than applying the Hungarian Constitution, an informed and practicable arrangement conforming to the terms of the Hungarian Constitution cannot disregard the law and procedures of the EU altogether.

II. Turning the Hungarian Constitutional Court's decision into a constitutional problem

Despite its relatively recent vintage, the Hungarian Constitutional Court's decision invalidating the bill on agricultural surplus stocks has been presented

2004, [2004] OJ L 39 and Regulation (EC) 735/2004 of 20 April 2004, [2004] OJ L 114; see also Regulation (EC) 60/2004 of 14 Jan. 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2004] OJ L 9.

³ On the lack of political agreement, see A. Sajó, 'Learning Co-operative Constitutionalism the Hard Way, The Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europawissenschaften* (2004) 2/3: 356–57.

and explained in a number of matrixes so far. Even a quick first glance at the decision made commentators remark that in the case, the Constitutional Court ended up openly defying the EU, or at least disregarding EC law. In this respect commentators suggest that the Court did not fully understand the change in legal circumstances brought about by Hungary's EU accession.⁴ In addition, one can also argue that since the President of the Republic referred to the Constitutional Court before signing the bill into law, it is possible to see Hungarian constitutional justices as allies of the President of the Republic, and, thus, ultimately of the parliamentary opposition.⁵ Such an explanation might reflect on the Constitutional Court's role in the domestic balance of powers *vis-à-vis* a markedly polarised parliament which is due to elect several new justices to the Constitutional Court and a new president of the republic in 2005, all before facing parliamentary elections in 2006.

Approaching the Constitutional Court's decision from a markedly different perspective András Sajó's account gives more weight to the European dimension of the case emphasising how the Constitutional Court refused to participate in European 'cooperative constitutionalism'.⁶ As Sajó points out, in the case the Court was acting as a guarantor of the achievements of democratic transition, standing up for principles and safeguards many of which were developed by the Constitutional Court over the past decade. Cooperative constitutionalism in the EU setting, however, would entail giving up some of these highly treasured achievements of democratic transition and trusting European institutions with taking acceptable decisions. Note that this notion of 'European trust' is not novel—at least on the level of abstract principles. Koen Lenaerts has identified

⁴ See, for example, A. Hanák, 'Tolatás és szívatás: az Alkotmánybíróság döntései Magyarország EU-csatlakozását követően' (Decisions of the Constitutional Court Following Hungary's Accession to the EU. The first part of the title is an untranslatable play on words), *Élet és Irodalom* (2004) 48/23; available at: <http://www.es.hu/>.

⁵ For the viability of such a construction, see also, W. Sadurski, 'Accession's Democracy Dividend: Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', *European Law Journal* (2004) 10/4: 389 (on the role of constitutional courts in general to this effect).

⁶ See, for example, A. Sajó, 'Learning Co-operative Constitutionalism the Hard Way, The Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europawissenschaften* (2004) 2/3: 351–71. For a similar view in a comparative Central European perspective, see Z. Kühn, 'The Application of European Law in the New Member State: Several (Early) Predictions', *German Law Journal* (2005) 6/3; available at: <http://www.germanlawjournal.com/>.

several factors that foster trust-building in the operation of the EU machinery.⁷ Lenaerts points to the principles of transparency and equality of arms, the precautionary principle and the principle of sound administration (the latter including legal certainty).⁸ Yet, as Sajó aptly concludes, it is exactly trust of this kind that is alien to the logic of the Hungarian polity's operation.

In the light of these observations it is hard to resist the temptation to elaborate on how a defiant Hungarian Constitutional Court refused to observe the supremacy of EU law when invalidating the bill on agricultural surplus stocks with reference to domestic constitutional considerations. Instead, the following pages will be used to show that in the case the Constitutional Court avoided taking a stand directly on the supremacy of EU law. Sure, the Constitutional Court's strategy (one might be tempted to call it judicial deference or self-restraint) might easily be criticised for its awkwardness and lack of respect for ECJ jurisprudence. The reluctance of the Hungarian Constitutional Court may be explained in terms of the justices' lack of interest in participating in the application and enforcement of EU law in Hungary. Be that as it may, the Hungarian Constitutional Court is not that different from other European constitutional review *fora* in seeking to leave EU law undisturbed to the farthest extent possible. The Hungarian Constitution's cryptic provisions on the status of international law⁹ and its famously inconclusive 'Europe clause'¹⁰ might also be used to justify a cautious judicial stance in EU matters.

⁷ See K. Lenaerts, "In the Union We Trust: Trust Enhancing Principles of Community Law", *Common Market Law Review* (2004) 41/2: 317–43.

⁸ *Ibid.*, pp. 340–42.

⁹ Article 7, Hungarian Constitution: "(1) The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law. (2) Legislative procedures shall be regulated by law, for the passage of which a majority of two-thirds of the votes of the Members of Parliament present is required." available in English at: <http://www.mkab.hu/en/enpage5.htm>.

¹⁰ Article 2/A(1), Hungarian Constitution: "(1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary in connection with the rights and obligations conferred by the treaties on the foundation of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may be exercised independently and by way of the institutions of the European Union". On the Hungarian Constitution's 'Europe clause' (Article 2/A), see A. Sajó, 'Accession's Impact on Constitutionalism in the New Member States', in G. Bermann and K. Pistor (eds.), *Law and Governance in an Enlarged European Union* (Oxford: Hart, 2004), pp. 415–35; A. Harmathy, 'The Presentation of Hungarian Experiences', in *The Position of Constitutional*

These remarks already pave the way for the situation of the Hungarian Constitutional Court's decision in a broader context; Hungary's transformation from a socialist state into a democracy capable of EU accession. The Hungarian Constitutional Court is often credited with actively participating in building a new, post-communist constitutionalism.¹¹ Its achievements involve far more than slavishly responding to EU demands during the long years of pre-accession conditionality. Among other achievements, the Court is often heralded as the single most important protector of constitutional rights in Hungary, while ordinary courts are frowned upon for their lack of skill, imagination and willingness in engaging in constitutional rights litigation.¹² Certainly, the Constitutional Court truly contributed to Hungary's meeting the Copenhagen criteria and redressing shortcomings in the Hungarian constitutional and legal system signalled by the European Commission. Yet, it remains the case that the Constitutional Court is not the single most important star in the grand narrative of Hungary's EU accession. Furthermore, looking at the old Member States, constitutional review *fora* tend not to be the stars of Member States' involvement in EU affairs (when they are not cast as notorious adversaries of success, that is). Moreover, in the old Member States the ordinary judiciary seems to regularly collect the honours in the domain of rights protection, a field particularly dear to the Hungarian Constitutional Court.

III. The Hungarian Constitutional Court's decision defying the supremacy of European law? Not yet

Before discussing the problems foreshadowed by the Hungarian Constitutional Court's decision, it is worth taking a closer look at the case itself.¹³ The challenged

Courts Following Integration to the European Union, proceedings of an international conference held at Bled, Slovenia, 30 Sept.-2 Oct. 2004, pp. 221–22; available at: <http://www.us-rs.si/media/zbornik.pdf>; W. Sadurski, 'Accession's Democracy Dividend: Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', *European Law Journal* (2004) 10/4: 386–87.

¹¹ For an account of the Constitutional Court's first chief justice, see L. Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy, with Special Reference to Hungary', *International Sociology* (2003) 18/1: 133.

¹² G. Halmai and G. A. Tóth (eds.), *Emberi jogok* (Human Rights) (Budapest: Osiris, 2003), pp. 226–35.

¹³ For an analysis in English see A. Sajó, 'Learning Co-operative Constitutionalism the Hard Way, The Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europawissenschaften* (2004) 2/3: 351–71. For another account by one of the justices of the Constitutional Court, see A. Harmathy, 'The Presentation of Hungarian

rules invalidated by the Constitutional Court essentially matched the terms of European Commission regulations containing transitional measures which sought to prevent the accumulation of surplus stocks of certain agricultural products before Hungary's accession to the European Union. Such transitional measures are usually explained in EC logic as safeguards against speculators who might take advantage of EC export refunds on certain agricultural products *twice*; by taking a brief stop in a country which is about to obtain EU membership before reaching their final export destination outside the (by-then enlarged) EC.

Such transitional measures are not unprecedented in enlargement history. Similar transitional measures were adopted in 1985 before the accession of Spain and Portugal, and in 1994 before Austria, Finland and Sweden joined the EC.¹⁴ It should also be noted that the transitional measures enacted by the European Commission in late 2003 and early 2004 were to apply not only in Hungary, but to all ten new accession countries. Furthermore, Hungary was not the only accession country concerned about the validity of these transitional measures. In Estonia reservations were voiced as to the Estonian law which transposed these transitional regulations into national law.¹⁵ Poles expressed their lack of enthusiasm through the Polish government's challenge brought before the Court of First Instance challenging both Commission Regulations, asserting, *inter alia*, that the European Commission's Regulations limit the free movement of goods, are *ultra vires*, impose unequal treatment and lack proper justification.¹⁶ Without intending to prejudge the success of the Polish and Estonian claims it is important to note that the jurisprudence of the ECJ seems to strongly support the European Commission's position. The ECJ upheld previous challenges against transitional measures applicable in the case of prior accessions.¹⁷ These factors are important

Experiences', in *The Position of Constitutional Courts Following Integration to the European Union*, proceedings of an international conference held at Bled, Slovenia, 30 Sept.-2 Oct. 2004, pp. 219ff.

¹⁴ This fact was indeed acknowledged by the Hungarian Constitutional Court in its decision. See 17/2004 (V. 25.) AB decision; part III.4.

¹⁵ Estonian MPs applied to the Minister of Agriculture in the matter already in the summer of 2004. See the English language summary of the minister's response of September 2004, available on-line at: <http://www.riigikogu.ee/>. The Estonian government was reportedly intending to bring a challenge against the sugar surplus stock Regulations before the ECJ. *Estonia to contest EU sugar stock ruling in court*, 27 May 2005; available at: <http://www.eubusiness.com/>.

¹⁶ See pending cases, T-257/01 and T-258/04.

¹⁷ See C-30/00 *William Hinton and Sons Ltd v. Fazenda Pública* [2001] ECR I-751 and C-179/00 *Gerald Weidacher (Thakis Vertriebs- und Handels GmbH) v. Bundesminister für*

to keep in mind when looking at the Hungarian Constitutional Court's decision on agricultural surplus stocks, as the bill invalidated in the case contained the equivalents of such transitional measures routinely imposed on new accession countries.

In the case, the Constitutional Court found that the bill enacted by the Hungarian parliament introduced legal obligations concerning agricultural surplus stocks on such short notice that the affected would not have had 'due time' to learn about their statutory duties. Obligations imposed in the bill with regard to agricultural stocks were to arise as of 1 May 1 2004, while the bill as passed by parliament would have entered into force as of 25 May 2004. Although the bill was passed in early April 2004, under Hungarian rules the period of 'due time' before promulgating a law imposing fiscal obligations must be forty-five days.¹⁸ The Constitutional Court found this 45-day period applicable as the bill on surplus stocks did impose a charge payable to the Hungarian government. Thereupon the Constitutional Court found that the bill on surplus stocks was to enter into force without allowing owners of agricultural stocks 'due time' to prepare for its application. According to the justices, the fact that several ministries issued a joint notice in the Hungarian Official Journal on the approaching agricultural surplus stock regime was irrelevant for the purposes of meeting the 'due time requirement'. Furthermore, the Constitutional Court added that it would have also violated the 'due time requirement', had parliament managed to pass the bill in a manner that would have allowed for its entry into force in mid-April. The latter remark is of considerable import taking into account the fact that in parliament the vote on the bill was delayed for two weeks for lack of quorum.¹⁹ In addition, the Constitutional Court held that the bill imposed a legal obligation in a retroactive manner, thus violating the requirements of the rule of law.

The Hungarian decision is characterised by several unconvincing judicial attempts at showing that reaching a decision in the case would not entail constitutional review of Community law or an open defiance of the supremacy of

Land- und Forstwirtschaft [2002] ECR I-105. Note that the Hungarian Constitutional Court also referred to these cases, assessing the ECJ's jurisprudence properly. Decision 17/2004 (V. 25.) AB decision; part III.4.

¹⁸ This deadline is set in an Act of Parliament on public expenditure, Act No. 38 of 1992.

¹⁹ See A. Sajó, 'Learning Co-operative Constitutionalism the Hard Way, The Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europawissenschaften* (2004) 2/3: 356.

Community law.²⁰ In the case, the Hungarian Constitutional Court emphasised that it was not testing the validity of the European rules (i.e. European Commission Regulations), nor was it concerned about their interpretation. Instead, for the Constitutional Court the issue in the case was the validity of the Hungarian regulation (i.e. the challenged bill) seeking to enforce the Regulations passed by the European Commission.²¹ In this respect the Constitutional Court adopted the position exposed in the President's challenge.²² Considering that the bill did little more than repeat the words of a set of European Commission Regulations, the Hungarian Constitutional Court's attempts at pretending that the constitutionality of Community law was not at issue in the case might appear almost futile. In addition, the Constitutional Court said that the constitutionality of Community law was not at issue in the case since those Regulations of the European Commission which contained rules identical to the ones in the Hungarian bill applied to new Member States, but not to citizens. This position seems to run counter to basic EU law logic: after all, regulations have long been known to have direct effect and be of direct applicability in the Member States. It was upon such premises that the Constitutional Court's analysis focused on the constitutionality of the bill enacted by the Hungarian parliament.

Awkward though they sound, these premises are best understood in the light of prior Hungarian constitutional jurisprudence concerning the effects of Community law and international law in Hungary. It is important to emphasise that the Hungarian Constitutional Court was familiar with previous transitional measures adopted by the European Commission during previous cycles of accession. The Hungarian justices were also familiar with the jurisprudence of the ECJ upholding previous regulations. Thus, it would be a mistake to assume that the Hungarian Constitutional Court's position was the result of sheer ignorance of EU law. Better, one might sense that the Constitutional Court was following its

²⁰ Thus, it is important to stress that the Hungarian Constitutional Court did not go as far as the Italian Constitutional Court in the case triggering the ECJ's decision in *Costa v. Enel* [1964] ECR 585. See A. Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004), pp. 82–83.

²¹ Decision 17/2004 (V. 25.) AB decision; Part III.5.

²² See *Petition of the President of the Republic*, I-2/1475–0/2004, available at: <<http://www.keh.hu/>>. The president's brief submits that since EC Regulations require Member States to take further action in respect of surplus stocks, the Hungarian bill should be taken as a piece of genuine Hungarian legislation passed by the Hungarian parliament in its own jurisdiction under the Hungarian Constitution. The president's brief explains that thus it follows that the same requirements of constitutionality apply to this bill as to any other passed by the Hungarian parliament in exercise of its constitutional powers.

old antics of trying to stick to dividing pre-accession and post-accession legal relations to the greatest extent possible. The Constitutional Court's fascination with a sharp and clear dividing line in time (i.e. the moment of Hungary's EU accession) shall be seen not only as a means of judicial comfort-seeking, but also a means to delineate the temporal dimensions of EU law. In effect, the Constitutional Court's retroactivity argument pushes the subject of the challenged bill—of the EU regulation—to a moment in time (i.e. before accession) when the European Commission could not possibly be in a position to issue a regulation that would be directly applicable or have direct effect in Hungary.

This logic is in line with the Constitutional Court's earlier decision concerning the applicability of EU law and jurisprudence in competition matters after the conclusion of the Europe Agreement and before Hungary's membership of the European Union.²³ The way in which the Constitutional Court phrased the issue is indicative. According to the Court, the issue was "whether it is possible to enforce, before the Hungarian competition authority, the internal norms of another subject of international law and of an independent public law system, which are meant to regulate legal relations under public law; without making these norms of public law become part of Hungarian law".²⁴ In the case the Constitutional Court famously (or infamously) held that before Hungary's accession to the European Union, EU law cannot be applied directly by Hungarian authorities. The Constitutional Court emphasised that Hungary is not a member of the EU, therefore, EU law qualifies as foreign law from the perspective of Hungarian authorities.

The Court's insistence on safeguarding Hungarian national sovereignty from the legal system of a foreign sovereign is the baseline of the 1998 decision on the Europe Agreement. The judiciary's position is in line with a dualist stance on international law.²⁵ We can trace the same logic of dualism in the recent decision

²³ Decision 30/1998 (VI. 25.) AB decision; available on-line in English at <http://www.mkab.hu/>. For comments, see J. Volkai, 'The Application of the Europe Agreement and European Law in Hungary: the Judgment of an Activist Constitutional Court on Activist Notions', *Harvard Jean Monnet Working Paper*, 1999/8; A. Tatham, 'Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI. 25.) AB of the Hungarian Constitutional Court', *International and Comparative Law Quarterly* (1999) 48/4: 913–20.

²⁴ Decision 30/1998 (VI. 25.) AB decision (author's translation).

²⁵ See A. Tatham, 'Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI. 25.) AB of the Hungarian Constitutional Court', p. 913, and I. Vörös, 'The Legal Doctrine and Legal Policy Aspects of the EU-Accession', *Acta Juridica Hungarica* (2003) 44/3–4: 141–63. See also, A. Harmathy, 'Constitutional Questions of the Preparation of Hungary to Accession to the European Union', in A. E. Kellerman, J. W. de Zwaan and

on agricultural surplus stocks.²⁶ The Court could disregard the EC regulations and their direct effect within the EU legal system simply because this was a legal realm which did not apply to Hungary at the time the material facts of the case occurred. Although the bill was devoted to handling the consequences of EU accession, the underlying EC Regulations and the bill itself were passed before Hungary's accession to the EU. For this reason alone, the direct effect of EC regulations imposing the transitional measures cannot possibly exist in Hungary. At the time, in order for the rules adopted by a foreign sovereign (i.e. EC Regulations) to have any legal consequence in Hungarian domestic law, parallel Hungarian norms needed to be passed. This stance is evident in Judge Harmathy's comment on the decision describing the function of the Hungarian bill as implementing EC Regulations.²⁷

It was precisely this formalistic line-drawing that helped the Constitutional Court purposefully avoid an open confrontation with the supremacy of EU law in the case. By insisting on the pre-accession origins of the material facts, the Court placed transitional measures concerning agricultural surplus stocks passed by the European Commission within its own exclusive jurisdiction. The Constitutional Court's decision concerned the validity of a Hungarian bill, and not of an EC regulation.

While insisting on drawing a neat dividing line on the day of EU accession might be appealing for those believing in a rather mechanical concept of national sovereignty and dualism, the implications of such a formalistic approach are considerable for an inquiry into the supremacy of EU law in Hungary. Critics of the Constitutional Court have argued that the judges are profoundly mistaken in applying the concept of dualism so harshly equating EU law with international law, as this approach does not properly account for the intrinsic qualities of EU law. Furthermore, on its merits, the Hungarian Constitutional Court's logic does openly contravene ECJ jurisprudence on transitional measures mentioned above. Certainly, within the logic followed by the Constitutional Court this collision, at least to the extent of the case at hand, is irrelevant. After all, as one learned already in 1998 on account of the Europe Agreement, the jurisprudence of a foreign

J. Czuczai (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001), pp. 324–25.

²⁶ A dualist tradition is a well-known obstacle to the supremacy of EU law. See A. Stone Sweet, *The Judicial Construction of Europe* (2004: 81ff).

²⁷ A. Harmathy, 'The Presentation of Hungarian Experiences', in *The Position of Constitutional Courts Following Integration to the European Union*, proceedings of an international conference at Bled, Slovenia, 30 Sept.-2 Oct. 2004, p. 225.

sovereign is, without implementation, just as inapplicable in Hungary as any other legal rule made that by that sovereign. While such a stance may be unacceptable to the ECJ, it is worth noting that such collisions between Hungarian Constitutional jurisprudence and ECJ jurisprudence are relatively safely confined to transitional measures adopted by the European Commission on account of enlargement.

One must note, however, that the Hungarian Constitutional Court's position on retroactivity also deviates significantly from ECJ jurisprudence on the inter-temporal effects of EU law.²⁸ Without entering into the details of the somewhat confusing terrain of ECJ jurisprudence on the inter-temporal effects of EC/EU law, it is worth noting that the European courts have on various occasions confirmed the applicability of EU law in legal conflicts where certain material facts occurred well before a Member State's accession to EU. This relaxed standard triggered an observer to distinguish retroactive EC rules from rules which apply to the "continuing consequences of past events".²⁹

The retroactivity issue is all the more striking in Hungary, a former post-communist state which prides itself on having resisted the imposition of retroactive criminal sanctions on the wrongdoers of the previous regime whose crimes went unpunished during the communist regime. In the early 1990s the Constitutional Court rejected a series of criminal solutions imposing retroactive criminal sanctions—invoking the requirements of the rule of law in all instances.³⁰ As Sajó points out, such safeguards stemming from the rule of law are particularly dear to Hungarians (or at least, to Hungarian constitutional justices) when it comes to legal measures that are directed at past facts.³¹

We should also note that the consequences of the Constitutional Court's understanding of dualism and retroactivity were not confined to the bill on

²⁸ For a recent analysis, see S. L. Kaleda, 'Immediate Effect of Community Law in the New Member States: Is there a Place for a Consistent Doctrine?', *European Law Journal* (2004) 10/1: 102–22.

²⁹ *Ibid.*, p. 12, also discussing relevant jurisprudence in detail.

³⁰ See 11/1992 (III. 5.) AB, 42/1993 (VI. 30.) AB and 53/1993 (X. 13.) AB decisions. On the retroactive criminal justice saga in Hungary see, G. Halmai and K. L. Scheppelle, 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past', in A. J. MacAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997), pp. 155–84.

³¹ A. Sajó, 'Learning Co-operative Constitutionalism the Hard Way, The Hungarian Constitutional Court Shying Away from EU Supremacy', *Zeitschrift für Staats- und Europawissenschaften* (2004) 2/3: 352.

surplus stocks. In two more recent decisions, the Court invalidated two bills seeking to implement (non-EU related) international treaties containing self-executing norms in Hungarian law.³² Both bills implementing international treaties were referred to the Constitutional Court by the President of the Republic who refused to sign the bills into law as they were meant to enter into force retroactively on the day of the international treaties' original entry into force. In these cases the Constitutional Court carefully distinguished the Court's jurisdiction to review international obligations before they are undertaken from the present case which involved a challenge to a bill implementing international agreements which had already been ratified. Thereafter the justices confined themselves to the retroactivity issue, leaving aside once again the riddle of the relationship between Hungarian law and self-executing norms of international law.

As these most recent decisions suggest, the Hungarian Constitutional Court is uncomfortable with determining the relationship between international law and Hungarian law. The Court is expected to take a position as the language of the Hungarian Constitution in this respect is noted for its ambiguity.³³ However, the Constitutional Court is not the only constitutional review forum to determine the relationship of EU law and domestic constitutional law without clear constitutional guidance to this effect.³⁴ Relying on inconclusive constitutional provisions, in cases where the rules of international law or EU law were believed to violate Hungarian constitutional law, the Constitutional Court sought to implement a strategy of reasoning where it can leave this matter sufficiently unresolved while deciding the case on different grounds. As far as it is possible to tell, in so doing the Court is following a dualist route. At least the justices' insistence on rhetoric of competing international and domestic sovereigns is a strong hint in this direction. The detour taken by the Constitutional Court resulted in an odd emphasis on national sovereignty,³⁵ temporal frameworks and an equally formalistic approach to retroactivity. These solutions prevented the

³² Decisions 7/2005 (III. 1.) AB and 8/2005 (III. 31.) AB decisions.

³³ See Article 7(1), Hungarian Constitution.

³⁴ See B. de Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?', in A. E. Kellerman, J. W. de Zwaan and J. Czuczai (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (2001: 69ff).

³⁵ On the impact of sovereignty rhetoric in domestic constitutional law on the supremacy of EU law see B. de Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?', (2001: 76).

Court from having to dwell on the relationship of international law, and then EU law with domestic law in a comprehensive manner. If understood in this framework one might see the Court's decision on agricultural surplus stocks not as an example of the its defiance of the supremacy of EU law, but as yet another successful judicial move in avoiding a decision on the status of EU law under the Hungarian Constitution.

IV. Beyond the issue of the supremacy of European law: the position of the Hungarian Constitutional Court on EU accession revisited

As Wojciech Sadurski has pointed out, in the CEE accession to the European Union was perceived as a step in strengthening the stability of democratic government, and also, by placing the fate of post-communist democracies in the more competent hands of EU institutions, an expression of hope.³⁶ Simultaneously, on the domestic platform of constitution and democracy, the establishment of constitutional courts was regarded as instrumental for the enforcement of the new constitutional order and for the protection of constitutional rights in post-communist Central Europe.³⁷ These courts were entrusted with a special task which no other body was believed to be capable of performing in post-communist countries: building constitutionalism and democracy (almost) from scratch. Moreover, these constitutional courts, as untainted bodies established in the institution-building wave of democratic transition, came to enjoy tremendous institutional legitimacy. Even in Slovakia, where confidence in ordinary courts is low and public opinion is highly critical of the judiciary, this widespread negative public attitude did not touch the Constitutional Court,³⁸ which has a reputation as one of the most active and activist review *fora* in the post-communist world. In the light of this positive reputation the Hungarian Constitutional Court's reluctance to plunge into EU law appears rather strange.

³⁶ W. Sadurski, 'Accession's Democracy Dividend: Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', *European Law Journal* (2004) 10/4: 372–73.

³⁷ See, for example, H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: The Chicago University Press, 2000); J. Kurczewski and B. Sullivan, 'The Bill of Rights and the Emerging Democracies', *Law and Contemporary Problems* (2002) 65/2: 272 ff.

³⁸ EUMAP Reports, *Monitoring the EU Accession Process: Judicial Independence*, Section 'Judicial Independence in Slovakia' (Budapest: Open Society Institute, 2001), p. 403.

Whilst it is true that the reputation of some constitutional courts may have suffered when exposed to highly controversial issues such as the constitutionality of transitional justice measures, economic reconstruction and other issues which deeply divide society, yet, in most post-communist countries, these courts were seen as potential guardians of EU membership as they were prepared and intellectually competent to handle foreign and international law. Constitutional courts' lack of enthusiasm in applying and enforcing EU law triggers fears that without their eager participation, post-communist democracies may be left without judicial protection.

V. Getting used to the idea of sharing the limelight with ordinary courts

Most post-communist constitution-makers opted for a centralised, Kelsenian model of constitutional review,³⁹ thus abandoning the model of decentralised constitutional review practised prominently in the United States. Although the reasons behind the rejection of the U.S. model differ in the various countries, a degree of distrust in the ordinary judiciary seems to be traceable in almost all cases. Distrust in the judiciary to conduct constitutional review is not a particularly East-European phenomenon. The establishment of the French Constitutional Council was heavily influenced by a long-held aversion towards the ordinary judiciary, a sentiment fuelled by centuries-old accusations of judicial corruption and fears of judicial arbitrariness.⁴⁰

Furthermore, the complicity of the judiciary in the actions of the previous oppressive regime might also make judges suspicious about trusting a new constitution with old judges, as the case of South Africa clearly demonstrates. According to commentators, while South African judges could have had the opportunity to ease the grip of apartheid by developing the common law, the judiciary at the time clearly missed this chance. Moreover, Webb argues forcefully that it is exactly the tainted history of the judiciary that prompts the South African Constitutional Court to frequently consult international law and foreign

³⁹ A notable exception is Estonia where constitutional review is performed by a specialised constitutional review chamber of the Supreme Court.

⁴⁰ D. Maus, 'The Birth of Judicial Review of Legislation in France', in E. Smith (ed.), *Constitutional Justice Under Old Constitutions* (The Hague: Kluwer Law International, 1995), pp. 113–43 and C. Germain, 'Approaches to Statutory Interpretation and Legislative History in France', *Duke Journal of Comparative and International Law* (2003) 13/3: 195.

constitutional jurisprudence in its decisions.⁴¹ In post-communist Eastern Europe, ordinary courts also administered the law of authoritarian regimes,⁴² and victims of certain judgements rendered out of political considerations were rehabilitated and even—at least partially—compensated. Nonetheless, in post-communist countries, reluctance to accept ordinary courts as guarantors of the new constitutions was primarily triggered by a fear of incompetence. As Cappelletti suggests, such concerns are not limited to post-communist courts. Reservations about ordinary courts as constitutional adjudicators reflect the perception and self-perception of continental judges as career officials whose task is to apply the law faithfully, but not to alter it.⁴³

The behaviour of ordinary courts in some post-communist countries would appear to support this hypothesis. Article 4 of the Czech Constitution provides that “fundamental rights and freedoms shall enjoy the protection of judicial bodies.” Thus, ordinary courts are entrusted to apply the rights provisions of the Czech Constitution in individual cases. Courts of general jurisdiction, however, are more reluctant to act on this authorisation—an inaction criticised even by the Czech Constitutional Court.⁴⁴ This is all the more surprising in the light of the fact that in the Czech Republic it is the duty of the ordinary courts to review the legality of sub-statutory norms.⁴⁵ Furthermore, in addition to entrusting the Constitutional Court with an exceptionally broad jurisdiction to perform constitutional review, the Hungarian Constitution also provides that ordinary courts shall have jurisdiction to hear claims arising from the infringement of fundamental rights.⁴⁶ Thus, under this provision, ordinary courts could take

⁴¹ H. Webb, ‘The Constitutional Court of South Africa, Rights Interpretation and Comparative Constitutional Law’, *University of Pennsylvania Journal of Constitutional Law* (1998) 1/2: 208.

⁴² For an interesting recent study see T. Annus and M. Tavits, ‘Judicial Behavior After a Change of Regime: The Effects of Judge and Defendant Characteristics’, *Law and Society Review* (2004) 38/4: 711.

⁴³ M. Cappelletti quoted in L. Favoreu, *Les Cours constitutionnelles*, 2nd edn. (Paris: PUF, 1992), p. 9.

⁴⁴ See Judgment of 6 June 1995, I ÚS 30/94, *The Relations Between Constitutional Courts and other National Courts, Including the Interference in the Area of the Action of the European Courts*, Report of the Constitutional Court of the Czech Republic Prepared for the 12th Congress of the Conference of European Constitutional Courts, par. 4; available at: <http://www.confcoconsteu.org/reports/>.

⁴⁵ Article 95(1) of the Czech Constitution, available in English at: <http://www.oefre.unibe.ch/law/>.

⁴⁶ Article 70/K, Hungarian Constitution.

rights claims based on the Constitution itself.⁴⁷ Nonetheless, in the first five years of post-communist Hungarian democracy, no such case was heard in ordinary courts.⁴⁸

While in the following years, ordinary courts became somewhat braver in applying and enforcing the constitution, cases brought under the constitution to ordinary courts are still rather rare.⁴⁹ Note, however, that in jurisdictions where ordinary courts ventured into the terrain of enforcing the constitution, they tended to openly defy the constitutional court.⁵⁰ This state of affairs is all the more troubling given that in the light of EU accession it is expected (or feared) that new claims involving constitutional and fundamental rights will be brought, not before constitutional courts, but before courts of ordinary jurisdiction. Against this background one might understand how the reluctance of the Hungarian Constitutional Court to get immersed in the enforcement of EU law makes observers conscious of fundamental rights and constitutionalism uncomfortable. Note, however, that with its reserved attitude, the Hungarian Constitutional Court is not atypical among its West European peers.

The ECJ is usually lauded for turning national courts into engines of European integration.⁵¹ The ECJ's jurisprudential toolkit of the doctrines of direct effect, direct applicability and indirect applicability and its progeny turned national courts into *fora* where private individuals affected by matters governed by EU law may call national courts to their aid in making governments comply with their obligations. The mechanism of preliminary rulings enables national courts to call the ECJ as an aid in this process. Numerous studies are devoted to explaining the relationship between the European and national courts in EC matters, the logic or psychology of the willingness of national courts to co-operate with the European Courts, the identity of claimants who engage national courts in matters ending up

⁴⁷ Article 36(1) of the Croatian Act on the Constitutional Court provides that "Every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations".

⁴⁸ A. Sajó, 'Rights in Post-communism', in A. Sajó (ed.), *Western Rights? Post-communist Application* (The Hague: Kluwer Law International, 1996), p. 153.

⁴⁹ Note that this does not entail performing constitutional review of legislation or sub-statutory norms.

⁵⁰ Z. Kühn, 'The Application of European Law in the New Member State: Several (Early) Predictions', *German Law Journal* (2005) 6/3. As Kühn explains the notable exception is Poland.

⁵¹ See A. Stone Sweet, *The Judicial Construction of Europe* (2004: 70).

in preliminary rulings and the impact of these phenomena on European integration and developments in constitutionalism.

Indeed, it was widely feared that the ordinary judiciary in the new accession states would not live up to these expectations, which require national courts to perform functions and apply skills which were previously almost unheard of in a courthouse in Central Europe. Such fears were expressed despite the fact that post-communist judiciaries in the new Member States went through changes as well: reforms involving the structure of the judiciary and the prosecution, the training of judges in office and the arrival of a new generation of judges, as well as a reform of procedural codes and substantive law, all contributing to altering the inherited judicial machinery. Early indications suggest that despite the concerns, ordinary courts in Hungary are courageous and knowledgeable enough to apply EU law directly, even if it is in contravention of Hungarian legal norms. In a recent case, a Hungarian labour court, following the lead of the ECJ responding to preliminary references from Spanish and German courts held that doctor's on-call duty (i.e. the time doctors spend attending calls outside their regular working hours) qualifies as work time and should be remunerated accordingly.⁵²

While national courts are being lauded, very little attention is paid to constitutional courts in these processes. Indeed, except for a few constitutional court decisions which are notorious for purportedly putting obstacles in the way of European integration and EU-driven constitutional transformation, constitutional courts go almost unnoticed in EU matters. With a few exceptions, it seems to be the case that constitutional courts are not participating in the grand European legal exchange on account of preliminary rulings. Also, constitutional review *fora* tend to avoid the opportunity of applying or interpreting EU law. Thus, the Hungarian Constitutional Court's hesitance to engage with EU law seems to conform to a trend, rather than amount to an exception.

Indeed, apart from the above considerations which apply to all constitutional courts in the EU, the Hungarian Constitutional Court is in a relatively weaker position when it comes to opportunities for monitoring the application and interpretation of EU law by ordinary (i.e. national) courts. True, the Hungarian Constitutional Court has by far the broadest jurisdiction in the EU, from the point of view of the rules on standing. Yet, what is missing from the Hungarian

⁵² See C-303/98 *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* [2000] ECR I-7963 and C-151/02 *Landeshauptstadt Kiel v Norbert Jaeger* [2003] ECR I-8389. The decision of the Labour Court of Veszprém County was reported in J. Gáti: 'Ítélet az orvosi ügyeletről, Bírósági szövegmények' (Judgment on doctors' on-call duty: legal complications) *Heti Világgazdaság*, 13 April 2005.

Court's arsenal is a real individual constitutional complaint, the so-called *Verfassungsbeschwerde* familiar in Germany. As mentioned before, the application and interpretation of EU law tends to take place before national courts. A constitutional court, like the Hungarian one, which does not have jurisdiction to review the constitutionality of the application of otherwise constitutional legal norms before ordinary courts does, however, miss a potentially important opportunity to monitor the constitutionality of the application of EU law in ordinary courts.⁵³ Since the Hungarian Constitutional Court, like its Western counterparts, is unlikely to end up in open confrontation with the European Courts and the Hungarian Supreme Court in matters where EU law prevails, all in all one might expect the Constitutional Court to retain its reserved attitude towards EU law—due to the supremacy of EU law or out of sheer prudence.

VI. In need of learned guardians of the separation of powers and constitutionalism: Constitutional Courts and post-accession executive powers

A domain which the Hungarian Constitutional Court is unlikely to be able to avoid following EU accession, in trying to ignore the supremacy of EU law, is the area of the responsibilities of the political branches. Many have written extensively on the effect of EU membership and accession on redrawing the lines of the traditional separation of powers in the Member States. What Sadurski calls the accession's democracy dividend is surely not the extension or strengthening of parliamentary powers. Instead, domestic executives are known to benefit from EU accession, if grabbing more power and control at the expensive of national parliaments is understood as a benefit. In the new accession countries an important task left for constitutional courts is to keep the executive powers at bay. Note, however, that in the post-accession context, this task entails constitutional courts responding to a wider array of executive discretion than before accession. Despite a projected widening of executive powers, "keeping executive powers at bay" nonetheless remains the aim of the task. In this regard, it is important to bear in mind the immense increase in executive decision-making powers in EU related matters.

⁵³ This is not to suggest that 'potential opportunities' culminate in constitutional courts automatically engaging in a wide-scale review of the constitutionality of the application of EU law as it happens before ordinary courts. Yet, with no jurisdiction whatsoever to this effect, the Hungarian Constitutional Court is prevented from undertaking such a task altogether.

From the perspective of a classical separation of powers as a means of limiting government, the story of EU accession is nearing an apocalyptic vision. The ideal (or idealistic) image of accession negotiations posits the elected representatives of the people instructing government representatives and then monitoring the activity of their representatives in the course of accession negotiations, with national parliaments passing legislation corresponding to the terms of such agreements. However, the reality of the years immediately prior to accession, was marked by unclear and unchecked mandates during negotiations, which were often concealed by elaborate domestic administrative structures, sheltered even from the eyes of parliament. Instead of passing legislation, national parliaments were rushing to meet deadlines for the legislative programmes designed to adopt the accession *acquis*, often by inexperienced and ill informed high executive officials.⁵⁴

This process of expedited legislative process⁵⁵ is aided and facilitated by numerous and nameless experts from the administration who are often invisible to those holding or imposing political responsibility. In the process, all national parliaments and parliamentarians learn is that EU matters require expertise which is beyond their reach and comprehension. Therefore, it is best to leave anything EU-related to expert administrators who know better how to handle such intrinsically technical matters which apparently have no legal, not to mention, constitutional implications. This trend also contributes to placing anything-EU related outside the sphere of at least partially transparent governmental operations, creating a place and atmosphere where informal negotiations ‘naturally’ replace formal governmental decision-making procedures. Since in Hungary, EU accession appeared relatively uncontroversial, there was little incentive for the political élites and the political branches to cast and problematise accession-related matters in the language of ordinary politics. The incentive was

⁵⁴ See, for example, A. Ágh, ‘Europeanization of Policy-making in East Central Europe: The Hungarian approach to EU accession’, *Journal of European Public Policy* (1999) 6/5: 839–56; D. Malová and T. Houghton, ‘Making Institutions in Central and Eastern Europe, and the Impact of Europe’, *West European Politics* (2002) 25/2: 101–20; K. Raik, ‘EU Accession of Central and Eastern European Countries: Democracy and Integration as Conflicting Logics’, *East European Politics and Societies* (2004) 18/4: 567–94

⁵⁵ D. Malová and T. Houghton, ‘Making Institutions in Central and Eastern Europe, and the Impact of Europe’, *West European Politics* (2002) 25/2: 111–12; see also, W. Sadurski, ‘Accession’s Democracy Dividend: Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe’, *European Law Journal* (2004) 10/4: 382 ff.

to meet the conditions set by ‘the EU’,⁵⁶ this remote and semi-mythical institution which was known for imposing a myriad of technical rules which were seen more as real life inconveniences, than constitutional or legal issues.

With EU membership the new accession countries cannot be regarded as the clients of the accession *acquis* doing their giant translation homework according to pre-set schedules, automatically adopting superimposed legal rules on a take-it-or-stay-away basis. The new Member States must realise urgently that they are not simply clients of EU law, but have become makers of it. EU rules currently in the making cannot be regarded anymore as Fortuna’s offerings capriciously left behind. The sooner the newcomers realise this change in circumstances the better off their polities will be. It is in this process of learning newly acquired bargaining positions where a constitutional court can contribute significantly to shaping the new balance of domestic powers, being mindful of EU law without directly enforcing it.

It would be too idealistic to expect greater familiarity with EU matters from parliamentarians overnight,⁵⁷ and it definitely is not the job of the constitutional court to teach such lessons. An important task a constitutional court can nonetheless undertake is to pull the exercise of EU related powers of the political branches back into the zone of visibility and intelligibility, and possibly under parliamentary control. The constitutional court may contribute to making the political branches and the polity realise that EU membership is not a matter for experts in public administration to handle behind closed doors. This is not to suggest that constitutional courts are expected to actively participate in this process of (re)distributing the bargaining chips of the political branches, nor it is to indicate that a constitutional court should strike down all pieces of EU law, or transpose or implement national legislation which violates the existing standards of constitutional jurisprudence in a new Member State. Rather, a constitutional court should get involved in deciding disputes concerning the separation of powers in EU-related matters, even if they involve jurisdictional conflicts between parliament and the executive or such intricacies of the legislative process as rules for promulgating legislation, the proper form of regulation (i.e. act of parliament *versus* another source of national or European Law), clarity of statutory language and delegation clauses, and it should make the political branches aware of the constitutional dimension of the issue and their corresponding responsibilities.

⁵⁶ W. Sadurski, ‘Accession’s Democracy Dividend: Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe’, *European Law Journal* (2004) 10/4: 379–80.

⁵⁷ *Ibid.*, p. 387.

A rigid insistence on concepts stemming from a dualistic vision of international or EU law and domestic constitutional law is likely to hamper such attempts, as it is exactly such a rigid approach that has prevented Hungarian constitutional justices from taking into account those dimensions of EU law that allow for their consideration in the appropriate terms, to translate the implications of the involvement of the Hungarian government in the operation of the EU into the language of Hungarian constitutional law. Indeed, in order to facilitate the responsive participation of the Hungarian government in EU institutions to the benefit of Hungary's domestic constitutional institutions and its polity, the Hungarian Constitutional Court would have to concede to the specificities of EU law and EU decision-making processes, a concession which constitutional justices have not been eager to make so far. Should the Constitutional Court appear unwilling to define the space of EU law in the Hungarian legal and constitutional system, from a silent bystander it might easily turn into an obstacle to Hungary's participation in EU institutions and decision-making processes.

This call for action is not at all unrealistic. In 2001 a framework decision to combat racism and xenophobia appeared on the EU agenda.⁵⁸ The process was halted because of lack of agreement in early 2003. Negotiations on the framework decision were reopened by the presidency in the spring of 2005. In 2004 a unanimous Hungarian Constitutional Court invalidated the government's latest attempt to expand the criminal prohibition of hate speech,⁵⁹ thus, for some Hungarians this most recent round of the European framework directive could turn out to be interesting. In its 2004 decision the Hungarian Constitutional Court did expressly mention European attempts at adopting a framework decision on racism and xenophobia. Yet, the Hungarian Constitutional Court found that a criminal law bill which defined group libel as "incitement to hatred or to violence before a large audience against any national, ethnic, racial or religious group or other groups of society", while introducing as a distinct misdemeanour, hate speech in the form of "diminution of human dignity before a large audience through denigrating or defaming another or others based upon

⁵⁸ Proposal for a Council Framework Decision on combating racism and xenophobia, COM (2001) 664 final, [2002] OJ C 75E, submitted by the Commission on 29 Nov. 2001.

⁵⁹ See 18/2004 (V. 25.) AB decision. Justice Kukorelli wrote for a unanimous Constitutional Court. For a critical account on the decision see A. Sajó, 'A rasszista nézetek büntetésének alkotmányosságáról' (On the constitutionality of punishing racist views), in B. Gellér (ed.), *Györgyi Kálmán ünnepi kötet ('Kálmán Györgyi' Festschrifts)* (Budapest: KJK-Kerszöv, 2004), pp. 479–509.

their national, ethnic, racial or religious traits”, violated the constitutional protection of freedom of expression (Article 61(1), Hungarian Constitution).⁶⁰

On the one hand, the Hungarian Constitutional Court’s hate speech jurisprudence and its 2004 decision may offer important guidance to the Hungarian government when participating in the debates in Brussels on the framework decision. True, a Hungarian position inspired by domestic constitutional jurisprudence may not be of any impact in any of the European decision making *fora*, if it otherwise fails to attract support from other Member States. This is not to diminish the significance of the Constitutional Court’s words as a source of inspiration for the Hungarian delegation, though. Furthermore, the stance taken by the Constitutional Court is also to guide the Hungarian government on the domestic plain when taking steps under the framework decision (once adopted), although it is too early to even speculate on possible Hungarian measures in compliance with the framework decision on racism and xenophobia.

Thus, the task to be performed is not alien to Hungarian constitutional justices. The Hungarian Constitutional Court for the first fifteen years of its operation benefited from drawing analogies with international and foreign law and jurisprudence. As a start a similar approach to EU law would be sufficient to raise the awareness among the political branches to the domestic legal and constitutional implications and constraints of EU membership. Note that this is the one task related to EU membership which ordinary courts—the agents and engines of the enforcement of EU law within the Member States—are less likely to be able to perform. Moreover, it is the task where the Constitutional Court could benefit from the judgements of ordinary courts to indicate problems and even potential solutions. Without the Hungarian Constitutional Court, the Hungarian polity runs the risk of electing representatives for domestic affairs controlled by the Hungarian Constitution, while the administration’s experts and professionals will take decisions in EU matters according to their assessment of the needs and interests of the polity in a liberating vacuum resulting from a lack of monitoring and review.

⁶⁰ On the problem of hate speech (extremist speech) in the post-communist hemisphere see A. Sajó, *Freedom of Expression* (Warsaw: Institute of Public Affairs, 2004), pp. 128–32; see also, W. Sadurski, *Rights Before Courts, A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Dordrecht: Springer, 2005), pp. 160ff. See also, M. Rosenfeld, ‘Hate Speech in Constitutional Jurisprudence: A Comparative Analysis’, *Cardozo Law Review* (2003) 24/4: 1523–1568.

VII. Conclusion

In the account of the Hungarian Constitutional Court's decision to invalidate a bill introducing transitional measures in connection with Hungary's EU accession, this chapter inquired into the Hungarian Constitutional Court's stance on the supremacy of EU law and argued that this decision is best seen, not as the Constitutional Court's defiance of the supremacy of EU law, but as the avoidance of the issue of supremacy altogether. The Constitutional Court's reluctance to befriend EU law would fit a trend discernable in other EU Member States, where—with the exception of a few, well-known accidents—constitutional review *fora* tend to keep out of the zone of EU law, leaving this segment of the universe to ordinary national courts. Nonetheless, I argue that there is a niche where constitutional courts might undertake an important role in fostering the participation of the governments of the new Member States in EU institutions and decision-making processes without engaging with the constitutional review of EU law. The Hungarian Constitutional Court's decision on agricultural surplus stocks does not prevent the Court from effectively influencing the Hungarian government's activities in EU-related matters.

Chapter 4

Ratification of the European Constitution in the New CEE Member States

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I. Introduction

The ratification of the European Constitution poses fundamental questions from the point of view of national constitutional law because constitutions have, according to traditional constitutional law, formed the basic and supreme documents governing the exercise of powers in sovereign states. The process of ratification is of particular interest in the new EU Member States from Central and Eastern Europe (CEE), as these countries re-established their sovereign governance just a decade and half ago. Whilst many of the old Member States have had several decades to gradually absorb the successive steps of European integration, the new CEE Member States had to take over a gigantic body of *acquis communautaire* by 1 May 2004. Just one year later (at least until the French and Dutch 'No' votes of 29 May and 1 June 2005 sent shockwaves through the EU), these new Member States were in the process of ratifying a document whose name contains the word 'constitution', something traditionally associated with statehood.

This chapter explores the ratification process in the CEE from the perspective of the national constitutions. After the collapse of the communist regime, sovereignty and independence were given a salient position in the constitutions of the CEE countries, especially in the Baltic countries. In order to join the EU, these countries amended their constitutions to enable the transfer, or delegation, of a part of state powers to the EU, and to bring the constitutions into line with other aspects of EU law. A detailed account of the amendments has been provided

elsewhere. A common trait of the amendments was that they remained relatively minimal in a number of countries, being addressed to international organisations in general rather than explicitly to the European Union, and leaving some direct conflicts with EU law unresolved. This resulted from a range of political sensitivities and procedural difficulties, combined with traditionally oriented theoretical views concerning sovereignty. Against this background, this chapter will explore whether the process of ratifying the European Constitution—which appears set to continue, despite a ‘period of reflection’ commonly agreed by the European Council on 17–18 June 2005 following the French and Dutch votes—might, if successful, necessitate further constitutional amendments or other legitimising measures such as a referendum.

II. Developments regarding the ratification of the European Constitution

The Constitutional Treaty, approved by the Intergovernmental Conference in June 2004, subject to the ‘period of reflection’ noted above, is currently undergoing a process of ratification in the Member States in accordance with their national constitutional procedures. It has caused a variety of reactions. On the one hand, comparisons have been drawn with the Philadelphia Convention in 1787, where the American Constitution was drawn up, and there have been calls for an EU-wide referendum for this ‘epoch-creating’ move. On the other hand, the Treaty has also been presented as a revision treaty or, in the United Kingdom, as a mere ‘tidying-up exercise’.

From the contrasting modes of ratification in the old Member States and in the CEE accession countries, it can be inferred that the new document is regarded as having a greater constitutional significance in the old Member States than in the new ones. A number of the old Member States have decided to hold a referendum: Spain, Portugal, Luxembourg, Denmark, France, Ireland, the UK and even the Netherlands, a country where no nation-wide referenda have hitherto taken place. Belgium also initially planned a referendum, but subsequently scrapped it due to fears that the right-wing Vlaams Block would exploit it as the issue of Turkey proposed membership of the EU. Germany, a country where referenda are not allowed by the Constitution, considered for several months the possibility of amending the Constitution in this respect. However, it eventually became clear that the parliamentary means of ratification was the only viable option. In France, the European Constitution was assessed by the Constitutional Council, who found that it constitutes an international treaty, which does not change the nature of the European Union. Nevertheless, the

Constitutional Council considered the amendment of the French Constitution to be necessary before the ratification could proceed, as the new document was found to pose certain challenges to the 'essential conditions of the exercise of national sovereignty'.

Whilst it is beyond the scope of this analysis to examine the consequences of the French and Dutch 'No' votes on the Constitutional Treaty, the latter illustrate the validity of concerns about sovereignty and referenda explored later in the chapter.

Amongst the new Member States, the developments in the ratification process appear to convey an impression that the document is not accorded the same importance as it is in the old Member States. Only Poland and the Czech Republic decided to hold a referendum on it (a decision that the Polish government put on hold following the French and Dutch votes), whereas others are likely to proceed by way of parliamentary ratification. Indeed, the first three countries to ratify the European Constitution come from amongst the 'newcomers'—Lithuania, Hungary and Slovenia. Such a smooth and speedy ratification, while undoubtedly being advantageous for the European project, is somewhat striking given the generally 'souverainist' constitutional setting of the CEE countries and their prior record of frequently holding referenda.

Lithuania became the first country to ratify the European Constitution on 11 November 2004, just ten days after the document was formally signed. By doing so, it arguably 'pulled the carpet' somewhat from underneath the European Parliament's feet, as the latter had expected to be the first parliament in Europe to ratify the Constitution in December of that year. The *Seimas* (Lithuanian Parliament) approved the document by an overwhelming majority (84 in favour, 4 against and 3 abstentions). The ratification took place on the last day of the term of office of the Parliament whose representatives had been involved in the work of the Convention. The close involvement of that parliamentary composition in the drafting of the Constitutional Treaty was one of the reasons for such a speedy ratification: following the general elections in October 2004, a new Parliament took over and started its work on 15 November 2004. Other reasons for parliamentary ratification included the fact that Lithuania had only just held a referendum on EU accession in May 2003, and it was argued that the Constitutional Treaty does not change the nature of the EU, compared with the kind of organisation Lithuania acceded to. However, certain opposition parties had opposed such a rapid ratification, arguing that both MPs and the Lithuanian people should have been given more time to familiarise themselves with the contents of the text. Several non-governmental organisations (NGOs) had also

called for ratification by way of a referendum, arguing that the new document does involve aspects which change the EU in a more radical way, necessitating therefore a legitimisation by the people. Others suggested asking the opinion of the Constitutional Court, but to no avail. On one hand, the speedy ratification has been applauded as a reflection of Lithuania's positive attitude to the European integration process, but, on the other hand, its risk of distancing ordinary people from European issues has also been pointed out. An additional challenge may lie in questions about the constitutionality of the ratification which may arise in ordinary courts, in concrete disputes related to the application of the European Constitution.

Lithuania was soon followed by Hungary and Slovenia. The Hungarian Parliament ratified the Constitutional Treaty Constitution on 20 December 2004, after having easily attained the required two-thirds majority (322 votes in favour, 12 against and 8 abstentions). The Slovenian Parliament followed suit on 1 February 2005, also approving it by an overwhelming majority (79 in favour, 4 against, and 7 abstentions). Before the general elections of October 2004, the liberal-democrat led government had sent out conflicting signals about the ratification procedure, at some times favouring a simple parliamentary ratification, and at other times calling for a national referendum. The new coalition government of conservative parties, after more than a decade of liberal and left-wing rule, decided in favour of a parliamentary ratification. The main reasons being that the Slovenian Constitution does not require a referendum, and the general agreement between the government and opposition as to the overall desirability of the Treaty, without any substantial pressure in the Parliament for a referendum. Only one small parliamentary party, the Slovenian National Party, announced that it might not support the constitutional text.

Amongst other CEE states, Slovakia ratified the European Constitution on 11 May and Latvia did the same on 2 June 2005. The Slovak Parliament approved the document by 116 votes in favour, with 27 against and 4 abstentions. Opposition came from the Christian Democrats, a government coalition party, and the Communists. They regretted that Slovakia's key demands, such as a reference to Christianity and better provisions for small Member States, were not included in the European Constitution, and they were also concerned about the EU Constitution forming a 'prelude' to the Union's gradual transition into a 'superstate'. A referendum had been called for only by the Christian Democrats and the People's Union, a small opposition party, both tendentially Eurosceptic. Prime Minister Mikuláš Dzurinda rejected the need for a referendum on the grounds that the Slovak Constitution requires a referendum only upon the

country's membership in 'a new state formation', something not entailed by the European Constitution.

The Latvian Parliament ratified the document after the required two readings on 19 May and 2 June; the document was approved by 71 'Yes' votes, with one solitary vote against. President Vaira Vike-Freiberga had earlier rejected—in consultation with the then Prime Minister, Einars Repse, and other politicians—the need for a referendum with the argument that the accession referendum had just recently been held, and that the country 'cannot hold referenda every day on technical matters and on issues the people already have voted for'.

In Estonia, the majority of MPs are against a referendum, and the government has also decided not to hold a referendum on the Constitutional Treaty, although the final decision will be taken by parliament. The only state institution to encourage a wider debate and examination of the new document has been the Chancellor of Justice, who has called on the government not to rush with the parliamentary ratification. According to the Chancellor, it would be regrettable if the Constitutional Chamber of the National Court had to give a judgment on the implications of the new document, if the case should be brought before it. Instead, the parliament should ascertain in advance that the Constitutional Treaty does not require any amendments before proceeding with ratification. Subsequently, in February 2005 the parliament established an expert committee to undertake a more profound analysis of whether the Constitutional Treaty can be ratified without amending the Estonian Constitution; the committee's decision was expected by June, but it was postponed following the French and Dutch referendum results.

The ratification process has been more controversial in Poland, where the political élite have been split over the Constitutional Treaty, and where it might be difficult to achieve the required majority in the parliament. The sweeping victory of the two centre-right Eurosceptic parties, law and Justice (PiS), and Citizens Platform (PO) in the 2005 parliamentary elections, with the defeat of the centre-left government led by Marek Belka, and its replacement by a government formed by Kazimierz Marcinkiewicz could well lead to the Constitutional Treaty being blocked. This risk is particularly significant due to the changes made to Poland's relative political voting power (in instances where QMV is used in the Council of Ministers) in the Constitutional Treaty in comparison with the more favourable terms obtained in Nice. In addition, the procedure for the ratification of treaties (Art. 90) expressly provides for the option of a referendum. Given the political situation, some commentators in fact considered a referendum to be an easier option for ratification than a parliamentary procedure, as opinion polls (at

least as of January 2005) revealed that most Poles were thinking positively about Europe's Constitutional Treaty. Problems could arise, however, with regard to the required minimum turnout of 50%, which already posed challenges for the accession referendum. In any case, as noted above, the government decided to suspend the referendum originally scheduled to coincide with the general elections.

As with Poland, recourse to a referendum in the Czech Republic might be an easier option than a parliamentary ratification, given that the ruling coalition only enjoys a slim majority of one vote in the parliament. In Poland and the Czech Republic, the difficulties were further demonstrated by the vote on the Constitutional Treaty in the European Parliament: Poland had the highest percentage of MEPs not supporting the Treaty (38 Polish out of a total of 54 MEPs voted against or abstained), and Czech MEPs had the highest percentage voting against (68.2%). While governing political forces in other CEE countries are strongly in favour of European integration, in the Czech Republic there has been a notorious clash of views between the pro-integration government and the rather Eurosceptic President, Václav Klaus. President Klaus has stated that he was "100% against approval of the European Constitution", noting that it limits the sovereignty of nation-states. Along with his party, the Civic Democrats, the Constitutional Treaty is also opposed by the Czech Communists, the second strongest opposition party. All the main parties want a referendum, but for different reasons: the Eurosceptics see it as an opportunity to block the entire project, whereas opinion polls indicate that the majority of the Czech electorate supports the idea of a Constitution for Europe.

III. The impact on national constitutions: the traditional constitution-state linkage

In line with the prevailing views on a referendum discussed above, the CEE accession countries do not generally consider it necessary to amend their national constitutions in order to ratify the Constitutional Treaty. It is interesting to note that, in the process of drafting the constitutional amendments necessary for accession to the EU in the CEE countries, the work of the European Convention was barely taken into consideration. This is because the focus was, understandably, on the harmonisation of laws to conform to the Union's *acquis*, and on the accession negotiations. In addition, federal visions of Europe caused uneasiness in Central and Eastern Europe. For instance, Joschka Fischer's famous speech on Europe's federal *finalité* encountered a negative reception across the region, and it was dismissed as a utopian vision of a distant future. Accordingly,

the state heads and top politicians of the CEE countries made it clear, in their contributions to the Debate on the Future of the Union, that they preferred to see a union of nation-states rather than a United States of Europe, and supported the simplification of the EU's Treaties rather than the adoption of a constitution.

In this context, coupled with difficulties relating to the accession referenda, the governments portrayed the discussions about a European Constitution as a separate matter for the future, unrelated to the issue of accession. Only in Latvia was an indirect reference made to the potential adoption of the Constitutional Treaty: Article 68 of the Constitution provides that a referendum may be held on 'substantial changes in the terms regarding the membership of Latvia'. This provision is meant for Latvia's potential secession from the EU, as well as for major changes in the Treaties. In Estonia, the centre-left People's Union Party insisted that the Constitution include a clause to allow the people to decide in future on treaties making fundamental changes to the character of the EU. This proposal was unsuccessful, but a reference was introduced to 'the founding principles of the Constitution', which is regarded as a so-called 'crisis clause' for potential future challenges by the EU to the basic principles of Estonia's statehood.

The constitutional implications of an eventual adoption of a European Constitution were addressed in Estonia in more theoretical terms in the 1998 Report of the Estonian Constitutional Expert Commission on the constitutional impact of accession. The Commission found that, in the process of EU accession, Estonia was allowed to *delegate (internal) sovereignty*, that is, some of its legislative, executive and judicial powers, to a confederation of states. In the meantime, *independence* had to be preserved, meaning that Estonia was not allowed to participate in a federal entity. A sign of the EU becoming a federal state, according to the Expert Commission, would be the adoption of the Union's own constitution. Another potential indicator of such a transformation would be the introduction of a fully-fledged bicameral parliament in the EU.

This view appears to represent, in straightforward terms, an understanding which is deeply entrenched in traditional constitutional law across both Eastern and Western Europe: that a constitution is an inextricable part of statehood. Under such a view, a genuine European Constitution would signal the EU's transformation into a federal state, and thus the end of national sovereignty. Therefore, the central question in the national political-legal debates appears to be whether the Union's new basic document creates a state and hence amounts to a 'genuine' constitution, or whether it is 'just another treaty'. Against such a theoretical background, the only viable answer, of course, is that the new

document remains an international treaty. Indeed, this view was taken by the French Constitutional Council, and it also prevails in the accession countries. Whereas the French Constitutional Council nonetheless deemed some constitutional amendments necessary due to further challenges to national sovereignty, most CEE countries have rejected the need for a referendum or additional constitutional amendments. The new document is rather characterised in terms of simplification, consolidation and rationalisation. It is perceived as making the Union more democratic and enhancing the efficiency of its institutions, but not as entailing any significant, transformative changes.

By way of example, Slovenian legal scholars take the view that the new document is 'an international agreement and thus a legal act of international law'. In the Slovenian Constitution, "there are no obstacles for ratification of such international agreement, since the Constitution has already been adapted in a way to allow the EU law to exercise its supremacy...". In Poland, leading legal scholars have concluded that "the Constitutional Treaty is a successive revision treaty (international agreement) implemented according to Art. 48 (TEU) and ratified by member states in accordance with their constitutional procedures". According to them, "[t]he title 'Constitution for Europe' has a symbolic meaning which does not refer to transforming the Union into a quasi-state. The new Union will be an international organisation based on an international treaty". In Lithuania, the Parliament, in preferring parliamentary ratification to a referendum, proceeded from the view that the EU will remain the same kind of organisation that the country joined on 1 May 2004, and that the Constitutional Treaty will not change the EU's fundamental nature. A similar view is echoed by a Lithuanian legal commentator, according to whom the "adoption of the European Constitution does not indicate the aim to create a superstate but rather to maintain a delicate balance between the EU and national constitutional levels and their plurality...". In Estonia, the Chairman of the Parliament's Commission of Constitutional Affairs has also emphasised that the new document forms a treaty and that "nothing will change in Estonia's legal order". In Latvia, commentators find that, due to the amendments that were made to the Latvian Constitution prior to and after EU entry, 'there are no barriers for ratification of the EU Constitution'.

The only issue in the European Constitution that has been found to raise some questions regarding the compatibility with the national constitutions in the CEE countries is the new supremacy clause. However, commentators rebut the proposition that this clause might be contrary to national constitutional law by reference to the fact that supremacy was already accepted when the accession treaties were ratified.

These theoretical views illustrate the governing presumption that a constitution is inextricably linked to statehood. For that reason, those who find the new document to be of a constitutional character are, across the region, mainly found in the Eurosceptic camp. For instance, the notoriously Eurosceptic Czech President, Václav Klaus has characterised the European Constitution as “a radical document with big consequences for national sovereignty” because “the EU will no longer derive its power from its member countries but from its own constitution”. In Estonia, a referendum has been requested by the Eurosceptic and relatively marginal Independence Party, which associates a constitution with a state-forming act. The Centre Party, which is the biggest opposition party and which is moderately on the Eurosceptic side, has also indicated its support for a referendum. In Poland, it is again mainly the Eurosceptics that draw attention to the challenges posed by the European Constitution to the Polish Constitution, for example, as concerns the supremacy clause. Similar views are mirrored elsewhere, for instance by the Conservative Party in the UK and Eurosceptic movements in the other Member States.

The fact that viewpoints highlighting the constitutional character of the EU’s new basic document tend to be associated with Euroscepticism regrettably limits free and effective discussion about the constitutional dimensions of the new document in political as well as scholarly circles. This is especially the case in those countries where Eurosceptic movements enjoy a stronger position. Similar concerns have also been voiced by Andras Sajó, who has said that, “[g]iven the importance of independence for the public[,] the political élite tries to hide that the European constitution is (or would be) about restricting and replacing national sovereignty”. He regrets such a view because, even though the document does not make the Union a federal entity, “it certainly presents developments that make the traditional national sovereignty based assumptions difficult to sustain and problematic for the citizens of the new member states”.

The analysis in the final section of this chapter presents alternative and more effective way of looking at the European Constitution, drawing on the swell of post-national literature which finds that a constitution can exist without a state. Before that, however, the influence of the prior experience with referenda upon the ratification debate will be considered.

IV. The shadow of the accession referenda and other considerations

Besides the theoretical background that has inevitably shaped the views about the nature of the new Constitutional Treaty, certain other circumstances have also left

an imprint on the debates. The first of these is the experience with accession referenda. There has been some concern that, if the new document were regarded as a constitution rather than a treaty, this would necessitate another referendum in many CEE countries, at a time when referenda on EU entry were only just held in 2003. Holding another referendum in such a short period of time would not only pose practical difficulties, but could also involve a degree of unpredictability. Although the accession referenda appeared to convey a great deal of enthusiasm towards membership of the European Union amongst the populations of Central and Eastern Europe, the preparations for these referenda were preceded by a few years of anxiety and political and procedural manoeuvring. To start with, the validity of referenda in a number of CEE countries is subject to a minimum turnout of 50%, and some countries prohibit repeating an unsuccessful referendum for a certain number of years. As a matter of fact, the quorum requirement was unfulfilled in more than half the referenda that were held beginning in 1994 and before the EU referenda in the eight accession countries. In EU accession referenda, the turnout also remained relatively modest in Hungary (42%) and Slovakia (52%). The validity of the concerns about turnout was recently demonstrated by the European Parliament elections of June 2004, where the average turnout in the new Member States from Central and Eastern Europe was just 26.4%, with the lowest results in Slovakia (16.7%), Poland (20.5%) and Estonia (26.7%). In most countries, wariness about Eurosceptic publics and the turnout requirements triggered some procedural manoeuvres with regard to the accession referenda, or proposals to this effect. For instance, a number of countries considered holding a consultative rather than a binding referendum, or even not holding a referendum at all. The Baltic countries, where a referendum is required for any amendment impinging on national sovereignty, interpreted the accession in a manner which did not find accession to undermine national sovereignty, and created instead new types of referenda for EU accession, with somewhat lightened procedural requirements. Various other political and legal devices were also deployed in order to encourage turnout, including the extension of the referenda over two days, and the tailoring of their timing. Due to the paramount importance of entry into the EU, and with procedural changes and rather aggressive campaigns, the governments succeeded in mobilising the people for a positive outcome. However, this exercise may be considerably more challenging with regard to referenda on the European Constitution. A Polish commentator has also pointed out that the impressive turnout in the Polish accession referendum (close to 60%) was exceptionally high, and that it would be very difficult to reach that level again. The cautious attitude in the CEE countries towards the European Constitution also becomes apparent if we consider that

recourse to referenda in most of these countries has previously been rather frequent: there have been at least forty-three referenda since 1990 in the eight CEE countries. On a positive note, however, public opinion surveys have shown a relatively firm support (at least prior to the French and Dutch votes) for the European Constitution amongst the populations of the new CEE Member States, although it appears that in the Czech Republic, only 19% of the voters intend to participate in the referendum.

Another reason against holding a referendum on the European Constitution is that the accession referenda are perceived by CEE policy-makers as also lending legitimacy to the ratification of the European Constitution, since the new text did not involve very significant changes. It has also been pointed out that most of the old Member States, apart from Ireland and Denmark, have not held referenda on EU issues for at least a dozen years (France, UK), or indeed never at all (Spain, Portugal, Luxembourg, the Netherlands). Consequently, it has been argued that the old Member States have a more pressing case for holding a legitimising referendum. Indeed, there are serious practical difficulties involved in holding two referenda on almost identical issues in a very short period of time. On the other hand, the European Constitution was portrayed in the CEE countries as a distinctly separate matter at the time of the accession referenda. In Estonia, it has been pointed out that, although several parties promised, before the accession referendum, to hold a separate referendum on the EU Constitution, they 'did not remember' this before the government signed the European Constitution.

Other reasons why most CEE countries will not hold a referendum on the European Constitution probably include the desire not to pose unnecessary challenges to the integration process and the fact that they are newcomers, mostly small in size and economically less developed. Additionally, there appears to be very little genuine public debate in many CEE countries. The scarcity of debate might partly be caused by the above-noted and rather unfortunate association of a genuine constitutional debate with Euroscepticism.

Prior to the French and Dutch votes, it appeared that the ratification process would be relatively fast and smooth in most CEE countries. That may no longer be the case. In any event, however, assuming the ratification process carries on, albeit at a somewhat slower pace, the question remains whether the approach to ratification in the CEE countries is sufficient, from a domestic constitutional point of view, to legitimise the European Constitution.

V. Remarks in the light of post-national perspectives on constitutionalism

It is beyond the scope of this chapter to explore the nature of the European Constitution in more detail. Many scholars share the view that the EU's new basic document is merely a treaty that rationalises and simplifies the current instruments, rather than creating a genuine constitution. The main reasons against finding that the text amounts to a constitution—as traditionally understood—appear to lie in the mode of adoption, the length and level of detail of the document, the absence of a 'European people', and the view that no substantially significant constitutional elements were added. In addition, several safeguards have been introduced for the protection of the position of the Member States, such as the clarification of competences, a stronger affirmation of the EU's respect for national identities, the introduction of an explicit right to secede from the Union, the maintenance of veto rights in crucial areas of state sovereignty, and the significant increase in the role of the national parliaments.

These arguments have been examined by the author in more detail elsewhere, with a conclusion that they do not preclude regarding the new document as one having a constitutional nature. To recap in a very cursory manner just a few points, the following could be pointed out. In the first place, the view that the new document is just another international treaty is often based on an examination of the European Constitution in isolation. And indeed, this document taken alone does not bring about a fundamental change in the nature or functioning of the Union. But the point is that European integration has usually taken place by incremental, piecemeal steps, by means of a series of successive Treaties and as a result of the accumulated case law of the European Court of Justice. European integration has evolved to such an extent that very few areas remain entirely unaffected by the EU's activity, and there are manifold and increasing direct forms of interaction with citizens. Indeed, the European Court of Justice established already in 1986 that the Treaties form a 'Constitutional Charter'. Further, as concerns the form of adoption of the text, one should point out the crucial role of the Convention in the constitution-making process, which has been compared to the Philadelphia Convention. As regards the excessive length of the document, there exist some other lengthy constitutions, and the European Constitution has been likened to 'the good old British Constitution: thoroughly historical, thickly layered, and deeply embedded in practice and case law'. As regards the claim that there is such thing as a 'European people', the instrumental role of constitutions themselves in *demos*-building should be pointed out. In the United States, passionate debates endured for decades on whether the American

Constitution was enacted by ‘the sovereign people of a single nation, or a compact between the sovereign peoples of independent states?’ It may also be interesting to point out that at the time the US Constitution was adopted in 1787, there was no rail connection or telegraph facilities, and the country was riven by civil war in 1861–1865. In Europe, by contrast, there is a relatively widespread acknowledgement that, in parallel to national identity, there are grounds to speak about a European identity, based on the common, transcending cultural and political values enshrined in the constituent documents, as opposed to organic ethno-cultural values. Several aspects in the EU’s constitutional reform appear to reinforce the European *demos* (e.g. the incorporation of the Charter, the new right of popular initiative and the strengthening of the European Parliament). There are also a number of other substantive changes which, adding to the already existing ‘constitutional charter’, appear to go beyond what is normally associated with a treaty. These changes also challenge, to some extent, the criteria established by the German Constitutional Court in the *Maastricht* Decision in 1993 to ensure the preservation of state sovereignty. These include the new supremacy clause, the EU’s legal personality, the reduction in the use of veto, especially in areas of asylum, immigration and some aspects of criminal law and law enforcement, the creation of the posts of the European Council President, EU Minister for Foreign Affairs and European Public Prosecutor, the creation of the External Action Service, and rotation in the Commission membership.

Taken together with the previous steps of integration, the new document does appear to go well beyond of what is normally associated with an international treaty. We can certainly speak about a ‘*constitutional treaty*’, with an emphasis on the word ‘constitutional’. However, it is important to emphasise that this does not in any way signal the EU’s eventual transformation into a federation. The traditional constitutional understanding, according to which constitutions are inherently bound to statehood, is increasingly becoming outdated—the EU is instead a novel and unique combination of supranational and intergovernmental structures to which nation-states remain central, and where democratic legitimacy derives from multiple levels. Indeed, a burgeoning corpus of post-national (or ‘post-etatist’) literature has demonstrated the existence and viability of constitutions and constitutionalism in non-state contexts, particularly in the EU as a new type of transnational polity. The example of the ILO Constitution of 1919 has also been brought up to illustrate the use of the notion of a constitution in a non-state context.

The conclusions concerning the constitutional character of the Union’s new basic document strengthen the case for introducing more references to the EU in

the national constitutions. This is especially so in Central and Eastern Europe, given that the amendments undertaken for EU accession remained relatively minimal and have portrayed the EU essentially as an ‘international organisation’, against the background of an overall ‘souverainist’ constitutional setting. In particular, direct and specific articles on the transfer of powers to the EU should be introduced into the national constitutions, in addition to the existing, broader provisions on international organisations. In addition, the constitutions could more visibly recognise the dual exercise of popular sovereignty, on the national and European level—via the participation of national parliaments in EU affairs, and via the European Parliament.

National constitutions have normally been amended to authorise changes in the domestic distribution of powers. Meanwhile, there appears to be a trend whereby changes in the exercise of state powers brought on by globalising governance, and especially by European integration, have been reflected to a minimal extent in the national constitutions, and this has led to a gradual devaluation of these texts. This issue has been considered in more detail elsewhere, alongside a consideration of various reasons why constitutions should be ‘taken seriously’ in the context of external influences upon national governance. This chapter concludes with the observation that keeping national constitutions as equal and credible building blocks alongside the European Constitution is a precondition for building any genuine ‘European constitutional order’.

Chapter 5

Constitutional Cultures in the New Member States:

Between Tradition and Europeanisation*

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I. Introduction

Constitutional cultures play a role in patterns of institutional change. This also holds for democratisation processes, where constitutional cultures intervene at several levels of political systems and at several points of the transformation of political regimes. Generally speaking, two main issues can be used to distinguish the positions taken by scholars with respect to this role. First, the question whether legal cultures¹—to which constitutional cultures belong—matter as causal factors in shaping new democracies.² Second, comparative politics has explored the relative weight of international *versus* national factors in

* I would like to thank Carlo Guarnieri for his comments on a preliminary version of this chapter.

¹ R. Cotterrell, 'The Concept of Legal Culture', in D. Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997), see p. 13 for the definition of the concept, and p. 19 for the causal role of legal cultures.

² C. Boulanger, 'Beyond Significant Relationships, Tolerance Intervals and Triadic Dispute Resolution: Constructing a Comparative Theory of Judicial Review in Post-Communist Society', paper presented at the Law & Society Association Annual Conference, Pittsburgh, 5–8 June 2003, p. 28; see also, C. Guarnieri and P.C. Magalhes, 'Democratic Consolidation, Judicial Reform and the Judicialisation of Politics in Southern Europe', *Instituto de Ciencias Sociais de Universidade de Lisboa Working Papers* 2001/1.

democratising countries.³ At the present time this addresses a crucial issue, since constitutionalism and national sovereignty seem to have been detached from one another, because of the empowerment of *international* and *transnational* agencies aimed at defending and enforcing rights across national boundaries.

Both of these issues—the causal role of constitutional cultures and the patterns of interaction between transnational constitutionalism and national democracy⁴—directly refer to the institutional changes which occurred in Central and Eastern European Countries (CEECs). In this region, the normative inputs coming from the European Union have represented one of the main factors that have entered into the building process of constitutional democracies.⁵

In the context of European studies two main positions co-exist: some scholars state that Europeanisation has fostered constitutionalism in candidate countries through the top-down mechanism of conditionality.⁶ Here, European influence is a constraint for national constitutional assemblies and thereafter for constitutional courts.⁷ Other scholars instead endorse a country-centred approach, where the constitutionalism of a candidate is the result of internal forces.⁸

³ The impact of the international factors on the democratisation in CEECs is analysed in depth in G. Pridham and T. Valhanen, *Democratization in Eastern Europe: domestic and international perspectives* (London/New York: Routledge, 1994). About the international dimension of the processes of democratisation we rely upon L. Whitehead, *The International Dimension of Democratization: Europe and Americas* (Oxford: Oxford University Press, 1996).

⁴ B. Ackerman, 'The Rise of World Constitutionalism', *Virginia Law Review* (1997) 83/4: 771.

⁵ The concept of 'constitutional democracy' is not used here in the neo-rationalist sense. Here we do not endorse the idea that constitutional rules are adopted by a social contract nor by rational collective choice. Furthermore, we strongly oppose the idea that constitutional rules and ordinary rules of politics interact with each other in a linear, direct way. This idea is exposed in C. Rowley (ed.), *Constitutional Political Economy in a Public Choice Perspective* (Dordrecht: Kluwer, 1995), for instance chapters 1 and 2. Constitutional democracies are, in our view, patterns of governance where the values of constitutionalism hold across policy sectors and policy-making processes.

⁶ H. Grabbe, 'European Union Conditionality and the *Acquis Communautaire*', *International Political Science Review* (2002) 23/3: 249.

⁷ N. Mavety and A. Grosskopf, 'Constrained Constitutional Courts as Conduits for Democratic Consolidation', *Law & Society Review* (2004) 38/3: 463.

⁸ M. Wyrzykowski, *Constitutional Cultures* (Warsaw: Institute of Public Affairs, 2000).

An assessment of the results achieved after the pre-accession strategy in new members with regard to their constitutionalism should be phrased in the terms of this debate. Furthermore, the hypothesis which accounts for the institutional changes which occurred prior to enlargement, refers directly to the institutional change that one can expect after the signature of the Accession Treaties. This is why we examine the patterns of constitutionalism that have been deployed in the last decade so as to detect areas that may be sensitive to constitutional issues in the future.

In this chapter, we argue that the constitutional cultures have affected the political decisions before entering the Union at three levels of the political regime: the balance between democratic governance and constitutionalism; the organisational pattern of constitutional democracies; and the definition of individual and collective rights.⁹ The salience of our analysis is not so much related to the explanation of what happened *before* accession, but much more to stress the crucial—and somehow underestimated—role of constitutional cultures. We argue that this role holds also for the future. Therefore, we can expect that constitutional cultures will matter in the future exploitation of opportunities for action created by the constitutional choices taken before enlargement.

We pursue the argument relying on three kinds of empirical evidence: the introduction of institutional devices aimed at protecting the constitution—even against democratic politics; the design of specific tools to address this task, that is, the constitutional courts; and the introduction in the constitution of provisions referring to individual and collective rights.

Within this analysis, the concept of ‘constitutional culture’ has a sociological institutionalist definition.¹⁰ Put differently, this concept refers to the belief shared by legal experts, academics and jurists enrolled within the institutions about the role that the law should play within social processes. When political élites act according to constitutional cultures, they adopt a kind of rationality that is normative or, put another way, grounded on the ‘appropriateness logics’.¹¹

⁹ I. Priban, ‘Reconstituting Paradise Lost’, *Law and Society Review* (2004) 38/3: 407.

¹⁰ J. T. Checkel, ‘Why Comply? Social Learning and European Identity Change’, *International Organization* (2001) 55/3: 553.

¹¹ J. G. March and J. P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York: Free Press, 1989), pp. 160–61. See also, L. Morlino and A. Magen, ‘EU Rule of Law Promotion in Romania, Turkey and Serbia-Montenegro’, paper presented at the workshop Promoting Rule of Law and Democracy: American and European Strategies and Instruments, CDDLR, Stanford University, 4–5 Oct. 2004.

The evidence we put forward will show the extent to which it is correct to talk about ‘democratisation through a convergence process’ when we deal with constitutional issues.¹² While, as a matter of fact, new eastern democracies have been shaped according to the core of European constitutionalism, it is also true that constitutionalism has a different meaning in each new Member State. Much more than a homogenous trend in institutional change—which would be explained according to the conditionality *rationale*—we will see that a problem-driven logic of action has created some convergences about three institutional devices: judicial review, guarantees of judicial independence (at least in formal provisions of the constitutions) and a commitment by constitutional courts to protect fundamental rights.¹³ All this notwithstanding, beyond the common commitment to a constitutional solution to manage politics, the kind of implementation each country has chosen can be reconstructed only with a deeper analysis, which goes far behind the formal and the structural dimensions.¹⁴

The conclusions of the analysis discuss the opportunities and the possible areas where national *rationale* and transnational constitutional discourse meet.

II. Towards a sociological institutionalist framework for the constitutionalism of the New Member States

The institutional changes which occurred in CEECs are at the crossroads of two different processes: the Europeanisation and the democratisation of national political systems. For this reason the theoretical framework adopted to interpret the role played by constitutional cultures in both these processes is double-edged. On the one hand, we should account for the role that constitutional culture plays in the process of reshaping a political regime. On the other hand, we should account for the role that constitutional culture plays within the Europeanisation process and, with regard to this, we have to stick to a well-defined concept of ‘Europeanisation’.

¹² G. Pridham, *Dynamics of Democratization: A Comparative Approach* (London: Continuum, 2000), p. 296.

¹³ S. I. Smithey and J. Ishiyama, ‘Judicious Choices: designing courts in post communist politics’, *Communist and Post Communist Studies* (2000) 33/1: 163.

¹⁴ D. Piana, ‘Cognitive boundaries matter. Cognitive constraints to constitutional change in the eastern and central Europe’, in W. Sadurski and A. Czarnota (eds.), *The Enlargement and the European Constitutionalism* (Dordrecht: Kluwer, 2005), pp. 209–25.

Comparative politics and democratisation studies clearly encounter a cut-off point when they should choose the concept of 'agency' they would adopt. Put differently, scholars can adopt either a rationalist view or a socio-cultural view of political actors. While in the first view, culture is an outcome of political choices, in the second view culture plays a causal role in determining political phenomena. The same distinction holds for the explanation of the international-national levels of agency. If the political actors are expected to be self-interest oriented, international factors can intervene in the democratisation processes changing the costs and the benefits expected from policy options that national players face within their national systems.

Conditionality politics adopted by international organisations and by the European Union is a concrete example of this view. Indeed, in order to be effective, conditionality relies upon the expectation of pay-offs that national policy-makers have about the different political strategies they can adopt in order to shape or reshape their own system.

From a different perspective, if agency is meant to be oriented by norms and values, international factors can intervene within the political systems penetrating them with norms and standards held to be valid at the international level. It is not so much the change of pay-offs expected from policies that matter in reshaping the political regimes, but rather the change of norms and ideas political élites have about which policies are more 'appropriate'. Mechanisms of social learning and argumentation are prominent in fostering the ideas and values that, once shared at the international level, can be accepted and used within national political systems.¹⁵

This broad distinction, which is even more articulated and differentiated in the literature, still holds when we explain the *constitutional outcomes* of democratisation processes. Scholars that have addressed the issue of constitutionalism in democratising countries have somehow followed the same path, either adopting a rationalist or a socio-cultural view in the interpretation of the relationship between national and international agency. The first one focuses the formal structure of the judiciary,¹⁶ which is meant to be an indicator of the

¹⁵ J. Checkel, 'International Institutions and Socialization', *Arena Working Papers Series*, 2001/5, see website: <http://www.arena.uio.no/>.

¹⁶ Comparative politics has recently paid much more attention than in the past to the decisions concerning the organisation of judicial systems in new democracies and, for instance, the role played by constitutional courts in the democratisation of CEECs. The need of an arbitrator, in a very uncertain situation after the democratic transition, makes sense of the role attributed to the courts. The impartiality of the courts, with regard to the political power

pattern of constitutionalism deployed by national states.¹⁷ The second one focuses the normative and the cognitive aspects of constitutionalism, which is conceived as the outcome of legal cultures, arguments elaborated within the courts, shared beliefs about the state and the political legitimacy.¹⁸

The hypothesis elaborated in comparative politics and democratisation studies directly refer to *CEECs constitutional policy-making*. Here the role played by the European Union should be integrated into our picture as an international factor, that is as a source of exogenous inputs that put pressure upon the national institutions.

European studies phrased in the ‘Europeanisation’ discourse¹⁹ exploit some concepts from comparative politics to address the (non)-intentional influence that international factors have had upon domestic systems: ‘imitation’, ‘persuasion’, ‘coercion’, ‘conditionality’.²⁰ In the case of European enlargement, these concepts are used to grasp the several *rationales* of European action within the candidate states.²¹ The promise of membership, a distinctive feature of the democracy promotion and stabilisation policy adopted by the EU

and the social groups as well, is crucial for the effectiveness of the court behaviour. On this aspect see the seminal M. Shapiro, *Courts: a comparative and political analysis* (Chicago: Chicago University Press, 1981), for instance pp. 29–30.

¹⁷ E. Herron and K. Randazzo, ‘The relation between the independence and judicial review in post-communist courts’, *Journal of Politics* (2001) 65/2: 422; see also, H. Schwartz, ‘The New Courts: An Overview’, *East European Constitutional Review* (1993) 2/2: 28–32.

¹⁸ C. Boulanger, ‘Beyond Significant Relationships, Tolerance Intervals and Triadic Dispute Resolution: Constructing a Comparative Theory of Judicial Review in Post-Communist Society’, p. 22; D. Piana, ‘Cognitive Boundaries Matter. Cognitive constraints to constitutional change in the eastern and central Europe’, p. 218.

¹⁹ C. Radaelli, ‘The Europeanization of Public Policy’, in K. Featherston and C. Radaelli (eds.), *The Politics of Europeanization* (Oxford: Oxford University Press, 2003), pp. 27–56.

²⁰ G. Pridham, *Dynamics of Democratization: A Comparative Approach* (2000: 11).

²¹ H. Grabbe, ‘How does Europeanization affect CEE governance? Conditionality, diffusion and diversity’, *Journal of European Public Policy* (2001) 8/6: 1013; see also, A. Wiener, ‘Finality vs Enlargement. Constitutive Practices and Opposing Rationales in the Reconstruction of Europe’, *Jean Monnet Working Papers* (2002) 8/2; available at: <<http://www.jeanmonnetprogram.org/papers/>>.

with respect to these countries,²² is the main leverage with which to obtain institutional adaptation.²³

This view seems very promising, since, at first glance, the constitutionalism adopted in CEECs has been nurtured by European constitutionalism. Put another way, the historical traditions of western European countries have represented a benchmark with which to measure the constitutional process in the new regimes. Nevertheless, two kinds of empirical evidence challenge this view. First of all, constitutional norms and values existed in CEECs some years before the Accession Agreements. In this process, the role of the Council of Europe and, more specifically, of the Commission of Venice—designed to monitor and assess constitutional drafting and constitutional justice in the ex-communist countries²⁴—was pivotal. Moreover, international standards to enforce the rule of law, good governance and respect for human rights have been attached to the delivery of international funds (e.g. the World Bank's conditionality). Informal interactions and patterns of cooperation among academics, legal experts, and political élites socialised in an international milieu, also occurred long before European conditionality politics entered in force. Last but not least, several constitutions in the region were already drafted when the pre-accession strategy entered into force—even in Poland, where the constitutional drafting process was not completed until 1997, a first liberal constitution was put forward during the first round table discussions.²⁵

The second kind of empirical evidence that must be mentioned here refers more directly to European normative inputs. The criteria formalised by the EU to assess the adequacy of candidates were very unclearly defined, fuzzy and consistent with many different institutional tools. In particular, the 'rule of law' criterion, which was one of the key-points in the pre-accession strategy, is far

²² T. Börzel and T. Risse, 'One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law', paper presented at the workshop Promoting Democracy and the Rule of Law: EU and US Strategies and Instruments, Stanford, CDDRL, 4–5 Oct. 2004.

²³ M. A. Vachudova, *Europe Undivided. Democracy, Leverage and Integration after Communism* (Oxford: Oxford University Press, 2005), and more precisely p. 19 for the presentation of the patterns of transition and their impact on the pattern of accession.

²⁴ For the documents adopted by the Commission of Venice see the website of the Council of Europe, the link to DG Legal Affairs, available on-line at: <http://www.coe.int>.

²⁵ W. Osiatyński, 'The Roundtable Talks in Poland', in J. Elster (ed.), *The Roundtable Talks and the Breakdown of Communism* (Chicago: The University of Chicago Press, 1996), pp. 21–68.

from being operationalised in a clear and detailed manner.²⁶ Moreover, even the model that the EU provided to candidate countries was neither unique nor clear. Scholars in legal and political studies have emphatically stressed the diversity and the divergence of the different types of constitutionalism that co-exist within the European tradition.²⁷

This evidence challenges the hypothesis of strict conditionality to explain the constitutional policies of CEECs. Human rights, the application of the law *erga omnes*, checks and balances in the organisation of political power, and individual rights are the main templates of a large blueprint proposed by the EU to foster the stabilisation of newcomers. This is a good reason to argue that the effective constitutionalism implemented in each candidate country relies upon the EU conception of the 'rule of law' *only* to a very limited extent.²⁸

This kind of evidence illustrates how the conditionality mechanism alone is not sufficient to explain the constitutional outcomes of the process of change occurring in the political systems of CEECs. If this argument holds, the mechanisms of social learning and argumentation should be adduced in order to account for the evidence.²⁹ We would argue, on this basis, that the constitutional cultures have been causal factors, because of the cognitive dimension of agency that has strongly intervened in the processes of transfer, diffusion and selection of models, norms and values related to the constitutionalism process. We would expect that the degree of adaptation to the international inputs transferred through argumentation and social learning is directly related to the embeddedness of constitutional culture in each national tradition, and that this correlation should hold in the future.

²⁶ D. Kochenov, 'Behind the Copenhagen Façade and the Structure of the Copenhagen Criterion of Democratic Rule of Law', *European Integration on-line Papers* (2004) 8/10; available at: <http://eiop.or.at/eiop/>.

²⁷ G. O' Donnell, 'Why the Rule of Law Matters?', *Journal of Democracy* (2004) 15/4: 32.

²⁸ T. Börzel and T. Risse, 'One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law' (2004: 12).

²⁹ F. Schimmelfennig *et al.*, 'Costs, Commitment and Compliance: The Impact of EU Conditionality on Latvia, Slovakia and Turkey', *Journal of Common Market Studies* (2003) 41/3: 495.

III. The balance between democratic legitimacy and constitutionalism in the New Member States: a problem-driven solution

In order to assess the kind of influence European models of constitutionalism had on the democratisation of CEECs, it is crucial to bear in mind the set of possible alternatives CEECs faced at the beginning of the transition.³⁰

The existence of different models of institutional devices aiming to protect and enforce constitutionalism is mainly due to the fuzziness of the ‘rule of law’ Copenhagen criterion. Indeed, western constitutionalism is a very differentiated model, which includes not only European interpretations of constitutionalism, but also American ones. The latter is also important for our topic because the first drafting of the democratic constitutions occurred during the period of the roundtable talks³¹ which took place in an environment of relatively high flexibility with regard to the specific model that CEECs were allowed to adopt. In other words, in order to be accepted and legitimised within western international clubs (the first of which would be the Council of Europe) the crucial element was to have a *constitutional* form of democratic governance (the emphasis being on ‘constitutional’). Nevertheless, while it seems that constitutionalism is a value of good governance and well-designed democracy shared by the US and EU, these respective models actually deploy a different interpretation of the source of normative legitimacy of the constitution and, last but not least, of the goals the constitution is expected to achieve.

In the European tradition, the anti-majoritarian meaning of the constitutional provisions emerged after the Second World War—in particular after experiences with non-democratic regimes. By contrast, in the US this dimension was prominent from the birth of the Federation.³² This is mainly due to historical and political reasons.³³ Moreover, the distinction between constitutional provisions and ordinary statutes is a particularly US idea and is aimed at voluntarily binding

³⁰ I. Priban, ‘Reconstituting Paradise Lost’, *Law and Society Review* (2004) 38/3: 410.

³¹ For a reconstruction of the round tables where the constitutional texts of the CEECs have been written, see J. Elster, *The Round Table Talks and the Breakdown of Communism* (Chicago: Chicago University Press, 1996).

³² M. Shapiro, ‘Judicial Review in Consolidated Democracy’, in R. Gargarella *et al.* (eds.), *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004), pp. 7–26.

³³ The *Federalist* is quite clear with regard to the role of the judiciary in the political system. The checks and balances recommended by Hamilton aimed at controlling public power, not only at the horizontal level, but also among different levels of governance.

the majority. In the US the source of legitimacy is not the parliament, but the constitution, which makes clear the substantial values and principles of the American people.³⁴ In this system the *Bill of Rights* defines the subjective rights that should be protected through the judicial review of the statutes passed by the legislature. In this pattern of constitutional democracy, the judge accomplishes a political, interpretative function and should not simply stick to the (statute) law. On the contrary the judge is expected to check that the law does not challenge fundamental rights.³⁵

Recently, a constitutional turn³⁶ occurred in the western tradition which has pushed towards a new conception of constitutionalism: the 'rule of law' has become the tool with which to defend minorities from the overruling power of parliamentary majorities, and a more interpretative attitude to constitutional justice has suddenly emerged after the Second World War. Once human rights enter the constitutional vocabulary of a sovereign state, they influence the constitutional discourse and empower the institutions that should enforce individual rights.³⁷

Therefore, the kind of western constitutionalism the ex-communist countries faced when they started the democratic transition differed from the traditional one, which is embedded in the formal and structural institutions used to shape modern states in the West.³⁸

³⁴ B. Ackerman, *We, the People. Foundations* (Cambridge: Mass. Belnap Press of Harvard University Press, 1991), pp. 11–12 for the role of the Bill of Rights.

³⁵ Therefore, the role of the Supreme Court in the system is very special, in a sense it can be justified only in a federal system of governance, within a cultural context where the majority is distrusted and where the control of the constitutionality of statutes is aimed at protecting the rights of citizens, instead of the coherence of the legal system; R. Dahl, 'Decision-making in a Democracy: The Supreme Court as a National Policy-maker', *Journal of Public Law* 1957/6: 279–95.

³⁶ G. Zagrebelski, *Il diritto mite* (Turin: Einaudi, 1991), p. 49, and R. Bellamy and C. Castiglione 'Constitutionalism in Transformation: European and Theoretical Perspectives', (special issue) *Political Studies* (1996) XLIV: 518.

³⁷ K. Pollet, 'Human Rights Clauses in Agreements between the European Union and Central and Eastern European Countries', *Revue des Affaires Européennes* (1997) 7/3: 290.

³⁸ T. Vallinder, 'When the Courts go marching in', in C. N. Tate and T. Vallinder (eds.), *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), see in particular p. 13 on the role of courts in policy-making.

With the collapse of communism, CEECs faced a common problem: a need to (re)build the state,³⁹ and a need to search for a source of political legitimacy not linked to the power of the majority. In a sense, when a political regime changes, the important thing is not so much how to shape it, as how *not to shape it*, in order to avoid the mistakes of the past. Therefore, the region shared the same macro-objective: to prevent the abuse of majority power, in whatever form.⁴⁰

Here we have some common patterns: the organisation of politics with checks and balances, and a constitutional court empowered to review statutes and to protect fundamental rights. European inputs enter the picture insofar as they have provided a solution for the majoritarian problem and for specific problems posed by totalitarian experience. In particular, the role played by fundamental rights can be seen as the effect of mechanisms of social learning and of argumentation that have transferred legal, technical and scientific expertise to CEECs. The Council of Europe, much more than the EU, has embarked on a wide programme of legal cooperation, which has allowed CEECs to assess, revise and reshape their constitutional texts during the first period of transition.

Therefore, European models of western constitutionalism have represented not so much a constraining factor on CEE constitution-making, but rather they have provided more appropriate solutions provided through socialisation and argumentation mechanisms.⁴¹

The isolation experienced by these countries during the communist regime has been perceived as a loss of identity, of prestige and of independence at the international level. The proper establishment of institutions was meant to be a

³⁹ G. Ekiert and J. Zielonka, 'Introduction: Academic Boundaries and Path Dependencies Facing the EU's Eastward Enlargement', *East European Politics and Society* (2003) 17/1: 7.

⁴⁰ Here we refer to the need to cope with the past, but not for instance to the practice of lustration, which still has been a way to cope with communist legacy. For the practices of lustration in democratising countries see A. Barahona de Brito *et al.* (eds.), *The Politics of Memory: transitional justice in democratising societies* (Oxford: Oxford University Press, 2001). On the reference for the role of past experience in the constitutional design see J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America and Post-communist Europe* (Baltimore: Johns Hopkins University Press, 1996), for instance pp. 42–55, stressed again at p. 235.

⁴¹ F. Schimmelfenning, 'Introduction: The Impact of International Organizations on the Central and Eastern European States – Conceptual and Theoretical Issues', in R. H. Lindstedt (ed.), *Norms and Nannies: The Impact of International Organizations of the Central and East European States* (Lanham: Rowman, 2001), pp. 1–29.

blueprint to ask for the recognition of their sovereignty and national identity.⁴² The human rights discourse provided by the Council of Europe represented a normative anchor to fix the fundamental dimension of the domestic institutions in an acceptable way from the point of view of the international community.⁴³

Moreover, the defence of rights and the drafting of written, fixed constitutions have also been a solution to a twofold problem. New rulers have tried to fix a set of common rules before playing the political game, which has become much more uncertain than before during the communist regime. The second aspect was linked to the fact that new political élites were searching for a wide political legitimacy. While it was unlikely to justify the new regime on the base of the expected outcomes in terms of social and economic resources, it was easier to argue in favour of the defence of fundamental rights and of the guarantee that the new state would have been bound by the rule of law. The threat of political conflict after the breakdown of communism was a good reason—for the opposition and for the ex-communist parties—to stick to common rules. The option provided by internationally acknowledged rules was worth adopting. This choice has somehow solved, at least for the first stage, the need to negotiate a new set of political and social rules.

The search for legitimacy has also influenced the structuring of the relationship between the new regimes and their constituencies. Indeed, policy-makers committed to transforming the regime were also seeking popular consent. Here, constitutionalism has been used differently in CEECs. The most prominent pattern is the exploitation of constitutional policy as a method of making a clean break with the recent past (see Table 5.1). New constitutions have been drafted to cope with the need for common rules, while the adjustment and the revision of constitutional provisions has been a competence of the constitutional court. In this context, the politics of memory has played an important role. The ‘return to Europe’ has been a popular slogan to refer to a deeper idea, i.e. the search for a legitimate link—embedded in a common past—with the European area.

⁴² Socialist ideology would have accepted the idea of an international society, but only when socialist organisation of socioeconomic processes would have been implemented. Before that, the international arena was depicted within the Soviet sphere of influence as western dominated. The strong opposition between western internationalism and the socialist one has been defended within socialist countries, S. Bartole, *Riforme costituzionali nell'Europa centro-orientale: da satelliti a democrazie sovrane* (Bologna: Il Mulino, 1993), pp. 22–23.

⁴³ L. Morlino, ‘Democratic Anchoring: How to Analyze Consolidation and Crisis’, *Central European Political Science Review* (2002) 10/3: 6.

IV. Managing uncertainty and anchoring new democracies: the role of constitutional courts

The differing patterns of the CEECs cannot be accounted for solely on the basis of European influence. On the contrary, bearing the notion of western constitutionalism in mind, their political élites have mostly related their constitutional choices to the capacity of the new political system to cope with the past.⁴⁴ Table 5.1 gives a general picture of the discontinuity *versus* continuity option that has characterised the democratic transition.

Table 5.1: Transition to constitutional democracies, procedures to adopt liberal constitutions

Country	Continuity/rupture	Procedure
Hungary	Revision	Parliamentary
Poland	Revision + new	Parliamentary + popular
Latvia	Old constitution	Parliamentary
Slovenia	New constitution	Parliamentary
Bulgaria	New constitution	Parliamentary
Romania	New constitution	Popular
Estonia	New constitution	Popular
Slovak Republic	New constitution	Parliamentary
Czech Republic	New constitution	Parliamentary
Lithuania	New constitution	Popular

As Table 5.1 shows, the prevalent pattern is to adopt a new constitution, not so much to endorse a specific, well-defined pattern of constitutionalism, but rather to give a clear sign of rupture with the past. Nevertheless, some special cases do emerge. The process of constitutional policy in Latvia is an interesting case. Here, the old constitution, drafted before communism, has been renewed and adopted again. Political legitimacy has, therefore, been sought for in the past, in the identity of the country, as it is embedded within the collective memory. No issue of popular consultation is therefore raised. The presence of collective frames to shape the constitutional agenda in an 'integrative' way—instead of a distributive

⁴⁴ I. Pogany, 'Constitution Making or Constitutional Transformation in Post-Communist Societies', *Political Studies* (1996) XLVI: 568.

one—has decreased the degree of conflict and has allowed for the legitimating of the constitution through parliament, i.e. the arena in which the set of collective preferences is represented.⁴⁵

The cases of Poland and Hungary are interesting, because of the common pattern of transition (*'ruptura pactada'*)⁴⁶ which was followed by a different organisation of politics. In both countries the ex-communists were involved in the constitutional process. The transitions were, in both countries, peaceful, driven by a preference for incremental change. Once this way is adopted, the change of the constitution and the revision of the legal system is realised within the new system.

Put differently, both countries needed an actor of change empowered to enact a slight evolution through ordinary policy-making. Differences in organisational choice—semi-presidential in Poland and parliamentary in Hungary⁴⁷—make sense of the differences in the role played by domestic constitutional courts.⁴⁸

We would argue that the distribution of political power and the checks and balances chosen in each country depend very much on the pattern of transition.⁴⁹ In particular, a correlation between the pattern of transition and the design of the constitutional court could be detected. The more continuity, the more the need for change within the legislative-judiciary dialogue exists.⁵⁰ The more this change

⁴⁵ F. Scharpf, *Games Real Actors Play* (Boulder: Westview Press, 1997), p. 113. The distributive effects of constitutional policies refer to the fact that each constitutional actor faces a pay-off attached to each institutional solution adopted for the constitutional problem. Put differently, actors can elude constitutional bargaining, at least with respect to some very general issues, because all of them are bound to international standards, which are common constraints independently of their own interests and political orientation. Scharpf talks about integrative decision-making when a common normative framework is used in a policy arena to define the problem. This allows actors to the jump to second step of the decision-making process, for instance the choice of instrument, because their general aims have already been defined through the common framework.

⁴⁶ J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation* (1996: 111).

⁴⁷ A. Orkeny and K. L. Scheppele, 'The Rules of Law: the complexity of legality in Hungary', in M. Krygier and A. Czarnota (eds.), *The Rule of Law in Post-communist Societies* (Aldershot: Ashgate, 1999), p. 58.

⁴⁸ G. Brunner, 'Development of a Constitutional Judiciary in Eastern Europe', *Review of Central and East European Law* (1993) 18/1: 819.

⁴⁹ L. Morlino, 'Constitutional Implementation', in J. Zielonka and A. Pravda (eds.), *Democratic Consolidation in Eastern Europe* (Oxford: Oxford University Press, 1991), pp. 101–2.

⁵⁰ An analysis of the role played by the courts in the legislative process could be done either through the instruments provided by rational choice analysis or through the instruments provided by discourse analysis. For the first approach see M. Shapiro, *Courts*, mainly the first

is linked with the legitimacy of the new order, the more a third, impartial, actor is needed who is able to apply constitutional law *erga omnes*.

At the organisational level, we can detect a strong convergence toward the adoption of a specific institutional tool, aimed at protecting constitutionalism: the *constitutional court*. Here again, the jurisdiction, the power and the capacity to enter into the policy-making process of the courts depend on the meaning that national political élites have attributed to this tool: an instrument to protect human rights within the national system or an instrument to balance the majoritarian tyranny.

Generally speaking, constitutional courts looked like an 'appropriate' solution to a double-edged problem. On the one hand, they enable the new democracies to settle specialised disputes. These disputes could be expressed in terms of international human rights discourse and rephrased within the national constitutional discourse. On the other hand, they represent a reliable and feasible solution to the political conflicts that were expected from the change of regime. In this sense, the anchoring strategy of CEECs is close to the one adopted in the third wave of democratisation.⁵¹

Again, one of the common tools we can see in CEEC constitutionalism is constitutional review. Constitutional courts are designed to have an autonomous space in all these countries where they decide upon the constitutionality of statutes. In this sense, the idea that courts control the power of the majority to vindicate rights and subvert the constitutional value of democracy seems to be shared in the region. Here, the European model (that is, centralised and attributed to a unique institutional body) has prevailed, not only because it is the most proximate, but also because it matches the need for a centralised and hierarchical coordination better than the American model.

Two mechanisms can be identified as lying behind this choice. The first is the mechanism of adaptive expectations. Constitutional assemblies in CEECs were aware of the possibility that they would be in a close relationship with the European Union, where a centralised system of constitutional review exists. The anchor with the Council of Europe has reinforced this mechanism, because of the expectation of having an open dialogue with the Council about human rights policy and the protection of minorities. The socialisation of legal scholars has

chapter, and for the second one see J. S. Dryzek, *Post Communist Democratisation: Political Discourse across Thirteen Countries* (Cambridge: Cambridge University Press, 2002).

⁵¹ L. Morlino, 'Democratic Anchoring: How to Analyze Consolidation and Crisis', *Central European Political Science Review* (2002) 10/3: 7.

strengthened the attractiveness of this option. Indeed, the actual implementation of the constitutional review device was experienced within an epistemic community,⁵² where transaction costs and communications were very much decreased. The second mechanism is linked to the democratisation process. According to comparative scholars, the experience of the previous regime shapes the expectation of citizens about the new regime. Political élites have strong reasons to search for a kind of legitimacy that is not only recognised by other states—as is the case of the legitimacy provided by the anchor to the Council of Europe—but also embedded in their own political constituencies. A visible, reliable constitutional court, identified as the master of fundamental rights protection and political stability is apposite from this point of view.

The effective power acknowledged within each domestic context to the court depends, on one hand, on the strategic position that the court has with regard to the legislature and, on the other hand, on the institutional legacies.

In Poland, where previous experiences of constitutionalism had been maintained in the collective memory and legal teaching had been permitted in quite an independent network of institutes,⁵³ constitutionalism was easily adopted after communism. The existence of a constitutional Tribunal in Poland established in 1984,⁵⁴ even if not working properly, represented a factor facilitating the constitutionalisation of the new democracy.⁵⁵ The same holds for the Czech Republic: the experience of a court structured according the Austrian model, created the ‘precedent’ to enable the political system to use this experience when the regime changed.

We would argue that the more consolidated the constitutionalism experienced in the past has been, the more the new court has enjoyed a higher level of legitimacy overall. This last correlation does not account for the judicial activism

⁵² P. M. Haas, ‘Epistemic Communities and International Policy Coordination’, *International Organization*, (1992) 46/1: 1–36.

⁵³ Cracow and Warsaw have maintained universities where the departments of law have continued to teach civil law in the Roman tradition.

⁵⁴ Traditions are also consolidated in formal institutions and in organisations. See L. G. Zucker, *Institutional Patterns of Organization: Culture and Environment* (Cambridge: Ballinger, 1988).

⁵⁵ T. Börzel and T. Risse, ‘Conceptualizing the Domestic Impact of Europe’, in K. Featherston and C. Radaelli (eds.), *The Politics of Europeanization* (2003: 57–80).

of the court.⁵⁶ Indeed, the behavioural pattern of the court, even if embedded in past experiences of constitutionalism, depends also on the balance that exists between the judiciary and the legislature.⁵⁷

V. Fundamental rights and constitutions: designing the space of constitutionalism through words

To give an account of constitutionalism, structures and formal rules are not enough. Above all, constitutional cultures enter into policy-making in the interpretation of human rights' provisions. Therefore constitutional justice should be an empirical field where the impact of constitutional cultures could be assessed for each national case. In particular, constitutional formulas define not only formal power, but also ground practical reasons used to struggle 'in the name of the law'.⁵⁸ The possibilities of enacting law have been created by the constitutional provisions defining the fundamental rights of citizens. An interpretative behavioural pattern is allowed within the boundaries that have been designed by the constitutional formulas.

It is important to emphasise this feature of constitutionalism. Constitutionalism in CEECs has not only responded to the need to cope with the uncertainties of the new democratic game, but has also moved towards a new kind of constitutionalism, which seems to be growing within the European Union. The constitutional courts are not only expected to check the formal acceptability of statutes from the point of view of the Constitution. As occurs in the US, constitutional courts have become the masters of basic rights' enforcement. In some countries the penetration of constitutional justice into ordinary policy-making is much more extensive because of the right to appeal to the Constitutional Court in the middle of the proceedings. Furthermore, in some

⁵⁶ For a comparative analysis of the behavioural patterns adopted by the constitutional courts in Eastern and Western Europe see W. Sadurski (ed.), *Constitutional Justice, East and West* (Dordrecht: Kluwer, 2002).

⁵⁷ See R. Gargarella *et al.* (eds.) *Democratization and the Judiciary. The Accountability Function of Courts in New Democracies* (London: Frank Cass, 2004) for a critical review of the possible patterns constitutionalism and democracy can have in different transitional processes.

⁵⁸ An insightful analysis of the role played by social expectation in the capacity of the courts to enforce rights and to make politics in the contemporary democracies is to be found in C. Epp, *The Rights Revolution: lawyers, activists and supreme courts in comparative perspective* (Chicago, London: University of Chicago Press, 1998). On the process of institutional building aimed to allow for a constitutional justice where rights would be enforced in CEECs see H. Schwartz, *Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: Chicago University Press, 2000).

CEECs, the citizens are allowed to bring an action before the court when they have exhausted all ordinary judicial procedures, and wish to have fundamental rights enforced. In 1993, before the start of the pre-accession negotiations, all the ex-communist countries were members of the Council of Europe. Conditionality with respect to membership of the Council entailed the endorsement of the European Convention of Human Rights, which came into force in domestic legal systems when constitutions were amended. The Convention strongly emphasises the role of human rights in binding the state. Moreover, it entails minority rights as a tool to prevent the abuse of power against ethnic and religious minority groups. International consensus with regard to the definition of human rights—if any—does not solve the question regarding the meaning human rights will have within each national system. Moreover, since rights-holders include national citizens (of course the relationship does not work the other way), human rights and citizenship should be analysed together. This can give us a realistic picture of the opportunities for individuals to bring an action before the courts—ordinary and constitutional—and the duties of public authorities to enforce rights.

Cultural boundaries and domestic priorities linked to the composition of society—cultural versus socioeconomic cleavages—matter in order to determine the final outcome, which is represented by the constitutional norms referring to individual rights.

At this point, the importance of national identity should be highlighted. Where national identity is strong enough to justify political action, human rights are found at the border of the overall structure of the constitutional design. This is the case in Poland and the Slovak Republic. National justification of politics is enough to build up public authorities and to allocate decisional power. It is different for the Czech Republic. In this case legal culture and collective identity need to be balanced. Equilibrium is achieved with the anchorage to human rights, so that nationality is not so important in the definition of individual rights.⁵⁹ While legalism stresses the centrality of the legality principle and the application of the law in a coherent and consistent way, human rights represents the origin of the substantive meaning given to the ‘rule of law’ principle. Formal coherence in the application of law to social systems and the legitimacy of the normative content of the law are therefore secure.

⁵⁹ W. Sadurski, ‘Constitutional Courts in the Process of Articulating Constitutional Rights in the Post Communist States of Central and Eastern Europe, Part I, Social Rights’, *European University Institute Working Papers Law*, 2002/14.

This pattern is also verified by the Slovenian constitution, where human rights have a central place in the constitutional design. The main causal factor in the entrenchment of individual rights in the human rights discourse is not the dynamic of institution building, but the emphasis on a substantial aspect of a democratic system of governance, so that the actions of the state are only legitimate if they enforce basic, beyond the formal respect of the legality principle.

Table 5.2: Extension and origin of fundamental rights in CEEC constitutions

Country	Social rights	Minority rights	Citizenship
Poland	Limited	Limited	National identity
Hungary	Extensive	Extensive	Human rights
Czech republic	Extensive	Limited	Human rights
Slovak republic	Limited	Limited	National identity
Latvia	Limited	Limited	National identity
Lithuania	Limited	Limited	National identity
Estonia	Limited	Limited	National identity
Bulgaria	Limited	Limited	National identity
Romania	Extended	Limited	Human rights
Slovenia	Extended	Limited	Human rights

To assess the extent to which social differences matter in constitutional design we should look at the constitutionalisation of ‘social rights’.⁶⁰ This provides us with some elements of the balance between collective aims and individual rights. Indeed, social rights could be addressed as a common objective of collectivity, defined within the classical formulae of ‘social justice’, ‘solidarity’, and so forth. If such a general formula is introduced in the constitution but few social rights are constitutionalised, the enforcement of such rights will depend on ordinary politics. The political attitudes of coalition governments, the capacity of the executive to successfully introduce social policy proposals in Parliament, and the attitude of the electorate, are the main factors behind the enforcement of social rights.

⁶⁰ W. Sadurski, ‘Constitutional Courts in the Process of Articulating Constitutional Rights in the Post Communist States of Central and Eastern Europe, Part III, Equality and Minority Rights’, *European University Institute Working Papers Law*, 2003/6.

Furthermore, social rights could be expressed in terms of rules targeted at individuals and not social groups. Rights holders are citizens or individuals, depending on the cognitive place national cleavages have within society. The existence of some limits to the constitutionalisation of social rights means that the balance between constitutionalism and democracy is designed in favour of day-to-day politics. Social objectives are open to novel influences from economic and social systems. In this case, constitutional design gives the floor to constitutional justice and, above all, to the legislative processes of law-making.

Also from the point of view of minority rights, constitutional texts supply us some elements with which to detect the importance of the individual versus collective dimension of social rights. Rights could, indeed, be bestowed upon individuals—as in the case of Latvia and Lithuania—and not particular ethnic or religious groups. In this case, policies of enforcing rights are left to constitutional supervision, while positive action to dismantle discrimination or *de facto* socioeconomic differences is not allowed.

The European impact on constitutional rights could be reconstructed according a differentiated pattern of mechanisms.⁶¹ Indeed, at the very beginning of the democratic transition, as we have already mentioned, the Council of Europe, through persuasion and diplomatic pressure, pushed for the integration of human rights provisions within the constitutions. The effective pattern of enforcement is not, however, determined nor defined by the Council. Rights enforcement depends on domestic constitutional design which includes not only rights provisions, but also a specific pattern of checks and balances in law-making.

After that, the European Union has used conditionality to push governments to take political action, which, at first glance, should not challenge human rights and, on closer examination, should aim to enact positive and integrative action. While procedural democracy is ensured by conditionality in the pre-accession negotiation, substantial aspects of domestic democracy are influenced by the European Union through the channel of human rights discourse.⁶² Still, it should be said that the politics of human rights adopted by the EU toward new members is strange and even questionable, in particular with respect to the second round of

⁶¹ Even if these contributions address the Europeanisation mechanisms in old Member States, the composite character of the Europeanisation pattern stressed by the authors may still apply for new Member States.

⁶² J.-M. Henckaerts and S. Jeught, 'Human Rights Protection under the new Constitutions of Eastern Europe', *Loyola L.A. International and Comparative Law Journal* (1998) 20/2: 145.

candidates. Bulgaria and Romania have been scrutinised, with respect to human rights enforcement, both from the point of view of minority rights (the Bulgarian policy towards the Turkish minority) and from the point of view of the application of the law to individual cases. Discrimination of individuals based on cultural or political and socioeconomic grounds is strongly opposed.⁶³

VI. Where constitutional cultures balance international and national factors

We have argued that the outcomes of the pre-accession strategy provide us with some deep insights into the opportunities and the actors that would be prevalent after enlargement. In particular, we would stress that the role of constitutional cultures, which has been detected beyond some general patterns of constitutionalism in Eastern Europe, will matter in the future. They have impacted several levels of the democratic patterns of governance and in particular the evolution of the balance between constitutionalism and democracy. As we have tried to point out, constitutional courts have been designed according to a common scheme, which is characterised by judicial review, the central jurisdiction of the court in the enforcement of human rights, the power to counter-balance the possible overruling of parliamentary majorities in front of constitutionalised rights.

Still, constitutional culture has mattered a lot with regard to the specific institutional devices and the designing of the national jurisdiction that each constitutional court enjoys in its own country. Therefore, we can expect that in the future, national differences will be prominent in the use of the institutional devices that have been adopted before accession, to protect and enforce constitutionalism in the East.

Our argument is still valid even if we consider that after accession the prominence of the conditionality rationale and its capacity to put national

⁶³ One could question whether the European Union is actually in the right position to teach a human rights policy to new members and, by doing that, achieve convergence towards a common pattern of European human rights policy in the enlarged Europe. Scholars in legal affairs and European law have stressed the fact that European Union discourse about human rights relies upon the European Convention of Human Rights, which is also referred to by the ECJ in case law. On the theoretical framework which is at the base of the role the courts can play through the enforcement of rights see the essay by T. R. S. Allan, 'Dialogue and the Justification of Judicial Review', *Oxford Journal of Legal Studies* (2003) 23/4: 563. On the role played by rights within the national legal contexts see M. Aziz, *The Impact of European Rights on National Legal Cultures* (Oxford: Hart Publishing, 2004).

institutions under pressure will decrease. It is true that for many policy sectors, the new members are well-monitored and some special clauses have been included in the Accession Treaties, so that if compliance with European rules is not maintained, the EU is allowed to take special measures (for example blocking structural funds). Nevertheless, this kind of warning seems much less relevant for constitutional issues. Eastern constitutionalism is well embedded in political practices and in legal cultures. Therefore, while before accession, conditionality and social learning could be thought of as complementary and co-existent mechanisms of diffusion of European normative inputs, after accession cognitive factors seem more prominent with regard to the exploitation, the redefinition and the interpretation of norms and values.⁶⁴ Put differently, after accession, constitutional cultures will be much more salient than before. Therefore, it is crucial to assess at what level of the political system and through which channels they can intervene.

The capacity of the court to intervene in the policy-making process will depend on the constitutional culture of each national state, not only with regard to the meaning that political élites attribute to the 'law', but also to the meaning that people, in particular rights-advocacy coalitions, will recognise within the 'law'. Somehow the courts have been designed with the capacity to accept cases from some actors eligible to bring cases before the court. In any case, if the actor does not believe that the right at stake is a fundamental one or, even, if the actor does not have the cognitive resources to apply to the court, then we can expect that courts will not exercise much influence over the policy-making process. Moreover, the capacity of the courts to endorse a more or a less active path also depends on the legacy of the recent democratic tradition.

A further level at which we can expect an impact from constitutional cultures is in the constitutional dialogue created by the enlargement. The courts will act as an interface filtering external normative inputs. They represent the arena where international norms should be integrated into the domestic legal systems. From this point of view, the reception of the *acquis communautaire* and the linkage with the international conventions (i.e. International Labour Organisation conventions, the European Convention for Human Rights and Fundamental Freedoms) will be accomplished to the extent that the constitutional courts guarantee the coherence of the legal system. This function has been accomplished

⁶⁴ The trade-off between conditionality and social learning is a hypothesis that I have drawn from Schimmelfennig *et al.*, 'Cost, Commitment and Compliance: The Impact of EU Conditionality on Latvia, Slovakia and Turkey', *Journal of Common Market Studies* (2003) 41/3: 498.

precisely because courts are entrusted to interpret constitutions. Furthermore, the use of human rights with regard to the definition of domestic citizenship and the space left to social rights—either as individual target rights or as collectively defined rights—change from one country to the other. Thus, we would expect that the more constitutional mechanisms overrule democracy, the more convergence there will be toward a supranational style of constitutional justice, even if the capacities of judges and the resources of the judiciary will matter in the future.

Certainly, the areas where we can expect Europeanisation to matter most are the ones where fundamental rights, entrenched within the constitutions,⁶⁵ allow or even oblige the state to create public policies to enforce them. While in the past EU pressure, through penetrating the legal system with the *acquis communautaire* would have been strong, in the future we can expect a more multi-lateral dialogue on constitutional issues,⁶⁶ where the interpretation of national constitutional courts will represent a possible source of innovation in the normative patterns of the enlarged Europe.

Therefore, we would argue that the effective implementation of constitutionalism will depend on, on one hand, the capacity of rulers to rule by the law and, on the other hand, the capacity of the ruled to address the social demands of justice toward the several levels of European governance. We will see that the human rights' area of policy, opened by European constitutionalism, will represent the prominent arena where normative interpretations reshape the balance that exist in each new member between the 'rule of democracy and the rule of law'.⁶⁷

⁶⁵ For an overview and in-depth analysis of the patterns of constitutional justice on the enforcement of rights before constitutional courts see W. Sadurski, *Rights Before the Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Berlin: Springer, 2005). This exploration would be taken into account to design specific projects of the research aimed to understand how the interpretation of constitutional provisions referred to fundamental rights will play a prominent role in the change of the political setting in the post-communist States.

⁶⁶ This proposal relies on the work of L. Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: N.J., Princeton University Press, 1998).

⁶⁷ J. Ferejohn and P. Pasquino, 'Rule of Democracy and Rule of Law', in J. Maravall and A. Przeworski (eds.), *Democracy and the Rule of Law* (Cambridge: Cambridge, 2003), p. 208.

Annex

Table 1a: Models of constitutional courts in CEECs: judicial independence of constitutional courts

Country	Political system	Appointment of judges	Tenure of judges	Origin of judges	N. of judges
Poland	Semi-presidential	Sejm	9 years	Legal	15
Hungary	Parliamentary	Parliament	Upper limit of 70 years	Legal	11
Czech Republic	Parliamentary	President of Republic	10 years	Legal	15
Slovak Republic	Parliamentary	President of Republic	12 years (no renewal)	Legal	13
Slovenia	Semi-presidential	Parliament (proposal) + President of Republic	9 years (no renewal)	Legal	9
Estonia (constitutional chamber of the Supreme court)	Parliamentary	Chief of Supreme court (proposal) + Parliament	Life	Legal	7
Latvia	Parliamentary	Parliament (proposal of parliament and supreme court)	10 years (renewal)	Legal	7
Lithuania	Semi-presidential	Proposal: Supreme Court (3) and Parliament (3) and president of republic (3) Seim appointment	9	Legal	9
Bulgaria	Semi-presidential	President of Republic (4) Parliament (4), supreme court (4) ^a	9 (no renewal)	Legal	12
Romania	Semi-presidential	3 Senate, 3 chamber of deputies, 3 president of republic	9 (no renewal)	Legal	9

^a Four judges are appointed by the president; four judges are elected by the parliament and four judges are elected by the Supreme Court.

Table 1b: Models of constitutional courts in CEE countries: jurisdiction of constitutional courts

Country	Applying actors	a-pr.	a-post.
Poland	<u>Abstract review</u> President, parliamentary minority, Prime minister, Supreme court chief, ombudsman <u>Concrete review</u> trade unions, business organisations, National judicial council	Yes (inter-national agreement) ^b	Yes
Hungary	political institutions, fifty member of parliament, ordinary courts and individuals	Yes	Yes
Czech Republic	Political institutions, 1/5 parliament, individuals, representatives of local authorities	No	Yes
Slovak Republic	1/5 of Parliament, President of Republic, Government, courts, Attorney General, legal persons (human rights)	No	Yes
Slovenia	Political institutions, legal person, representatives of local authorities	No	Yes
Estonia ^c	Political institutions, courts, individuals	No	Yes
Latvia	The President, the Saeima, not less than twenty members of the Saeima, the Cabinet of Ministers; the Prosecutor General; the Council of the State Control, the Dome (Council) of a municipality, the State Human Rights Bureau, a court, when reviewing an administrative, civil or criminal case, a judge of the Land Registry when entering real estate- or thus confirming property rights on it- in the Land Book, individuals	Yes	Yes
Lithuania	The government, 1/5 of Seim, courts, the President of Republic	No	Yes
Bulgaria	National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court or the Chief Prosecutor. A competence suit between the bodies of the local self-government; supreme court of cassation	No	Yes
Romania	President of Romania, the President of either Chamber of Parliament, the Prime Minister, or the Chairman of the Superior Council of Magistracy, the Ombudsman	Yes	Yes

^b Only the President of the Republic is allowed to apply to the court for *a priori* review. It is worth stressing that the review concerns the constitutional adequacy of statutes implementing international agreements.

^c In Estonia constitutional review is exercised by the constitutional chamber of the Supreme Court.

Table 1c: Jurisdiction of constitutional courts in CEECs

Country	Intern. Agreements ^d	Abstract	Concrete
Poland	Yes	Yes	Yes
Hungary	Yes	Yes	Yes
Czech Republic	Yes	Yes	Yes
Slovak Republic	Yes	Yes	Yes
Slovenia	Yes	Yes	Yes
Estonia	Yes	Yes	Yes
Latvia	Yes	Yes	Yes
Lithuania	Yes	Yes	Yes
Bulgaria	Yes	Yes	Yes
Romania	Yes	Yes	Yes ^e

^d We also mean the power of constitutional review to assess the conformity of statutes and regulatory acts with fundamental rights as defined in international agreements, signed by the country.

^e The court does not rule on the ordinary application of the law.

Part 2

The Impact of the Enlargement on the Future of Europe

Chapter 6

Assessing the Institutional Provisions of the Constitutional Treaty:

An Exercise in Ambiguity*

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I. Introduction

The fiasco of two referenda on the Constitutional Treaty in France and the Netherlands appear to make the need for detailed debate on its provisions, if not wholly redundant, then seriously questionable. If the Treaty is indeed dead what is the sense of analysing it? If we look closely at the current debate, however, it turns out that the idea of ‘cherry picking’ is gaining ground. Many specialists and politicians seem to believe that we should ask ourselves which provisions of the Constitutional Treaty could be saved? The logic of this approach suggests that certain elements of the Treaty are indispensable for the effective functioning of the European Union. Using this line of reasoning, such provisions could either be implemented through an agreement of all Member States, or become the subject of a new Intergovernmental Conference whose object should be to agree a limited set of necessary institutional modifications. In any case, it seems that an analysis of the most important institutional reforms may still be useful.

Many provisions of the existing treaties are not clear and thus open to interpretation. For example, the issue of how to trigger ‘enhanced cooperation’, and specifically the famous referral to the European Council, is assessed very differently by different lawyers. The open-ended nature of some of the Treaty’s

* An earlier version of this chapter appeared in Polish in *Nowa Europa, Przegląd Natoliński* 1 (2005): 141–66.

provisions is not very strange. The nature of intra-Community negotiations is a fertile ground for ambiguity. Clarity and transparency are enemies of compromise. The more easily a given text lends itself to varied interpretation, the easier it is to sell it to different electorates. The problem with the Constitutional Treaty, as I will try to demonstrate in this chapter, is that ambiguity and open-endedness obscure the understanding of many of its most fundamental institutional provisions, provisions which may have an influence on the very nature of the Union.

First of all, a given institutional reform on the face of it beneficial for the whole Union may provoke negative unintended consequences. Secondly, the impact of a new provision on the European Union may not at all be clear at the outset, it may depend on practical implementation or human factors. At the beginning of the Convention there was hardly any agreement on the philosophy of institutional reform. The Member States' take on most of the relevant issues differed fundamentally. Therefore the negotiated compromise is in many instances unclear and ambiguous. Every Member State had to go home able to sell the deal interpreting certain provisions in a very different manner.

II. The election of the President of the European Commission

For years the European Parliament advocated having a greater say in the process of the election of the President of the European Commission. This position was also supported by many important Member States, *inter alia* Germany and Belgium. When a common Franco-German stance in the Convention was being elaborated, however, the French vigorously defended the *status quo*. The UK and Spain shared the French position in this respect. The supporters of a strengthened role for the European Parliament did not succeed in imposing its will on their partners. As a result the provisions of the Constitutional Treaty do not differ much from the current treaties. True, there is a slight change of wording—instead of 'the nomination shall be approved by the European Parliament' (Article 214 of TEC),¹ the new text reads: 'This candidate shall be elected by the European Parliament' (Article I-27).² Most specialists agree that the legal significance of this change, however, is not fundamental.³ It is still the Council which will be

¹ Treaty establishing the European Community, *Official Journal of the European Union*, 24 Dec. 2002, C 325.

² Article I-27 of the Treaty Establishing a Constitution for Europe, *Official Journal of the European Union*, 16 Dec. 2004, C 310.

³ Although there are those who claim that the substitution of the word 'approve' by the word 'elect' means that in the latter case the European Parliament was finally empowered to reject

responsible for choosing the candidate, and the Parliament will only give its assent, regardless of how it is called in legal jargon.⁴

The Constitutional Treaty nevertheless contains a very important legal novelty regarding the election of the President of the European Commission. Article I-27 states explicitly that the President should be elected after the elections to the European Parliament are taken into account. Such a provision may produce unintended consequences. On the one hand, the outcome of the reform conducted along these lines is positive. The Commission gains much greater legitimacy—its political vocation is influenced by the composition of an institution directly elected by the people. The political preferences of citizens are reflected in the ideological profile of the Commission. As a result the process of election may finally become more relevant and interesting for ordinary citizens.⁵

On the other hand, the politicisation of the Commission may also produce negative effects, paradoxically constituting a deadly blow to its neutrality. The Commission is to play the role of an independent initiator of community legislation and an honest broker in intra-Community bargaining. Both the power and effectiveness of the Commission are largely dependent on whether the Member States perceive it as a neutral agent capable of producing politically unbiased compromise proposals. Endowing the Commission with a certain political profile by making the choice of its president explicitly dependent on their political affiliation politicises the College of Commissioners and thus reduces the confidence of the Member States in its undertakings. This claim was recently substantiated by the crisis relating to the election of the Barroso Commission. Some socialist and green deputies in the European Parliament treated the President of the Commission and some of his fellow-Commissioners, not as independent agents of the Community, but as political adversaries with whom one had to fight to ensure the ideological profile of the future College. Once the

the proposition of the Council, see E. de Poncins, *Vers une Constitution européenne, texte commenté du projet de traité constitutionnel établi par la Convention européenne* (Paris: Editions, 10/18, Département d'Univers Poche, 2003), p. 168.

⁴ Although according to the Constitutional Treaty an absolute majority in the Parliament is needed for a successful election of the Commission's President (not a simple majority, as per the current treaties).

⁵ The supporters of this thesis agree that the Commission was never actually politically neutral and that it would be better to put it explicitly in the treaties. See, *inter alia*, P. Craig, 'European Governance: Executive and Administrative Powers Under The New Constitutional Settlement', in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective Jean Monnet Working Paper*, 2004/5: 7; available at: <http://www.jeanmonnetprogram.org/papers/>.

conflict had been defined along these lines the Commissioners were attacked from purely partisan, political positions. It all amounted to a perception according to which the current Commission is not neutral, which certainly will have a negative impact on the effectiveness of its functioning.

III. Strengthening the European Council and the establishment of the position of its President

The introduction of a new post of a permanent President of the European Council to the EU institutional system undoubtedly constitutes one of the most important innovations of the Constitutional Treaty. In relation to the original ideas of Valéry Giscard d'Estaing, the prerogatives of the President were seriously curtailed, but nevertheless, the Constitutional Treaty provisions endow him with considerable competences.⁶ It is not easy to assess the role that the President of the European Council could play in the new institutional set-up of the Union. The evaluation cannot be unequivocal because much will depend on the practical implementation of the Constitutional Treaty provisions and on the personality of the President himself.⁷ In this context we should ask ourselves a crucial question—will the President answer all the hopes that supporters of such an institutional innovation have nurtured? The President may increase the effectiveness of policy coordination, strengthen the Union's strategic dimension, endow the European Council with much-needed institutional memory, increase cohesion and continuity of its functioning and clarify the Union's representative role *vis-à-vis* its partners.⁸

Most importantly the introduction of a new post into the Union's institutional set-up would reorganise executive power in the Union. Currently the executive prerogatives are largely in the hands of the Commission (although it is strictly

⁶ Article I-22.

⁷ Some authors, especially French ones, see the risk associated with choosing a person with a difficult character as minimal. According to Florence Deloche-Gaudez, since the President is elected by the heads of state or government, it will be impossible to elect a forceful personality. Moreover, such a person would be kept in check by his colleagues in the European Council see F. Deloche-Gaudez, *La Constitution Européenne, que faut-il savoir?* (Paris: Les Presses de Science-Po, 2005), p. 127. However, one should recall the way in which the heads of states and governments chose Valéry Giscard d'Estaing and the skill with which he managed to monopolise the Presidium of the Convention.

⁸ See, for example, R. H. Lauwaars, 'The President of the European Council: The Beginning of a European Government?', in J. W. de Zwaan *et al.* (eds.), *The European Union: An Ongoing Process of Integration, Liber Amicorum Alfred E. Kellermann* (The Hague: T.M.C. Asser Press, 2004), pp. 74–76.

controlled by the Council of Ministers through the so-called comitology procedure), the European Council so far does not enjoy any executive functions. The Constitutional Treaty foresees a small revolution in that respect—dividing the executive power between the Commission and the European Council.⁹ Some specialists assess that evolution very positively, they are fully convinced that such a solution is indispensable—in other words, there is an absolute necessity for the heads of states and governments to get involved in the day-to-day management of the Union.¹⁰ Others mourn the weakening of the so-called Community Method and the European Commission itself.¹¹ Only practice would show whether the new President would enhance the control of the Member States over European integration (strengthening of the intergovernmental method) or whether he would undergo the ‘socialisation’ effect and act in accordance with community spirit (he will not easily yield to any Member States) promoting the interests of the Union as a whole.

It may be the case that the positive scenario would not be realised. The introduction of a new post into the Union’s legal order could not only destabilise the intra-institutional balance but also undermine its coherence. Again much would depend on practice. Only time would tell whether the President of the European Council and the President of the Commission will be able to come up with a symbiotic *modus vivendi* and agree on such a division of tasks that would allow them to avoid conflicts. Some commentators seem to believe that both Presidents would cooperate very smoothly, because allegedly their functions differ so much.¹² There remains a question, however, who would enjoy a privileged position in the new set-up? The future of the Community Method seems to be at stake. Would the President of the Commission enjoy more authority? He has strong political legitimisation (elected by the Parliament, on the basis of

⁹ See also, P. Craig, ‘European Governance: Executive and Administrative Powers Under The New Constitutional Settlement’, in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective* Jean Monnet Working Paper, 2004/5: 7.

¹⁰ G. Bermann, ‘Executive Power in the New European Constitution’, in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, p. 9.

¹¹ This thesis is shared by J. W. de Zwaan, ‘The Role of the European Commission Over the Years: Changes and Challenges’ and L. W. Gormley, ‘Disturbing or Rebalancing Powers within the European Union’, in J. W. de Zwaan, *et al.* (eds.), *The European Union: An Ongoing Process of Integration* (2004: 65ff., 52ff.).

¹² E. De Poncins, *La Constitution Européenne 25 clefs* (Paris: Lignes et repères, 2005), pp. 141–42. De Poncins somewhat naively, believes that the President of the European Council would not have any ambitions to influence the day-to-day functioning of the Union (“il n’aura pas vocations à intervenir dans la vie quotidienne de l’Union”).

parliamentary majority), he chairs a powerful bureaucratic institution and manages a considerable budget.¹³ One can imagine the opposite result. Would not the President of the European Council, elected by the heads of states and governments and thus enjoying their trust, establish for himself a much stronger position than that of the President of the Commission?¹⁴

There is no denying it, the simultaneous existence of two powerful figures in the EU institutional system, who have similar and sometimes even over-lapping competences could lead to rivalry. It is not at all clear who would resolve such conflicts. Let us look closely at two problems, that of agenda-setting and that of the coordination of EU Policy. The Constitutional Treaty endows the European Council with concrete prerogatives concerning agenda-setting. The European Council is to be responsible not only for defining the general political guidelines of the Union as it is currently (Art. 4, TEU), but also for the Union's *general political directions and priorities* (Art. I-21), which might constitute a direct challenge to the exclusive right of initiative that the Commission enjoyed hitherto. How would both politicians share tasks pertaining to agenda-setting? In the decision-making hierarchy the new Treaty explicitly assigns the primary role to the European Council. Currently it is the Commission which is largely responsible for programming the agenda of the Union, both in a short and long-term perspective.¹⁵ As noted, the Constitutional Treaty assigns the task of setting the Union's priorities to the European Council. A lot of questions which might be asked in this very context remain unanswered. Would the President of the European Council have the right to amend the draft agenda prepared by the Commission? The Commission would stress its exclusive right of initiative and the President of the European Council its right to set out the Union's general political directions and priorities. If conflicts were to arise, whose opinion would prevail?¹⁶ Does the word 'general' mean that the European Council might draft its

¹³ A. Lamassoure, *Histoire secrète de la Convention Européenne* (Paris: Fondation Robert Schuman, Albin Michel, 2004), p. 393.

¹⁴ J. W. Sap, 'The European President', *European Constitutional Law Review* (2005) 1/1: 50.

¹⁵ In 2002, starting with the reform of the functioning of the Council of Ministers introduced at the summit of the European Council in Seville, the General Affairs Council presented the European Council with a draft three-year agenda of the Union. Such a draft was established through the process of consultation between the respective Presidencies and the Commission. It was the opinion of the Commission, however, which was decisive throughout the consultations.

¹⁶ See K. Hughes, 'The Battle for Power in Europe: Will the Convention Get it Right?', *CEPS/European Policy Institute Network Working Paper*, 2002/Feb.; see also, K. Hughes, 'A

own multi-annual agenda of the Union? Does that mean that the Commission while planning the detailed agenda of the Union, which practically constitutes its exclusive competence, should take into account all of the decisions taken by the European Council?¹⁷ One should also not rule out the ambitions of the Presidency and of the Minister of Foreign Affairs when it comes to planning the Union's agenda. Is not such a competence overlap a potential recipe for disaster?

We cannot exclude the risk that so many decision-making sites may also hamper the coordination of the Union's policy. Who would be responsible for coordination and continuity of the workings of the European Council? The Constitutional Treaty enumerates three instances—the General Affairs Council (GAC), the Commission, and the President of the European Council. Who would be responsible for coordinating the workings of the Council of Ministers—the team Presidency, Minister of Foreign Affairs (who is to preside over the General Affairs Council), or the President of the European Council? The new Treaty (Art. I-24 (2)) assigns the task of implementing the decisions of the European Council to the General Affairs Council. The GAC should do this in liaison with the President of the European Council and the Commission. In practice this would allow the President of the European Council to meddle in the day-to-day working of all the formations of the Council of Ministers under the pretext of ensuring the follow-up of the meetings of the European Council. Would the President of the European Council use that provision in order to claim the coordinating prerogatives away from ministers of foreign affairs of the Member States?¹⁸ It seems that the new President of the European Council could try to strengthen and enlarge the remit of his competences, not only in relation to agenda-setting or coordination. Moreover, no provision of the new Treaty prohibits the setting up of a new administrative structure which would allow the President to consolidate his influence.¹⁹ In view of the above-mentioned arguments one has to come to the conclusion that the assessment of the role of

Dynamic and Democratic EU or Muddling Through Again? Assessing the EU's Draft Constitution', *European Policy Institute Network* 2003/8: 5.

¹⁷ P. Craig, 'Institutional Structure: A Delicate Balance', *European Constitutional Law Review* (2005) 1/1: 56.

¹⁸ See, P. Craig, 'European Governance: Executive and Administrative Powers Under The New Constitutional Settlement', in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective Jean Monnet Working Paper*, 2004/5: 39–41.

¹⁹ European Policy Center, EPC Convention Team, 'The Draft Constitutional Treaty – An Assessment – The EPC Convention Team', *EPC Issue Paper*, 2003/5: 9.

President of the European Council to a large extent has to be based on supposition and conjecture.

IV. The Union's Minister of Foreign Affairs

During the work of both the Convention and the Intergovernmental Conference there was general agreement as to the need for strengthening the effectiveness of the Common Foreign and Security Policy (CFSP). Most Member States also agreed with an idea to establish the post of the Union's Minister of Foreign Affairs who would be responsible for coordinating foreign policy. Full agreement concerned only the idea of setting up the post of the minister. The devil, as always, was in the details. Some of the most pro-integrationist Member States, such as Germany, wanted to endow supranational institutions with responsibility for managing CFSP. They were of the opinion that the Commission should take care of the whole spectrum of external relations (not only its economic aspects). France and Great Britain, on the other hand, defended the intergovernmental *status quo*.

After long and protracted negotiations in the Convention, finally a compromise agreement was reached. The Union's Foreign Minister is supposed to be simultaneously a member of two institutions, which in the Union's jargon has been baptised as 'double hatting', the minister would be a member of not only the European Commission (its vice-President) but also of the Council of Ministers—more specifically the chairman of the Council of Foreign Affairs. According to the Constitutional Treaty the Minister would be chosen by qualified majority voting by the European Council, with the agreement of the President of the Commission. The Minister, mandated by the Council of Ministers, would conduct the Union's Common Foreign and Security Policy, and, at the same time, as a member of the Commission, he will be responsible for external economic relations and coordination of all external actions of the Union. In exercising his duties the Minister shall be bound by Commission procedures.

The most important question which can be posed in the context of such enormous responsibilities concerns the sheer physical ability of the Minister to effectively carry out such an amount of work without negative consequences for the quality of Union's external policy.²⁰ The Constitutional Treaty did not answer other important dilemmas. First of all, where should the administrative structure

²⁰ See J. Howorth, 'The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility', *European Foreign Affairs Review* (2004) 9/4: 501.

supporting the Minister be placed? Second of all, how should the Minister behave in case of a difference of opinion between the Commission and the Council? Thirdly, what would be the exact division of competences between the Minister and the President of the European Council?

In Article III-296(3) the Constitutional Treaty mentions the setting up of the European External Action Service,²¹ but the Treaty does not resolve the problem where exactly the service should be located in the Union's institutional architecture. Should it be responsible to the Commission or the Council of Ministers or should it be a completely independent structure? The answer to that question is of fundamental importance not only for the evaluation of the role that the service should play but also for the whole community institutional set-up. If the European External Action Service were to be a body completely independent of the Commission one could easily imagine competition between two parallel bureaucratic structures. Certain Member States might even feel tempted to strip the Commission of its external responsibilities. In such a case the new service, besides foreign policy, would also be responsible for the Union's whole external policy (trade, assistance to the third world, representation in international organisations). If such an option were to be accepted, the Commission would be reduced to a secretariat managing the functioning of the Single Market, which would be tantamount to the death of the Community Method. Fortunately, because of its radicalism, such a solution would probably not get support from the majority of Member States.

In the view of the position taken by Great Britain and France, it is equally unlikely that full responsibility for the service would be granted to the Commission. Therefore, we would quite likely be faced with a hybrid solution where the service will be somehow linked to the Commission, however, its functioning will also be tightly controlled by the Member States. In the view of above-mentioned controversies, it is very difficult to evaluate and assess the consequences of the setting up of the service. A nucleus of common diplomacy might increase the effectiveness of the Common Foreign and Security Policy, making it clear to the Union's citizens that the Union, also in its political dimension, may be quite useful to them (for example through the defence of their interests in a place, where there is no diplomatic or consular representation of the country of their origin). One should not, however, reject a priori a possibility that

²¹ 'European External Action Service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States.'

the setting up of the European External Action Service would in the near future provoke competence disputes, which might contribute to the weakening of the Community Method.

The double status of the Minister is another problem worthy of attention, above all because it might produce a severe conflict of loyalties. The Minister will make decisions in two ways which quite often compete with each other. The Minister would be simultaneously responsible before two bosses (before the European Council and the President of the Commission) and as day-to-day experience teaches, it is not at all healthy to have two bosses at the same time. Such a situation may easily lead to a conflict of interest.²² One should ask a question whether the Council of Ministers through direct pressure on the Minister would want to intervene in the Commission's daily management of external policy, which could endanger its initiating a monopoly in that very field? Would the Minister become the Trojan Horse of the Council in the Commission?²³ Everything seems to suggest, if the Treaty were to enter into force, that the Minister would have closer institutional and legal links with the Council than with the Commission, he would preside over the Foreign Affairs Council and he would be responsible for conducting common foreign policy. The Minister would also be a full member of the Commission, but one should not forget that he would be bound by the Commission procedures only insofar as he would conduct Commission business and when it would not interfere with his other Council 'hat'.²⁴ Such a negative interpretation is, however, not the only one. Paul Craig, for example, is of the opposite opinion. He believes that setting up of the post of the Union's Foreign Affairs Minister will strengthen the Commission. The Minister would promote the Community viewpoint in the European Council. Such an

²² This problem is even highlighted in a very enthusiastic report of the European Parliament about the Treaty "But potential conflicts between the Minister and the President of the Commission or the President of the European Council remain possible, and his hybrid status may give rise to conflicts of loyalty to the Council and Commission", European Parliament (rapporteurs: R.Corbett, I.Mendez de Vigo), *Report on the Treaty Establishing the Constitution for Europe*, 2004/2129).

²³ Such a question was posed by J. Wouters, 'The Union Minister for Foreign Affairs', in J. W de Zwaan, *et al.* (eds.), *The European Union: An Ongoing Process of Integration* (2004: 85). Sometimes one can even hear the opinions that 'double hatting' might have a negative impact on the collegiality of the Commission, J. Howorth, 'The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility', *European Foreign Affairs Review* (2004) 9/4: 502.

²⁴ Article I-28 (4).

evolution would be especially worthwhile within the Common Foreign and Security Policy where the role of the Commission was hitherto very limited.²⁵

Conflicts of loyalties may be exacerbated by turf wars between the Minister and the President of the European Council.²⁶ It is easy to foresee problems associated with an unclear division of competences between the two above-mentioned instances. The external representation of the Union is a good case in point. Article I-22 states that this will be the task of the President of the European Council, without prejudice to the powers of the Minister.²⁷ The Treaty, however, does not specify how to do this in practice. Article III-296 (2), on the other hand, endows the Minister with very similar responsibilities.²⁸ The problem of overlap could be resolved through an informal deal between the President and the Minister. The question remains as to whether it can be done without provoking conflict?

At the end of our query about the Minister one should not forget the fact that it is not at all clear to whom the Minister is really responsible? Article I-26(8) states that the European Commission is responsible to the European Parliament. This provision concerns the Minister only in his Commission 'hat'—in the case of a successful motion of censure against him or her, the Minister shall resign from

²⁵ P. Craig, 'European Governance: Executive and Administrative Powers Under The New Constitutional Settlement', in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective Jean Monnet Working Paper*, 2004/5: 45–47.

²⁶ This opinion is shared by many experts, see, *inter alia*, W. Wessels and T. Traguth, 'The Constitutional Treaty Within a Fusion Trend', hand-out based on W. Wessels, 'Der Verfassungsvertrag im Integrationstrend: eine Zusammenschau zentraler Ergebnisse', *Integration*, 2003/4: 284; see also, S. Duke, 'The Convention, the Draft Constitution and External Relations: Effects and Implications for the EU and its International Role', *EIPA Working Paper* (2003) (W/2); J. W. de Zwaan, 'The Role of the European Commission Over the Years: Changes and Challenges', in J. W. de Zwaan, *et al.* (eds.), *The European Union: An Ongoing Process of Integration* (2004: 66); J. Howorth, 'The European Draft Constitutional Treaty and the Future of the European Defence Initiative: A Question of Flexibility', *European Foreign Affairs Review* (2004) 9/4: 502; European Parliament, *Report on the Treaty Establishing the Constitution for Europe*.

²⁷ Interestingly, in the previous version of the Treaty (CONV 770/03) the external representation of the Union was also the responsibility of the President of the Commission; available at: <http://europa.eu.int/constitution>.

²⁸ "The Minister for Foreign Affairs shall represent the Union for matters relating to the common foreign and security policy. He or she shall conduct political dialogue with third parties on the Union's behalf and shall express the Union's position in international organizations and at international conferences."

the duties that he or she carries out in the Commission (however, they keep their Council 'hat').²⁹

V. Vote weighting

As a result of a compromise, negotiated during the European Council Summit in June 2004, a new system of weighted votes based on the so-called double majority formula was accepted by the Member States. In comparison to the system agreed during the work of the Convention the new formula was based on somewhat higher thresholds needed for taking decisions by qualified majority voting in the Council of Ministers. According to the new system, which in case the Constitutional Treaty would enter into force would be operational after 2009, for the decision to be valid it must be supported by a coalition of at least 55% of Member States representing at least 65% of the Union's population. Thus, in a Union of 25 Member States any decision can be blocked by at least twelve Member States or a coalition representing 35.01% of the Union's population.³⁰

The issue of vote weighting was especially important for Poland. Warsaw was especially concerned that the double majority system could weaken the position of three crucial coalitions in the EU decision-making system—that of the new Member States, that of the group of poorer states and of those states which are genuinely interested in the Eastern dimension of the EU neighbourhood policy. Poland's government was concentrating on the issue of a blocking minority, as indeed were all Member States during the IGC of 2000 negotiations on the issue, not because they intended to block decisions, but because blocking minority parameters determine the power of a given Member State in both formal and informal negotiations. Moreover, under the new regime Poland would not be such a worthy partner in constructive coalitions, under the current system it is as interesting a partner as any of the big Member States. The greatest problem for Poland consisted of the fact that the Nice system of weighted votes constituted one of the most important and advertised conditions of Poland's membership of the EU accepted by the population in the accession referendum. There is nothing strange therefore in the fact that during the IGC negotiations Warsaw proved a

²⁹ The Minister could still carry out their functions in the Council, and their candidature could be submitted again. After acceptance by the European Parliament, the Minister could become a part of the new college.

³⁰ Moreover the Constitutional Treaty contains a provision that such a coalition must consist of at least four Member States.

very difficult negotiating partner on that particular issue. Because of Poland's intransigence an ingenious compromise solution had to be found.

The higher thresholds did not satisfy the Polish government, as its position with respect to blocking minorities was only marginally better than that negotiated in the Convention. Therefore, at the last moment of the June Brussels Summit a special declaration was added to the Constitutional Treaty which allowed a coalition of states dissatisfied with the result of negotiations to prolong discussions on a given subject for a reasonable time.³¹ The special mechanism could be triggered in cases of opposition by the group of Member States representing at least three-quarters of the population, or at least three-quarters of the number of Member States necessary to constitute a blocking minority under the new system (that is, a coalition of ten states or a coalition representing 26.26% of the Union's population).

The Polish government presented the compromise as a great success, stating that the position of Poland (when it comes to blocking minority) would equal that achieved under the Nice Treaty. The devil, as always, is in the details. Everything depends on the interpretation of the functioning of the special mechanism. Here the opinions of the experts differ very much. The Polish government argued that basically the lower thresholds from the declaration would always protect Polish interests. If ten Member States or a coalition representing 26.26% of the Union's population would not agree with the course of the discussions, the Union would refrain from taking a controversial decision. Obviously the declaration would be invoked only in the case of the national interests of great import and its existence would be guaranteed only until the year 2014.³² As the Polish government argued, however, the most important interests were to be defended as easily as under the Nice system.

Most experts disagree with this interpretation.³³ Where problems arise the Member States will discuss the controversial matter further. However, the declaration states that these discussions should not exceed a 'reasonable time' and the limits set by EU law. This means that a given matter would be referred to the

³¹ Declaration on the Article I-25 as attached to the Treaty establishing a Constitution for Europe.

³² According to the declaration annexed to the Treaty, in 2014 Member States would take a decision by qualified majority vote whether to prolong the functioning of the mechanism.

³³ See, for example, G. Milton, J. Keller-Noëllet, and A. Bartol-Saurel (eds.), *The European Constitution, Its Origins, Negotiation and Meaning* (London: John Harper, 2005), pp. 110–111. M. Dony and E. Bribosia (eds.), *Commentaire de la Constitution de l'Union européenne* (Brussels: Institut d'études européennes, 2005), p. 157.

Council for further arbitration, where discussions should be continued for a certain, limited amount of time, after which the procedures will follow their normal course.³⁴ Unlike the Polish government experts, the cited authors believe that the mechanism will simply provide a pause for reflection, a sort of a 'second reading'. The dominant view is that the declaration is often taken as a face-saving measure, a device to buy time, which allow Member States to ask for reconsideration.

The interpretation of the functioning of the declaration has a fundamental importance for the debate concerning the Constitutional Treaty in Poland. If the special arrangement were to function as the Polish Government depicted—the argument that the new Treaty diminishes Poland's power in the Council would lose a lot of its salience. If the interpretation given by most European experts were to prevail, the Constitutional Treaty would be rightly criticised for weakening Poland's say in the EU decision-making system. In any case, it should be stated that the ambivalent nature of the safeguard clause makes it very difficult for Polish citizens to make an informed decision on the Treaty.

VI. Conclusion

The debate on the Constitutional Treaty made a lot of simplifications and at times the opinions formulated had no grounding in reality. Many of the Treaty's critics tend to attack the already existing Community legal order and lament the creation of a super-state, whereas it is quite clear that the Constitutional Treaty is in no sense 'revolutionary' as it merely consolidates the *status quo*. On the other hand, the supporters of the Treaty, sometimes label as Eurosceptics all those who have any doubts about the new Treaty. The ambivalent nature of many of the Treaty's provisions means, however, that all of those who analyse it are bound to have mixed feelings, regardless of the fact whether it is viewed from a European or purely national perspective.

The Treaty contains many provisions which should be assessed positively—especially all those changes designed to simplify the existing legal order, or which strengthen the effectiveness of policies concerned with internal and external security. Some key institutional provisions, however, do have an intrinsically ambiguous nature. Their assessment is very difficult. Some reforms may produce negative unintended consequences, but the nature of other reforms is so open-ended that it is difficult to evaluate them with any authority.

³⁴ The decisions will be taken according to 55%/65% threshold.

It is extremely hard to come to unequivocal, straightforward conclusions when opinions have to be based on interpretation or conjecture. Especially in a post-enlargement scenario which brought about a qualitative change which renders all comparison with previous experience very unreliable, to put it euphemistically. Naturally, a decision has to be made about Treaty even without bullet-proof evidence or unquestionable data. It would be, however, very difficult for an honest, informed observer of the Union's reality to be absolutely free of any doubt.

Chapter 7

Enlargement and the Position of the EU in the World

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I. Introduction

The recent round of enlargement of the European Union by the adoption of new Member States (commonly known as the EU Eastward enlargement, although the term is not entirely correct), has been an event of historical importance, not only to the new entrants, but also to the whole EU where the outset of the twenty-first century saw an enormous intensification and important qualitative changes of integration processes (the successful introduction of the Euro as common currency being just one of many examples).

The adoption of ten new Member States, mainly from Central and Eastern Europe (CEE), was a difficult test for the EU structures and policies, and not only because this has been the biggest round of enlargement in the history of the European Communities so far. The growth in numbers alone has been serious enough to challenge the inner organisational consistency of any integrating group. It will probably make some difficulties even harder to cope with, including communication, negotiating common positions and the implementation of common actions, and the establishment of effective decision-making structures and mechanisms, etc. This, however, is just one of many problems.

Another key issue is that the experiences of the newly-adopted members in recent times, as well as their political and cultural backgrounds, have been for the most part very different from those of Western European countries, which partially accounts for their different levels of social and economic growth. As such, new entrants contribute their own genuine elements to practically all areas of EU activities, contributing what is essentially a new political quality. In this

sense the European Union faced new challenges, both as regards a follow-up to the task of carrying on its own integration processes, and absorbing the wealth and potential of the new entrants in order to be able reap the benefits resulting from accession.

Such challenges have considerably influenced the international dimension of European integration, including the EU's global position, and will continue to do so in the future. Two principal aspects of this influence may be distinguished: the area of foreign and security policy and the economic and social area.

II. The area of foreign and security policy

The recent enlargement will influence the European Union's foreign and security policy in its broadest meaning in relation to a number of issues, including international security in a wide context, transatlantic relations and the EU's Eastern policy. The addition of new Member States seems likely to modify EU policy with respect to its priorities, the influence of Poland and other new entrants in the debate and clashes regarding the US intervention in Iraq or the evolution of the EU's attitude towards Ukraine being just two examples.

At the same time, however, the very fact of enlargement did not bring any major or radical changes nor was any serious modification observed in the EU's political position in the world. This should be especially emphasised, as there is much opinion to the contrary, suggesting significant changes taking place in the field of EU foreign policy, allegedly resulting from the new Member States denying or undermining earlier EU experience. In fact, it is evident that the enlarged European Union has the same foreign and security policy, as that designed and developed prior to enlargement.

An apt case study in this context is to examine the influence of enlargement on transatlantic relations which have traditionally been the core of the European Union's foreign and in particular security policy throughout the post-war era. This history has had an interesting evolution full of elements of partnership and co-operation as well as those of competition and clashes.

The latter aspect has been especially prominent recently as one compares foreign policies or, in a broader sense, compares key areas of the international activities of the EU and the USA. Differences go far beyond the way they behave, reaching into the basic principles underpinning this area. Clearly, controversies in transatlantic relations are nothing new. The views and positions of both partners over various political, economic or defence-related matters have always differed considerably and they still do. However, the situation facing us today is something

qualitatively new, with fundamental differences existing with respect to both the doctrine and practice of how foreign and security policy is conceived and implemented in the EU and the USA. The recent round of enlargement, rather than provoking such differences, only emphasised their existence.

The main point in this respect relates to different attitudes towards today's crucial problems. Synthetically, one can say that (as R. Kagan put it in his well-known diagnosis)¹ the USA has clearly tended to divide the world into 'the good' and 'the bad' in a Manichean way, preferring firm actions and coercion to persuasion, and tending to reach for military power with little hesitation, as could be seen many times. Another peculiarity of US foreign policy, which recently gained importance, is its unilateralism, not only observed in political practice but reflected in official strategic ideas as well, for example, in the so-called 'Bush doctrine', announced in autumn 2002 and providing for potential preventive actions to be taken against rogue countries, as the USA call them. The European Union's activities in the global arena, on the other hand (potential charges of inconsistency or ineffectiveness notwithstanding) are carried out according to principles such as the promotion of democracy and human rights, applying of conciliatory and peaceful methods, renouncing military measures (in line with the concept of so-called 'civilian power')² which give way to political and economic instruments, etc. Moreover, Europeans seem quite determined to pursue comprehensive and multi-faceted actions, preferably implemented under the authority of the United Nations or at least consulted and agreed upon in a broader forum such as NATO.

We have to deal, then, with two distinct political philosophies: a more 'rigid' US one and a 'softer' European one. Both have been given additional labels in the literature: US policy has been called 'economic containment' referring to the famous doctrine of the Cold War era, while the EU position has been described as

¹ R. Kagan, *Of Paradise and Power. America and Europe in the New World Order* (New York: Atlantic Books, 2003).

² The *civilian power* characteristics include, among other things, repudiation of the exertion of military pressure which is replaced with peaceful measures, the superior status of political and diplomatic actions in solving global problems and using mechanisms and structures of international organisations to that end. See, D. Milczarek, 'The International Role of the European Union as a "Civilian Power"', *The Polish Foreign Affairs Digest* (2003) 3/4; see also, and S. Stavridis, 'Why the "Militarising" of the European Union is Strengthening the Concept of a Civilian Power Europe', European University Institute Working Papers, 2001/17.

‘interdependence’.³ Furthermore, the terms ‘asphyxiation’ and ‘oxygen’ respectively, have been used.⁴ Such differences reflect the division into categories of *hard power* (a policy that applies various forms of pressure, including the use of military force), and *soft power*, based upon conciliatory and peaceful methods.

The differences in question are well illustrated by very different attitudes to one of the most important global problems, i.e. how to deal with international terrorism. It has been evident that transatlantic allies have different visions of solving the problem. The USA, as can be seen from their intervention in Afghanistan and then in Iraq, is primarily concerned with finding military solutions, with political action playing a minor role. Most EU Member States, on the other hand—in particular Germany and France—are quite resolute about the opposite order of action: using military power only as a last resort, after (and provided that) all the potential of political solutions, especially within the United Nations, has been exhausted to no effect.⁵ It seems that this really stems, in the first place, from a different political philosophy, as outlined above, represented by European politicians, rather than from the fact that the military potential of EU Member States is vastly inferior to that of the USA, which leaves Europeans with barely adequate instruments to act.

Such differences in attitudes to basic international problems seem to reach far beyond what is revealed by concise analyses which reduce the problem to ‘just a family quarrel’ in the core of the Western world. Catastrophic visions aside, one nevertheless has to observe that, in the long run, such disagreements may

³ J. Zielonka, ‘Introduction: Eastern Europe in Transition’, in G. K. Bertsch, H. Vogel, and J. Zielonka (eds.), *After the Revolution. East-West Trade and Technology Transfer in the 1990s* (Boulder: Westview Press, 1991).

⁴ F. L. Lavin, ‘Asphyxiation or Oxygen? The Sanctions Dilemma’, *Foreign Policy* 1996/Fall.

⁵ There are, however, some significant exceptions to this practice, especially the attitude of the UK and a couple of other countries, including Poland, which seem to subscribe to the American line. It should be observed that an impact of transatlantic controversies upon Poland’s foreign and security policy has already been evident and will probably grow even stronger in the future, see the following articles: D. Milczarek, ‘After the EU and NATO Eastward enlargement: what kind of a new European order? Polish point of view’ in D. Milczarek and A. Z. Nowak (eds.), *On the Road to the European Union. Applicant countries’ perspective* (Warsaw: Warsaw University Centre for Europe, 2003), pp. 259–76, and D. Milczarek, ‘Ewolucja instytucjonalnych aspektów bezpieczeństwa w związku z integracją Polski z Unią Europejską’ (Evolution of institutional aspects of security in the context of Poland’s integration with the European Union), in U. Kurczewska, M. Kwiatkowska, K. Sochacka (eds.), *Polska w Unii Europejskiej. Początkowe problemy i kryzysy? (Poland in the European Union. Initial problems and crises?)* (Warsaw: PISM, 2002), pp. 127–40.

seriously undermine the transatlantic alliance, a spectacular example of which could be seen in a fierce controversy—not only between the EU and the USA, but also within NATO—about the US-led intervention in Iraq. The USA and EU Member States have already made serious accusations against each other: the USA accusing Europe of passive or even cowardly behaviour in the face of global threats, while charges of political and military irresponsibility and an urge to play the ‘global gendarme’ go the opposite way.⁶ Both actors are partially right, although it seems that the US policy is the one that gives more reasons.

Generally speaking, the present global power arrangement, based upon US domination, has been increasingly criticised for many reasons, including, *inter alia*, its ineffectiveness in providing global stabilisation and its scant consideration of other parties’ interests. The European Union, while not its only critic, is undeniably its most outspoken one, and its general vision of modern international relations, including, in particular, the methods used to solve the principal problems of global security, contrast strongly with those of the USA.

Once again, the controversy about the US-led intervention in Iraq is one of the best illustrations of how these discords develop and consolidate, leading to an open political and diplomatic conflict between the EU and the USA. Leaving the inner clashes over that matter in the EU apart (it is well-known that some Member States, including the United Kingdom and most new entrants, declared themselves in favour of the line taken by Washington), one has to agree with the opinion that the position assumed by two driving forces of European integration—France and Germany—have been decisive. Considering this, it would not be fair to conclude that Europe either comes out against the USA as such, or in defence of its own interests or bruised ambitions (the latter, while partially true, is only a secondary reason). Instead, it seems that what we are facing is a bold attempt to reconstruct a polycentric world, free from overwhelming US dominance; a world in which Europe, along with other leading global powers, would have more to say in response to the US unilateral and lop-sided model. In order for the analysis to be complete, some factors should be added that mitigate the image outlined above of tensions in transatlantic relations, and suggest that there are still chances to save the latter from failure. In fact, a number of positive aspects can be seen, both in the most sensitive area of foreign

⁶ According to R. Kagan, whilst the USA plays the role of the sheriff actively fighting bandits on the global scale, Europeans not only confine themselves to the role of passive onlookers, but sometimes appear to be more anxious about the rash sheriffs than they are about the bandits.

and security policy and, even more so, in the field of economic exchange and co-operation.

To begin with, one should note that despite the abovementioned controversies or even discordant political philosophies, the foreign policy of the EU as a whole could not be called strictly anti-American either as regards economic external relations or foreign and security policy. Moreover, as can be concluded from analysing developments in, for example, the EU Common Foreign and Security Policy/European Security and Defence Policy, it has still largely been based upon the long-standing transatlantic alliance. Such a balanced view is justified as one considers key issues which resist quick judgements prompted by current political events whose effects in the can hardly be foreseen in the long run.

It is sufficient to recall that the European Communities have been involved in a complex web of all sorts of relationships with the USA for decades and that both parties, their competition or rivalry apart, have really been each other's closest ally and partner. This is especially evident as one evaluates their economic co-operation, the total annual value of which is assessed, by some sources, at USD 2.5 billion and which generates 14 million jobs on both sides of the Atlantic Ocean. The USA and EU's share in each other's total exports and imports are in the range of 20–25%, making them each other's largest commercial partners. Even more meaningful data concern direct foreign investments: over 60% of all Foreign Direct Investments (FDI) in the USA is made by companies from the EU Member States, whilst US interests account for about a half the foreign investments in the EU.

As important as it is, this co-operation has not been free of tensions and clashes. Apart from periodic 'trade wars',⁷ both parties accuse each other either of general economic inefficiency (the USA's traditional charge against Europe), or the maintenance (by the USA) of an excessive trade deficit which results in the weakening of the US Dollar, thus promoting US exports to the detriment of the EU and other economies.⁸ However, such controversies, being common in so intense and important bilateral relations, should not be overestimated in the general assessment of transatlantic relations.

⁷ One of the most recent examples can be found in the decision made by President Bush in 2002 to impose customs duties upon steel goods imported to the USA; see *The Economist*, 11 May 2002.

⁸ According to experts, there is a threat that this deficit may even reach the level of 100% of US GDP. For more on this subject, see *The Washington Post*, 4 Jan. 2005.

We can agree with the opinion that the “United States and the European Union maintain the world’s largest and most significant economic relationship, which in turn is a foundation supporting the transatlantic political partnership”.⁹ In fact, both parties are each other’s largest economic partners and the roles they play with respect to each other in political terms cannot be underestimated. History shows that the USA has played the role of the principal guarantor of security for uniting Western Europe for more than half a century. Europe has been a natural US ally, having an enormous geo-strategic importance for the USA. Not even disputes over the war in Iraq, implying an open political and diplomatic conflict, can undermine these fundamentals of transatlantic partnership, both parties are well aware of that. This was further revealed by an evident improvement in political relations after President G. W. Bush’s re-election. Since early 2005, heads of state and diplomats began to send clear messages suggesting their readiness to resolve controversies and reach a compromise over the Iraq issue and other matters in dispute.¹⁰

It is against this broad background that one must view the role played by the new EU Member States, in particular those from the CEE. Most of them, having regained full independence at the turn of 1980s and 1990s and due to obvious geopolitical reasons, have chosen an active policy of close alliance with the USA and with NATO. It is in the latter political and military alliance that they look for guarantees of safety from Russia’s imperial ambitions, whereas in the European Union they see a structure of economic integration, which is important or even necessary for their further development. They do, however, regard the EU as a form of political and defence integration, albeit to a much lesser degree (quite understandably considering the weaknesses of EU foreign and security policy).

Obviously, the adoption of such a strategy largely determines the EU new Member States’ position as regards the transatlantic debate. This mainly relates to Poland, the country with the largest military potential and the biggest political ambitions among the new entrants, which has the most pronounced pro-American attitude. Poland’s position in the latter is not only manifested in its full political support for the US armed intervention in Iraq, but even to military

⁹ Working Group on the Transatlantic Economy in 2020, *The Transatlantic Economy in 2020: A Partnership for the Future?* (New York/Washington, 2004), ix.

¹⁰ Similar signals have been sent by Presidents Bush and Chirac among others and during her visit to Poland the new U.S. Secretary of State, Condoleezza Rice, commented that “Europe and the USA have shared common challenges”, and that “fears of those who said European and transatlantic unity cannot be reconciled with each other have occurred unjustified”, *Gazeta Wyborcza*, 11 Feb. 2005.

involvement in the war, which, by the way, provoked a good deal of justified doubts within the country as to its sense and consequences. While such behaviour elicits objections or, in some cases, even the irritation of certain EU partners, one should not forget that Poland is not the only one which adopts this line. Rather, Poland belongs to a broader group of countries revealing 'pro-Atlantic' sympathies, consisting of at least the United Kingdom (traditionally the USA's loyal ally), Italy, Spain (which changed its position mid-2004) and several other countries which have also supported the USA in both political and military terms.

One can safely argue, then, that the pro-US policy of the new entrants to the EU, and Poland in particular, whilst not exactly bringing any new elements to the transatlantic debate, very much consolidated a political option that has been observed in the EU for a long time, favouring strict co-operation with the USA. In other words, the positions assumed by the new entrants added to the existing controversies, both internal (especially evident between France and the UK), and external (between the EU and the USA) than caused them. This has to be firmly emphasised in the context of the misjudged opinions of some US politicians, such as the Secretary of Defence, Donald Rumsfeld, who tended to oppose the 'new Europe' of the EU recent entrants standing by the USA against the 'old Europe' of previous Member States, less favourable towards US policy. In reality conflicts over those matters are played along quite different dividing lines.

III. Economic and social issues

The influence of the Eastward enlargement has also been visible in terms of the general economic and social potential of the European Union in the international arena. Synthetically, this potential should be regarded as geographic, economic, demographic and social, military, etc. resources available to the European Union. Such resources are either substantive (the size and age of the population, territorial area, productive capacities of industry, etc.), or organisational and functional, including the educational and occupational structure of societies, labour organisation and efficiency, innovativeness of economies, and so on. They may be examined using various quantitative and qualitative indicators referring to various theoretical or empirical concepts such as geopolitics.¹¹

¹¹ This category has been understood in many different ways; for a review of various concepts of geopolitics see, J. E. Dougherty and R. L. Pfaltzgraff Jr., *Contending Theories of International Relations: A Comprehensive Survey* (New York: Pearson Higher Education, 1997).

For the present study it was essential to use geopolitical factors. These include geographic and demographic, economic, social and scientific/technological data, with a focus on highlighting transformations taking place in this field as the result of the EU enlargement by ten new Member States in 2004. Analysing the present situation against the background of the former EU-15 gives a better view of how things evolved and how to distinguish between the strengths and weaknesses of the EU in a global context. In order to obtain a clear and comprehensive image, ratios and indicators analysed below, quoted as cumulative data for the whole European Union, are compared with data relating to another crucial actor in international relations, namely the United States.

To begin with, basic data should be examined describing the European Union in terms of its geographic and demographic potential,¹² highlighting the factors that are unique to it, and placing particular emphasis on the results of the recent enlargement.

The first thing the data in the field of political geography reveal is that the present European Union, consisting of 25 Member States, is comparable in terms of a number of members to such international groups as the African Union or the Organisation of American States. Moreover, it will remain so after subsequent rounds of enlargement to 27, or even 30, Member States as well. In other words, it is not unique in this respect.

The situation is quite different when we consider other basic indicators: those of the territorial area and size of the population. As a result of the last enlargement the area of the European Union increased rather significantly, from *circa* 3.2 to 3.9 million square km., that is, by *circa* 20%. Despite this fact, the territory of the EU is still much smaller than that of the USA or several other important actors of international relations. Nevertheless, the EU maintains its meaningful position in the map of the world, which has more to do with the fact it covers most of the European continent (discounting Russia) which is very significant in geopolitical terms, than with the exact percentage of the global area it occupies.

With the 2004 enlargement, the European Union's population increased by nearly 75 million (which translates into a growth of *circa* 20%, as in the case of the

¹² The data presented below is from publications of the EC Statistical Office (Eurostat), CIA and other American agencies, the World Bank, OECD and the World Trade Organisation. It should be emphasised that the data reveal differences (quite considerable in some cases), even when they come from the same source and regard the same period. This may be caused, among other things, by different methodologies of data collection and processing.

area), thus reaching a total of over 455 million people. This leaves both the USA and Japan far behind, being second only to China (1.3 billion), and India (over 1 billion inhabitants). Whilst demographic potential is not pivotal for the position and power of any actor on the global scene in the modern world, it is obvious that it nevertheless strengthens a country's position in international relations. The reason is, among other things, that it generates a large sales market which is more important in the case of the EU given that its purchasing power is significant, not to mention other economic or political benefits. Additionally, Europeans live in a relatively densely populated area, which, at the same time, ensures propitious conditions for general social and economic development.

Furthermore, the population of Europe, including the enlarged EU, is very diverse (over 80 nations and ethnic groups). In many cases state borders run along the lines of fundamental ethnic divisions (Poland, which is very homogenous in this respect, being a good example), although there are also polyethnic countries, such as Belgium. This implies great cultural and linguistic diversity which manifests itself, for example, in using some languages not only within states, but also in wider areas as well, for instance in French or German-speaking areas.

Europe is not, however, the only part of the world to contain such diversity, and marked differences in ethnicity and language can also be observed in other global regions. Europe's *differentia specifica* is the fact that its diversity, especially within the European Union, basically gives no impulse for the emergence of serious tensions or conflicts stirred up by issues of nationality. With the one tragic exception of modern history, that of the Balkan region, other European sore points (such as conflicts in the Basque Country or in Northern Ireland or ethnic clashes in Belgium and in some CEECs) are not an imminent or direct threat to peace in Europe. Nor do they alter the image of the continent as a stable region as compared with other areas worldwide, where much more serious ethnic or cultural conflicts are experienced.

As shown above, the European Union has considerable geographic and demographic potential giving it a leading position globally, not only in terms of population, but also in less measurable categories such as cultural wealth, stability of social structures or the lack of serious ethnic conflicts. The recent round of enlargement brought positive changes in this respect, mainly through the ample growth of both EU territory and population as well as further enrichment of its ethnic, cultural and linguistic diversity. In sum, this forms a set of circumstances favouring the use, by the European Union, of its potential in the international arena.

EU economic potential is reinforced with the mechanisms of the Single Market and the Economic and Monetary Union, giving the EU a high position in macroeconomic rankings in the modern world. Regarding the crucial factor of Gross Domestic Product (GDP), one has to point out that while the 'old' EU, with a GDP of USD 10.5 billion was second only to the USA (USD 11 billion), their GDP levels after enlargement are similar. Considering the fact that the rate of GDP growth in Europe was lower than in the USA, its increase in absolute terms should be attributed to a general growth of EU economic potential, largely due to the accession of new Member States. (Although the growth was not exactly impressive: as the EU's territory and population increased by 20%, its GDP grew up by only around 5%.) Nevertheless, in this way the EU assumed a crucial position in the global economy, which is reflected in the respective shares of the two pivotal actors in the world's total GDP: both—the EU and USA—account for around 30%.

With respect to the rate of GDP growth in the EU Member States, ups and downs have been evident (which is typical of any developed country): in the 1990s an upward trend prevailed in the old EU, and it was only the recession which occurred at the beginning of the new century which reduced the growth ratio from 3.6% in 2000 to 0.8% in 2003. (The USA experienced a similar change, albeit with slightly different timing). One had to wait until 2004 for the first signs of a resurgence in the EU with a growth level of 2.4% in all 25 Member States, which presumably resulted from a general improvement of economic conditions rather than from the positive effects of enlargement, as suggested by forecasts for the next couple of years, according to which the rate of growth will merely remain at the present level, both in the EU and the USA.

The enlargement, however, prompted some changes in the EU's international economic position. The adoption of ten new Member States, while on the one hand increasing the total volume of the EU's GDP a little, making it comparable with that of the USA, implied, on the other hand, some negative trends in terms of the ratio of GDP *per capita*, calculated in Purchasing Power Standards (PPS): in the old EU it amounted to 27,500, decreasing after the enlargement to 24,000. The obvious reason was that new Member States, while strengthening the EU's demographic potential, have generally had a lower level of economic development.¹³ In any case, this increased the gap by which Europe trails the United States. This means that the European Union not only fails to make up for

¹³ It is sufficient to note that none of the new entrants has a GDP index of 100% of the average for the whole enlarged EU (half of them, including Poland, have an index in the range of 40–50%), while Portugal, as the poorest country of the EU-15, has 75% of the same average.

the distance lost to its US competitor, but also, in relative terms, drops a few places in the ranking. During the last decade US GDP *per capita* was around 50% higher than the EU and following the latter's enlargement this advantage increased to 60%. However, such weaknesses considered, the fact is that in general, EU Member States have enjoyed the top places in global wealth rankings while the US advantage over Europeans in terms of real purchasing power has diminished to less than 30%.

Another important factor revealing the huge international potential of the EU economy is the size of its foreign trade. Before the recent enlargement the EU ranked first in the world in terms of global exports and was second in imports, with a 22–23% share in both categories. Those indicators (taking only trade with third countries and not intra-Community trade into account) were comparable with the achievements of the leading global power, the United States, which took second place in exports and first in imports. The 2004 enlargement paradoxically diminished the EU's position in international trade, albeit only statistically, not in real terms. As a result of the inclusion of economic exchange with ten new Member States in the category of intra-Community trade (they were regarded as third countries beforehand), officially the EU-25 rank lower than the old EU-15 in international rankings. At present, the EU's share in global exports and imports is just over a dozen percentage points in either category, whilst the United States have enjoyed the first place in both. However, it is worth pointing out again that this is not meant to suggest any abrupt breakdown of the real volume of trade exchange with the outer world. The EU still remains a leading economic power of the modern world and its potential in this area will probably become even stronger, since the new entrants' foreign trade has developed better than expected.

The successful control of inflation in the 1990s was another important EU achievement: at the end of the decade the Harmonised Indices of Consumer Prices (HICPs) stood at only little over 1%. The situation in this area remains unstable, because inflation in the first years of the new century oscillated at around 2%. However, similar problems resulting from changing economic conditions, have been experienced in the developed world, including the US, where the inflation ratio is at a similar level. The effects of the EU enlargement in this respect are still hard to estimate, although—according to forecasts—it is not going to hurt too much because the new Member States have coped well with inflation control.

The EU's strong position in international financial markets has been another important factor. The common currency, the Euro, launched in 1999, is only beginning to compete, mainly with the US dollar, for a global position. The

success it enjoyed in 2004, when its value increased by 44%, coupled with the decline of the value of the US dollar by roughly one-third, seems to have given it a promising starting position. However, it has to be remembered that the vast majority of exchange transactions globally are made in US dollars, that this currency accounts for almost a half of the financial reserves of all countries and its low conversion rate benefits US exports.

An important asset of the EU economy, especially as regards old Member States, is its modern structure, as evidenced, among other things, by the predominance of the services sector whose share in the generation of total gross added value accounted, at the beginning of this decade, for over 70% (only slightly less than in the USA). In the old EU as a whole, the services sector employed nearly 70% of the total labour force (compared to 24% in industry and *circa* 4% in agriculture), and the ratio has been quickly increasing. Following EU enlargement, considering the aggregated data for the EU-25, the growth of this ratio slowed down a little, mainly as the result of the accession of CEECs, as their economic structure is in most cases less modern than that of the EU-15. For example Poland still employs over a 12% in agriculture.

In general, the economic potential of the enlarged European Union definitely ranks in leading positions globally and may only be compared with that of the United States. (This mainly relates to total GDP levels or the strengths of the common value of the Euro.) At the same time, however, weaknesses in certain areas should not be overlooked, in particular as regards a gap between the EU and the USA in terms of living standards measured by GDP *per capita* level or the general competitiveness of European economies.

Such weak points can be attributed, at least partially, to the effects of the recent EU enlargement which, on the one hand, generally consolidated the EU economy, but, on the other hand, diminished a number of factors relating to the European Union as a whole, especially those measured *per capita*. It seems, however, that such problems should be considered from two different perspectives: in the long run new entrants, bringing their potential and dynamism to the EU, are probably going to further contribute to its substantial economic and social growth, although in both the short-term and medium-term one has to reckon with some difficulties. In any case, the enlarged European Union has significant economic instruments at hand, enjoying a strong ability to benefit from enlargement in the international arena.

As we consider EU potential in relation to the so-called 'human factor' we have to deal with a more complex situation, which includes a category referred to in

this study as the European Union's social dynamism. Generally speaking, this means present and future development potential, stemming both from objective quantitative data and from certain, not so easily measurable qualitative characteristics, mainly relating to the structure of the population and the situation in the labour market (also taking scientific and technological potential into account), the level of education and the scale of innovativeness of the EU Member States' economies.

Starting with an analysis of population structure, one should keep in mind the basic demographic indicators, mentioned earlier, showing that in the effect of the recent enlargement, the European Union grew in number by 75 million people, that is by around 20%. Another key source of the growth in the number of inhabitants was migration, which mainly relates to the old EU countries. Since the mid-1990s immigrants have accounted for a majority of new EU inhabitants (although their number in absolute terms has gradually decreased). The accession of new Member States, especially CEE countries, reduced EU indicators in this area because the phenomenon of immigration (at least officially) has been much less intensive there. At the same time, however, problems regarding illegal immigration were seriously aggravated with enlargement; the new entrants adding, since 2004, their difficulties in this context to those experienced in the Western Member States.

The European Union in general features a decreasing trend in terms of population growth, which is mainly due to a very low level of indigenous growth. In the old EU-15, net population growth (net migration plus natural growth) has been gradually declining since the 1990s. This is in contrast with the situation in the United States, where the rate of population growth was, in the same period, several times higher. Even more importantly, net immigration accounted for only about a third of growth, whilst the rest consisted of a high level of natural growth which was as much as eight times higher than in the EU.

The enlargement of EU membership in 2004 not only failed to improve the situation, but it is quite likely to make it even worse. As revealed by natural growth indicators recording the ratio of births and deaths per 1,000 population,¹⁴ all of the newly-acceded CEECs have recorded negative natural growth, i.e. a decreasing population, in some cases dramatically, Latvia having the record-breaking ratio of almost -5. At the same time, among the old Member States, only Germany and Italy have recorded negative natural growth, but it has been at a

¹⁴ A positive rate indicates more births than deaths, while a negative one shows the opposite trend.

much lower level and there are cases of very high positive growth as well (Ireland: over +8). As a result of negative trends among the new Member States, the enlargement made the average ratio for the EU as a whole fall from +0.8 to +0.4. The situation is further deteriorated by inauspicious forecasts: whilst in 1950 Western Europe had twice as many inhabitants as the United States, in the mid-twenty-first century these proportions are likely to be the other way round.

Other trends which have intensified since the end of 1990s, should be mentioned, suggesting that the societies of EU Member States have been ageing rapidly. It should also be emphasised that the same tendency is positive from another point of view in the sense that this means an increase in life expectancy, reflecting an improvement in social conditions and living standards. In effect, the average EU citizen has a life expectancy of a little over 80 for women and nearly 75 for men. In the old EU these ratios were even better than in the USA, however, the enlargement, rather than improving them further, made the situation worse. In the societies of the newly-adopted countries, living standards are lower and, in effect, in the present EU-25 the average women's longevity is shorter by around half a year and the average man's by a whole year, than the average of the old EU-15.

In the EU the trend for a longer average life expectancy has been coupled with a negative trend in the form of a decreasing number of young people under the age of 14 (in the late 1990s they accounted for 17% of the total population), and an increasing number of elderly persons aged over 65 (*circa* 16% at that time). Similar negative tendencies can also be observed in the new entrants' societies. In effect, in the present European Union young people only account for a little over 16%, while the number of old people has increased to nearly 17%. Facing this, concerns seem justified about further growth of Europe's demographic potential. In the USA, however, the social structure is much better: young people account for 21% of the entire population and elderly persons for only 12% of the total population.

It may be concluded from the above demographic data that the societies of the enlarged European Union, undergoing a process of aging (which is typical of all the developed countries) are in a less advantageous situation than the United States. A large and still increasing group of elderly people in the EU Member States, absorbing more and more social funds, gradually becomes a burden for general social and economic development, especially for less wealthy new entrants. From this point of view, the younger and more dynamic US society probably has better opportunities in terms of both present and future competition with Europe.

As regards labour force potential, the EU's strength is its extensive character: a larger population simply translates into more hands at work. On the other hand, the European labour force in the old EU-15 was about 20% more expensive than in the USA, which in turn was compensated by the fact that they are much more efficient: EU workers were ranked among the most efficient workers globally, capable of manufacturing top quality goods (thus resistant to pressures to reduce prices). The entry of a relatively large number of workers from the new Member States into the EU labour market, while generally reducing the costs of European labour, also lowered labour efficiency ratios, so that in net terms it has not improved the EU economy's competitiveness in any significant way.

However, it is unemployment that is considered the most serious EU problem in terms of labour. One has to admit that although the old EU has had some success in controlling unemployment, the problem proved endemic, as revealed by the fact that both in the early and late-1990s it remained unchanged at 8%. The recent enlargement only added to the problem, as half of the new entrants have recorded unemployment ratios higher than the EU average (Poland leading with an alarming 19%). In consequence, the present average unemployment level in the EU has increased to 9%, as compared to around 5% in the USA which seems to have coped much better with the problem.

Generally speaking, the analysis of the situation as regards unemployment suggests that the European economy finds it much harder than the USA to solve the problem. Obviously, competition in the US labour market is much more intense than in Europe, but this also puts pressure on people to try harder, thereby strengthening general social development potential. In effect, this narrows European opportunities to compete in the international arena. On a more positive note, the EU has managed to create social security systems which are vastly superior to US ones, protecting people from the hardships of unemployment or other social problems. This should certainly be seen as an important strength of the European social model.

To conclude these considerations, we should discuss EU potential in the area of the development of science and technology. This is another area which cannot be considered using only quantitative data, however, there are adequate instruments at hand, such as the Technological Achievement Index (TAI). This records a set of factors indicating the level of general social and economic development of a given country, including issues of education, internet use or the number and character of patents registered.

We can conclude, using this tool to analyse the situation in the enlarged European Union that “a successful integration of the East Central European candidate countries into the European Union increases, rather than decreases, the European technological and open society potential”.¹⁵ The real point of this assessment is that it correctly rejects the clichés often repeated in both old and new EU Member States. Whilst it is known that old Member States have traditionally occupied, along with the USA, high positions in the TAI ranking,¹⁶ it should be stressed that some new entrants ranked not far behind: on the eve of their accession, the Czech Republic and Hungary, in 21st and 22nd place respectively, ranked just behind Italy, while Poland, last in this category (29th place) was not far behind Greece or Portugal (26th and 27th, respectively).

The same holds true as regards data on the average period of education. The USA leads the global list in this area, the average US citizen remaining in the educational system for twelve years. The best EU Member State is Sweden (5th place), while Poland, best among the new entrants, achieves 11th place with almost ten years’ education, which places it just behind Finland or Germany and far ahead of such important old EU Member States as France, Spain or Italy, not mentioning Portugal (61st place). Other newly adopted Member States also ranked reasonably well, with the Czech Republic at 15th, Slovakia on 23rd and Hungary in 25th place.

In general terms, EU countries have matched US achievements as regards the level of education of their societies. This is revealed, among other things, by the rate of young people aged 20–24 years graduating from high school, which oscillated around 74% for the old EU-15. Importantly, this is also the area in which the effects of EU enlargement are undeniably positive, increasing the same ratio for the present EU-25 by three percentage points. This should be attributed to the impressive results achieved by most new entrants from the CEE; in some of them, such as Poland, the Czech Republic, Slovakia or Slovenia, respective levels reach 90%, exceeding the result recorded in the old EU where Sweden has been leading with nearly 90%, but Portugal, last in the ranking, fails to get even 50%. This illustrates the new entrants’ emphasis on education, particularly of young people, and proves their serious contribution to development potential which will

¹⁵ A. Tausch, ‘The European Union in the World-System Perspective’ in R. Stemplowski (ed.), *European Union in the World System Perspective* (Warsaw: PISM, 2002), p. 53.

¹⁶ Before enlargement Finland ranked first, with the USA in second place, Sweden coming third, and other countries ranking within the first thirty.

prove essential both for them and for the social and economic growth of the EU as the whole.

Another area where last enlargement improved the general EU position is university education which is vital for a country's social and economic growth. Here the data are equally positive. The total number of university students in EU Member States, increased by more than 3 million, that is, by more than one-fourth, being a relatively larger percentage than that of the total growth of the EU population after enlargement. The good position of Poland in this respect should not be overlooked: with over 1.9 million university students it ranks before Spain (1.8 million) which has a similar population, and the same as Italy which has a much larger population.¹⁷ However, comparison of the EU as a whole with the USA is less impressive: the United States has almost the same number of university students as the EU. Considering the vast European advantage in demographic potential, this really reveals a net US advantage. This is confirmed by the ratio of university students to the total population, amounting to *circa* 4% in the EU and 6% in the USA. Moreover, the USA have allocated more funds expressed as percentage of GDP to university education than Europe has (1.5% compared to 1.1%).

The above data seems to suggest, in general, that the USA places more emphasis on the importance of education as the key factor in upgrading the skills of the labour force and improving the opportunities of finding a good job. In fact, this has a direct relationship with the previously discussed labour market situation which has been more demanding in the USA, but featuring lower unemployment at the same time.

Using the TAI ratio methodology one can supplement the analysis of levels of education with various indicators of scientific and technological development. It seems that the most expressive single factor is the internet use ratio in society as it really indicates a general level of the development of any given country. In absolute terms, the EU's position is quite fair: its inhabitants account for one-third of the *circa* 600 million global internet users, while respective shares for the USA and Japan are over one-fourth and around 10%. The recent accession of several CEECs, featuring an underdeveloped IT infrastructure, did not improve the situation and in fact, unfortunately it made it worse. This is quite obvious considering, for example, the rate of households with internet access, which

¹⁷ The position of Poland is only slightly worse than that of countries that are much larger in demographic terms and much wealthier, such as the UK (2.2 million), Germany (2.1 million), and France (2 million students).

decreased from 47% in the EU-15 to 43% in the EU-25. As an obvious conclusion, the EU should intensify its efforts to diminish such disproportion.

The same postulate relates to EU policy in the Research and Development (R&D) area. Whilst the United States have allocated around 3% of their GDP to research studies and technological growth, this is less than 2% in the EU. Worse still, the new Member States have spent even less on this field, so the ratio regarding the whole European Union decreased over the last year.

It is interesting how the situation in that area translates into the use of scientific and technological patents. Whilst around one-fourth of the global number of patents developed domestically by national scientists comes from the EU, higher by around ten percentage points than the USA, it is also true that Europe cannot compare in these terms with some Asian countries, Japan in particular, accounting for almost 60% of such patents. The situation is even worse as regards the import of patents, which really indicates the level of dependence of a given economy on an inflow of scientific-and-technological thought from abroad. EU Member States have depended upon such imports to a much higher degree than the USA; (50% for the USA, compared to 60% recorded by Germany, the best European country in this respect, with the rest of the EU Member States trailing far behind with levels in excess of 90%. Against this background data regarding the new entrants are quite similar to the EU average and in the case of Poland even better: with its ratio slightly over 90%, Poland ranks better than most countries of the old EU-15, Greece being the extreme example with dependence assessed at over 99%. Clearly, there is nothing to brag about, but again this disproves some of the clichés and confirms the above-mentioned opinion on the positive influence of enlargement upon the social and scientific/technological potential of the European Union.

Finally, let us consider investment in the development of modern technology, including, in particular, Information and Communication Technologies (ICT), the area in which the USA has a clear advantage over the European Union, as evidenced by the following figures: the ICT outlays in the EU accounting for less than 3% of GDP, compared to 5.5% in the USA. This seems to suggest Europeans have shown less appreciation of the importance of technology which is undeniably going to be one of driving factors of social and economic growth in both the short and the long term.

This also illustrates the opinion that “the European Union is in no position to effectively play the role of technologically leading centre of the world economy in

the 21st century”.¹⁸ Even if this view is too rigorous, it is by no means unjustified. Especially when compared to the USA, the EU really seems to put less effort in raising the general level of education of its societies and in particular in developing its scientific and technological potential. Whilst both in absolute terms and in a global context, the EU’s achievements are impressive, they may in fact prove insufficient to effectively face the present and future challenges of international competition, mainly posed by the USA.

IV. Conclusion

Generally speaking, the influence of the recent round of EU enlargement upon its international standing in political and military, as well as economic and social terms, does not allow for simple judgements. What is certain is the lack of any radical or key changes as compared with the situation prior to 2004.

There are areas where the enlargement has not brought any improvement at all, at times even aggravating problems experienced by the former EU-15. This relates, in particular, to some macro-economic growth *per capita* indicators (resulting from the sheer increase of the EU population), as well as to some data concerning economic and social potential, the entry of the new members resulting in a lower level in terms of general development.

The latter aspect has to negatively affect the bottom line of enlargement, but it should not be seen as crucial. Despite their relatively inferior economic and social position, new Member States manage to make a serious contribution to the EU-25 in terms of both individual strengths and resources; quite apart from the extensive growth of the EU demographic potential, they have also increased its economic power including the volume of foreign trade, as well as social and scientific/technological factors, especially in the field of youth education. All this is expected to appreciably complement the efforts undertaken in the context of the implementation of the Lisbon Strategy of 2000, assuming that by the year 2010 the EU should become the most competitive economic group world-wide.¹⁹

The same relates to the influence of enlargement on the EU’s foreign and security policy. It has been evident how the new entrants voiced their genuine political sensitivities in this field, and how clear their efforts to have their points of view and national policy priorities taken into account have been (Poland’s

¹⁸ A. Tausch, ‘The European Union in the World-System Perspective’ (2002: 62).

¹⁹ See, European Commission, *Delivering Lisbon-Reforms for the enlarged Union*, COM (2004) 29 final, Brussels, p. 2.

attitude to the Ukrainian issue being the best example); but again, they have made no revolution here. Instead, they have fitted smoothly into existing political constellations, enriching the range of options available for the enlarged EU in the area of foreign and security policy. Summing up, and contrary to some hasty criticism, not only have the new entrants from the East not undermined the EU's general prospects in the international arena, but they have, in fact, consolidated potential in this field.

While it is too early to draw any final conclusions, one can be confident that the EU, supplied with 'fresh blood' from the East, now enjoys better prospects for future growth both politically and economically. The adhesion of societies that are still not wealthy, but which have been very active in the pursuit of a better life, has given a new impulse to the processes of integration and consolidated the European Union as a whole. All in all, this means that its already significant international standing will probably become ever stronger in time.

Chapter 8

Pre-accession Conditionality and Post-accession Compliance in the New Member States:

A Research Note

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I. Introduction

Will the European Union face an ‘eastern (compliance) problem’ after the accession of eight new members from Central and Eastern Europe? There is certainly considerable debate about whether, or to what extent, the EU has a compliance problem in general, and a ‘southern problem’ in particular. However, most of the insights from this debate suggest that the implementation and application of EU rules in the New Member States (NMS) might be problematic.

The factors emphasised by the literature as crucial for the emergence of compliance problems are generally highly salient across the NMS. Adjustment costs for the NMS are high and their administrative capacities are limited. Societal mobilisation is weak and other factors on which the EU’s compliance system relies at the domestic level—such as levels of public awareness about EU rules and the experience of the judiciary with regard to the application EU rules—are generally problematic across the NMS. Certainly, the salience of such factors differs across the NMS, but due to the similar structural conditions relating to the socio-economic context of post-communist transition, conditions for compliance with EU rules are generally unfavourable.

However, awareness of these challenges has led the EU to take novel measures in the case of eastern enlargement. The involvement of the EU, and the Commission in particular, in the domestic politics of candidate countries during the pre-accession phase has been extraordinary. The imposition of such a strict and pervasive pre-accession conditionality is unique in the history of EU enlargement and the intrusiveness of monitoring pre-accession compliance is in stark contrast to the reactive approach *vis-à-vis* full members. As a result, the Commission has claimed that the last enlargement round was the best prepared in EU history. In its last annual monitoring report, the Commission stated that “in most areas of the *acquis*, preparations for membership have been virtually completed already at this stage [the end of September 2003] [...] They have reached a very high degree of alignment, and generally deserve to be commended for these achievements”.¹ Indeed, recent studies find that the EU’s conditionality was extremely efficient in prompting the adoption of EU rules during the pre-accession phase in the NMS.²

Yet despite the success of the EU’s pre-accession conditionality in prompting rule adoption, it is far from clear whether this success will prove sustainable. Much of the rule adoption during the pre-accession phase has consisted of the *formal* transposition of EU rules into national legislation. By contrast, *behavioural* rule adoption, that is, the application and enforcement of the rules, is lagging behind.³

A number of factors give rise to concerns that the application and enforcement of EU rules after accession will be problematic. These factors include the structural conditions relating to the specific socio-economic context of the NMS. The negative impact of some other factors is more likely to be short-term, such as changes in politico-administrative personnel as staff with particular expertise on EU affairs leave national administrations to take up positions allocated to the NMS in EU institutions.

This chapter suggests that the analysis should focus more on a factor that is specific to new members in an international institution with a high density of

¹ European Commission, *Comprehensive Monitoring Report on the State of Preparedness for EU Membership*, 5 Nov. 2003, p. 23.

² F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (Ithaca, NY: Cornell University Press, 2005); S. Leiber, ‘Implementation of EU Social Policy in Poland: Is there a Different “Eastern World of Compliance”?’, paper presented at the EUSA conference, Austin, 31 March–2 April 2005.

³ F. Schimmelfennig and U. Sedelmeier, ‘Conclusions: The Impact of the EU on the Accession Countries’, in F. Schimmelfennig and U. Sedelmeier (eds.), (2005, pp. 210–28).

rules and who have adopted the rules of the organisation prior to accession. In order to understand the nature and extent of problems with compliance in the NMS after accession, we have to take a closer look at pre-accession conditionality, and hence the *mechanisms of rule transfer* during the pre-accession phase.

In brief, the main mechanism that accounted for much the pervasive adoption of EU rules during pre-accession, were the external incentives of membership which underpinned the EU's conditionality, rather than alternative mechanisms of social learning or lesson-drawing.⁴ The dominance of conditional incentives as the main mechanism of rule transfer creates unfavourable conditions for post-accession compliance. Rationalist and constructivist approaches to international institutions both share this generally negative assessment. However, they differ in their particular views about why this should be the case, and accordingly also on how compliance problems can be avoided or overcome.

In a nutshell, for the *rationalists/materialists*, the key point is the changing incentive structure after accession. With regard to the bulk of the *acquis*, the key question is, then, whether the sanctions entailed in the EU's compliance system will be able to compensate for the absence of conditional incentives. From this perspective the specific sanctions and safeguards that the EU created in the accession treaties are therefore particularly salient. However, the prospects are then particularly daunting for the rules of the so-called 'enlargement *acquis*', such as minority rights, which were included in the EU's accession conditionality, but which the EU institutions have no power to patrol *vis-à-vis* full members.

For *constructivist/ideational* approaches, the key point is that rules transferred under conditional incentives are likely to remain contested after accession. Such rules do not enjoy the same legitimacy as rules that the NMS have actively helped to create, if the EU has not persuaded them of the appropriateness of these rules. However, from a constructivist perspective it is conceivable that processes of identification and persuasion, which were marginalised and superseded by conditional incentives during pre-accession, might now be able to come to the fore and acquire a causal impact on compliance. From this perspective, the 'social' instruments included in the EU's compliance system can therefore play a crucial role in overcoming compliance problems.

⁴ F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy* (2004) 11/4: 661–79; F. Schimmelfennig and U. Sedelmeier, 'Conclusions: The Impact of the EU on the Accession Countries', in F. Schimmelfennig and U. Sedelmeier (2005: 210–28).

II. Compliance conditions in the NMS

The compliance literature generally distinguishes between two distinctive sources of non-compliance with international rules. Non-compliance can be either the deliberate result of a state's strategic choice,⁵ or it can take the form of involuntary defection, due to the limited capacities of a state.⁶ The former case usually results from the high costs of adopting international rules (and the low enforcement capacities of the international organisation). Capacity limitations that lead to compliance problems stem from a lack of financial, administrative and institutional resources and technical expertise.

Both of the main sources of non-compliance are highly salient in the NMS, due to shared characteristics in their domestic structures. First, in the context of the socio-economic transformation which the NMS underwent, the scope and the depth of adjustment that EU rules required generally created high adjustment costs across countries and policy areas. The high financial, administrative and institutional costs to governments and firms created incentives for defection. Secondly, the administrative and institutional resources necessary to implement and enforce EU rules are severely limited in the Central and Eastern European Countries (CEECs) and often had to be created from scratch. The scarcity of technical expertise will be exacerbated by the mass departure of experienced officials who will take up positions in EU institutions after accession. Furthermore, private litigation and enforcement of EU rules through national court systems may be problematic. The principles of direct effect and supremacy of EU law, and the preliminary ruling system are weakly embedded. Technical expertise in the legal profession is scarce. These various capacity limitations create ample scope for involuntary defection.

The CEECs might thus present indeed a 'hard case' for the EU's compliance system. However, even if the main factors identified in the literature are generally unfavourable in the NMS, their salience varies across countries (and across policy areas). The quantitative data on post-accession compliance in the NMS that is currently available is unsuitable for a meaningful analysis. The 2004 Internal Market Scoreboard contains country-level data on notification of transposition of directives, but it consists essentially of self-reporting that has not been

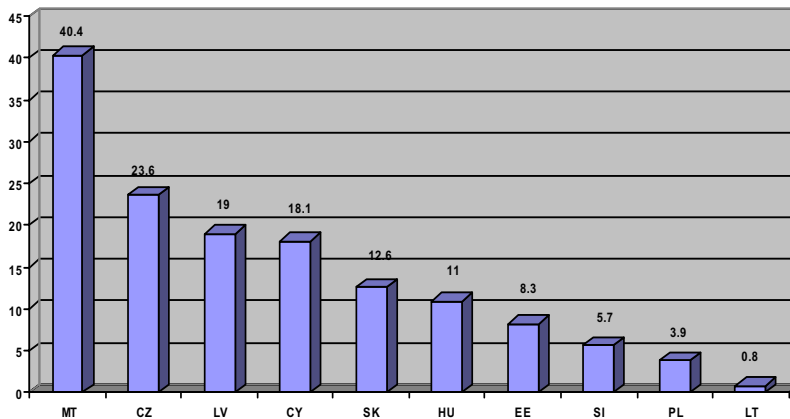
⁵ J. Fearon, 'Bargaining, Enforcement, and International Cooperation', *International Organization* (1998) 52/2: 269–305.

⁶ A. Chayes and A. H. Chayes, 'On Compliance', *International Organization* (1993) 47/2: 175–205.

verified by the Commission for correct transposition (let alone application and enforcement).⁷

For what it is worth (and probably not much), this data suggests significant variation in the NMS' implementation records (see Table 8.1). A very superficial analysis suggests that adjustment costs and capacity limitations alone cannot explain these variations. Lithuania's good record, failing to notify national implementing laws for only twelve directives (0.8%), contrasts starkly with the Czech Republic (360 directives, 23.6%), where the compliance conditions should be more favourable. The poor record of Malta (617 directives, 40.4%) casts doubt on whether compliance is a particularly eastern structural problem.

Table 8.1: Percentage of Directives not notified by the NMS, July 2004



Source: European Commission, *Internal Market Scoreboard*, No. 13, July 2004

Apart from generally unfavourable compliance conditions with regard to costs and capacities, another factor specific to eastern enlargement and that does not receive much attention in the compliance literature is the case of new members of an international institution with a high issue density, adopting the rules of the institution prior to obtaining membership. Cases of compliance of new members can also be related to other factors in the literature, such as the length of membership or influence on decisions (none in the case of new members). By contrast, moving the analysis from the macro-level to the (rule-specific) micro-

⁷ European Commission, *Internal Market Scoreboard*, No. 13, July 2004; available at: <http://europa.eu.int/comm/internal_market/>.

level is a useful starting point for analysing post-accession compliance and facilitates a better understanding of the mechanisms and conditions of rule adoption during the pre-accession stage. The main assumption is that the mechanisms of pre-accession rule adoption lead to specific causal paths of post-accession (non)-compliance.

III. Alternative mechanisms of rule transfer during the pre-accession phase

For a clearer understanding of pre-accession rule transfer from the EU to the NMS, we can distinguish three modes of rule adoption: external incentives, social learning, and lesson-drawing.⁸ These models differ with respect to two key dimensions (see Table 8.2).

Table 8.2: *Alternative mechanisms of Europeanisation*

		Logic of rule adoption	
		<i>Logic of Consequences</i>	<i>Logic of Appropriateness</i>
Principal actor in rule adoption process	<i>EU-driven</i>	External incentives model	Social learning model
	<i>CEEC-driven</i>	Lesson-drawing model	

Source: F. Schimmelfennig and U. Sedelmeier (2005: 8).

External incentives

The *external incentives model* is a rationalist bargaining model and captures the main dynamics underpinning EU conditionality. The actors involved are assumed to be strategic utility-maximisers interested in the maximisation of their own power and welfare. In a bargaining process, they exchange information, threats and promises; the outcome depends on their relative bargaining power. The main proposition of the model is that *governments adopt EU rules if the EU's rewards for doing so exceed the domestic costs of rule adoption*. In turn, this cost-benefit balance depends on a number of factors: (i) the determinacy of conditions, (ii) the

⁸ This section draws heavily on F. Schimmelfennig and U. Sedelmeier, 'Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy* (2004) 11/4: 661–79, and F. Schimmelfennig and U. Sedelmeier, 'Introduction: Conceptualizing the Europeanization of Central and Eastern Europe', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 1–28).

size and speed of rewards, (iii) the credibility of threats and promises, and (iv) the size of adoption costs.

First, the most basic requirement with regard to *determinacy* is that the EU must set the adoption of a given rule as a precondition for rewards (e.g. membership). Unless this is the case, the external incentives model would not expect a state to adopt EU rules. Furthermore, the clearer the conditions and the rules concerned, the more likely the adoption of those rules. Second, the likelihood of rule adoption depends on the size and speed of the EU's rewards, where the size of the reward depends on the type of incentives that the EU offers (e.g. association agreements, inclusion in accession negotiations, or membership), and the speed concerns the estimated time to achieve the rewards.

Third, in order to prompt rule adoption, the EU's conditionality has to be credible. This *credibility* depends on a number of factors. The EU's bargaining power has to be sufficient to be able to withhold the rewards unless the conditions are met; the application of conditionality has to be consistent and has to be underpinned by internal consensus within the EU; and the EU requires sufficient information resources in order to monitor the proper adoption of its rules.

Finally, the size of domestic adoption costs and their distribution among domestic actors determines whether they will accept or reject the conditions. Adoption costs can have various sources. First, they may take the form of the opportunity costs of foregoing alternative rewards offered by adopting rules other than EU rules. Second, they may produce welfare or power costs for private and public actors. On the other hand, adoption costs are balanced by the benefits of EU rewards. As a result, adoption costs may become negative: they turn into net benefits for some or all domestic actors. Given that EU rules have to be adopted and implemented by the state, the effectiveness of conditionality, then, depends, on the preferences of the government and the number of veto players with significant net costs of rule adoption.

Social learning

The *social learning model* follows core tenets of social constructivism. It has informed studies of international socialisation in general,⁹ and constitutes the most prominent alternative to rationalist explanations of conditionality¹⁰ and

⁹ J. Checkel, 'Why Comply? Social Learning and European Identity Change', *International Organization* (2001) 55/3: 553–88.

¹⁰ J. Checkel, 'Compliance and Conditionality', *ARENA Working Papers*, 2000/18 Oslo, ARENA; M. Kahler, 'External Influence, Conditionality, and the Politics of Adjustment', in S. Haggard

Europeanisation.¹¹ In contrast with the rationalist model of conditionality, the social learning model assumes logic of appropriateness.¹² According to this logic, the actors involved are motivated by internalised identities, values, and norms. Among the alternative courses of action, they choose the (most) appropriate or legitimate. Correspondingly, arguing for the legitimacy of rules and the appropriateness of behaviour (rather than bargaining about conditions and rewards), persuasion (rather than coercion), and ‘complex’ learning (rather than behavioural adaptation) characterises the process of rule transfer and rule adoption.

From this perspective, the EU is the formal organisation of a European international community defined by a specific collective identity and a specific set of common values and norms. Whether a non-Member State adopts EU rules depends on the degree to which it regards EU rules and its demands for rule adoption as appropriate in the light of this collective identity, values, and norms.¹³ The most general proposition of the social learning model therefore is: *a state adopts EU rules if it is persuaded of the appropriateness of EU rules.*

Several groups of factors impinge upon the persuasive power of the EU: legitimacy, identity, and resonance. Legitimacy refers to the quality of EU rules, the rule-making process, and the process of rule transfer. In this perspective, the legitimacy of EU rules and, as a result, the likelihood of rule adoption, increases if rules are formal, Member States are also subject to them, the process of rule transfer fulfils basic standards of deliberation, and EU rules are shared by other international organisations. As for identity, the likelihood of rule adoption is expected to increase with the identification of the target state and society with the EU community. Finally, rule adoption will be facilitated if conflicting domestic rules are absent or de-legitimised and if EU rules tie in with existing or traditional domestic rules (resonance).

and R. Kaufman (eds.), *The Politics of Economic Adjustment* (Princeton, NJ: Princeton University Press, 1992), pp. 89–133.

¹¹ T. Börzel and T. Risse, ‘When Europe Hits Home: Europeanization and Domestic Change’, *European Integration Online Papers* (2000) 4/15; available at: <http://eiop.or.at/eiop/>.

¹² J. March and J. Olsen, *Rediscovering Institutions. The Organizational Basis of Politics* (New York: Free Press, 1989), pp. 160–61.

¹³ F. Schimmelfennig, *The EU, NATO and the Integration of Europe. Rules and Rhetoric* (Cambridge: Cambridge University Press, 2003), pp. 83–90.

Lesson-drawing

According to the *lesson-drawing* model, non-Member States adopt EU rules without EU incentives or persuasion. Lesson-drawing is a response to domestic dissatisfaction with the *status quo*.¹⁴ Policy-makers review policies and rules in operation elsewhere and make a prospective evaluation of their transferability, i.e. whether they could also operate effectively in the domestic context.¹⁵ The most general proposition of the lesson-drawing model is: *a state adopts EU rules, if it expects these rules to solve domestic policy problems effectively.*

Whether a state draws lessons from EU rules depends on the following conditions: a state has to (i) start searching for rules abroad; (ii) direct its search at the political system of the EU (and/or its Member States); (iii) evaluate EU rules as suitable for domestic circumstances. These conditions depend in turn on four sets of factors: policy dissatisfaction; EU-centred epistemic communities; rule transferability and veto players.

IV. Pre-accession rule transfer

During the pre-accession period, the external incentives underpinning the EU's conditionality have been highly effective in prompting the transfer of EU rules to the NMS. Studies in this area show that the key condition for the success of EU rule transfer is whether the EU sets its rules as conditions for countries with a credible membership perspective.¹⁶ Some rule adoption even before the EU's conditionality was spelled out has been observed, but it was patchy and selective. CEEC governments often adapted EU rules or mixed EU rules with other models. However, once a given issue area became the subject of the EU's conditionality, rule adoption increased dramatically and became a consistent feature across countries and issue areas.

The external incentives model thus appears highly successful in explaining rule transfer. However, not all of the conditions that the model postulates as relevant are equally important. The *credibility* of the prospect of EU membership as a reward for rule adoption, which increased significantly once accession

¹⁴ R. Rose, 'What is Lesson-Drawing?', *Journal of Public Policy* (1991) 11/1: 10–12.

¹⁵ *Ibid.*, pp. 23–24.

¹⁶ This section draws heavily on f. Schimmelfennig and U. Sedelmeier, 'governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe', *Journal of European Public Policy* (2004) 11/4: 671–74; and F. Schimmelfennig and U. Sedelmeier, 'Conclusions: the Impact of the EU on the Accession Countries' in F. Schimmelfennig and U. Sedelmeier (eds.), (2005: 210–28).

negotiations started, emerges as the most important factor influencing the cost/benefit calculations of CEEC governments. With the massive benefits of EU membership within reach, the fulfilment of EU *acquis* conditions became the highest priority in CEEC policy-making, crowding out alternative pathways and domestic obstacles.

Adoption costs and domestic *veto players* do not play as decisive a role. Costs are unlikely to be prohibitive, as once a credible membership perspective has been established adoption costs in individual policy areas are discounted against the (aggregate) benefits of membership, rather than just the benefits in this particular policy area. In the area of social policy, the CEECs even adopted the more costly rules relating to secondary legislation (such as health and safety in the workplace) more fully than the less costly rules relating to the Social Dialogue.¹⁷ Similarly, concerning the free movement of persons, rule adoption was more pronounced for the more costly Schengen rules than for the internal market rules.¹⁸

In other cases, adoption costs explain variation in the *speed* of rule adoption across issue areas and countries. In the Czech Republic, regionalisation only increased after the reticent Klaus government lost office.¹⁹ In Slovakia, rules for decentralisation were eventually adopted after the election victory of the anti-Mečiar coalition, but the divergent preferences within the coalition relating to ethnic minority politics still made for protracted negotiations.²⁰ In the area of environmental policy, opposition from the energy sector in Poland prevented the adoption of control-and-command instruments that the EU prescribed to combat air pollution. In contrast with the Czech Republic, EU rules were thus only adopted in the late 1990s once the EU's conditionality set in.²¹ In sum, adoption

¹⁷ B. Sissenich, 'The Transfer of EU Social Policy to Poland and Hungary', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 156–77).

¹⁸ H. Grabbe, 'Regulating the Flow of People across Europe', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 112–34).

¹⁹ M. Brusis, 'The Instrumental Use of European Union Conditionality: Regionalization in the Czech Republic and Slovakia', *East European Politics and Societies* (2005) 19/2: 291–316; W. Jacoby, 'External Incentives and Lesson-Drawing in Regional Policy and Health Care', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 91–111).

²⁰ M. Brusis, 'The Instrumental Use of European Union Conditionality: Regionalization in the Czech Republic and Slovakia', *East European Politics and Societies* (2005) 19/2: 291–316.

²¹ L. Andonova, 'The Europeanization of Environmental Policy in Central and Eastern Europe', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 135–55).

costs and veto players may therefore influence the *timing* of rule transfer, but they do not lead to systematic variation in the success of EU rule transfer as such.

Thus, a credible membership perspective and the setting of rules as conditions for membership appear to be the most important conditions for successful rule transfer through the external incentives mode of EU external governance. Variation in the timing of rule transfer can be explained primarily with domestic veto players and the salience of an issue area for accession.

However, how can the—albeit limited—alignment of the CEECs with the *acquis* prior to the explicit formulation of the EU's conditionality, or in issue areas in which EU conditionality is absent, be explained? The broader picture of patchy, selective and adaptive transfer in the absence of conditionality conforms to the conditions specified in the external incentives model. Yet, although EU incentives become a sufficient condition for rule adoption and trump all alternative mechanisms once the EU provides a credible membership perspective and spells out its requirements, EU incentives are thus not a necessary condition for rule transfer. To the extent that rule transfer occurred at all in such cases, it happened through the alternative modes of external governance—social learning and lesson-drawing.

Examples of patchy rule adoption that predates the EU's conditionality include the adoption of command-and-control rules against air pollution in the Czech Republic—but not in Poland;²² moves towards regionalisation in Hungary, which started even prior to 1989, in contrast with the Czech Republic and Slovakia;²³ central bank independence in Poland;²⁴ minority protection in Hungary and, to some extent, in Poland, but not in Romania;²⁵ or elements of health policies in

²² Ibid., pp. 135–55.

²³ M. Brusis, 'The Instrumental Use of European Union Conditionality: Regionalization in the Czech Republic and Slovakia', *East European Politics and Societies* (2005) 19/2: 291–316; W. Jacoby, 'External Incentives and Lesson-Drawing in Regional Policy and Health Care', in F. Schimmelfennig and U. Sedelmeier, (2005: 91–111).

²⁴ R. Epstein, 'Diverging Effects of Social Learning and External Incentives in Polish Central Banking and Agriculture', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 178–98).

²⁵ G. Schwellnus, 'The Adoption of Nondiscrimination and Minority Protection Rules in Romania, Hungary, and Poland', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 51–70).

Hungary and the Czech Republic that were oriented toward their pre-war Bismarckian health insurance systems.²⁶

In such cases of social learning and lesson-drawing, the presence or absence of epistemic communities promoting EU rules emerges as a key factor. The presence of EU-centred networks of experts and officials was an important condition, for example, for the reception of EU rules for clean air policies in the Czech Republic, while the dominance of more US-centred International Financial Institutions (IFI) experts led to the adoption of different rules in Poland.²⁷ Dense interactions between CEEC officials and experts with EU counterparts also facilitated social learning, as in the case of Polish central banking,²⁸ or of officials in CEEC interior ministries who—in contrast with their colleagues from foreign ministries or prime ministers' offices—appear to have largely internalised the ideas underpinning the EU's Schengen rules.²⁹ At the same time, the presence of epistemic communities alone is not a reliable indicator. For example, in contrast to earlier periods, consultations with EU health policy experts had little impact on Hungarian policies after 1998.³⁰

Finally, in cases in which the EU's requirements leave some room for choice within a larger universe of acceptable rules, the lesson-drawing model might explain which specific rules the CEECs adopt or how they interpret and use these rules. An example is regionalisation in the Czech Republic and Slovakia. Both countries adopted a regionalisation scheme compatible with EU rules. The Slovak government, however, designed regionalisation to promote democratisation, whereas the Czech government emphasised subsidiarity.³¹

²⁶ W. Jacoby, 'External Incentives and Lesson-Drawing in Regional Policy and Health Care', in F. Schimmelfennig and U. Sedelmeier (2005: 91–111).

²⁷ L. Andonova, 'The Europeanization of Environmental Policy in Central and Eastern Europe', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 135–55).

²⁸ R. Epstein, 'Diverging Effects of Social Learning and External Incentives in Polish Central Banking and Agriculture', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 178–98).

²⁹ H. Grabbe, 'Regulating the Flow of People across Europe', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 112–34).

³⁰ W. Jacoby, 'External Incentives and Lesson-Drawing in Regional Policy and Health Care', in F. Schimmelfennig and U. Sedelmeier (2005: 91–111).

³¹ M. Brusis, 'The Instrumental Use of European Union Conditionality: Regionalization in the Czech Republic And Slovakia', *East European Politics and Societies* (2005) 19/2: 291–316.

V. Post-accession compliance: preliminary considerations

The previous section suggests that the main mechanism that accounted for much of the pervasive adoption of EU rules during the pre-accession period were the external incentives of membership which underpinned the EU's conditionality, rather than alternative mechanisms of social learning or lesson-drawing. In general, both rationalist and constructivist approaches to international institutions would expect that the dominance of conditional incentives as the main mechanism of rule transfer would create unfavourable conditions for post-accession compliance. However, they differ in their particular views about why this should be the case, and accordingly also on how compliance problems can be avoided or overcome.

Mode of pre-accession rule transfer

The mode of pre-accession rule transfer is a first key factor that affects post-accession compliance. The rules transferred through external incentives are more likely to remain contested than those transferred through social learning or lesson-drawing. For example, Rachel Epstein demonstrates that central bank independence in Poland, which was adopted as the result of a social learning process, enjoyed wide acceptance and was successfully defended against governmental attacks by a broad coalition of societal actors.³² By contrast, the coercive process that led to the adoption of agricultural policy resulted in widespread domestic resistance and contestation. Heather Grabbe shows that social learning and lesson-drawing by officials in CEEC interior ministries led to the implementation of Schengen rules, despite the concerns of foreign ministries and prime ministers' offices.³³ Thus, in cases where rule transfer is based on social learning or lesson-drawing, sustainable compliance after accession is highly likely. Since the NMS governments are either persuaded of the normative legitimacy or their utility independently of EU accession, the act of accession should not lead to a reversal of rule adoption.

By contrast, in those cases where conditional incentives were the main mechanism of rule transfer, conditions for post-accession compliance are generally more unfavourable, and the likelihood of compliance will depend on additional factors. A constructivist perspective emphasises that if the EU has not

³² R. Epstein, 'Diverging Effects of Social Learning and External Incentives in Polish Central Banking and Agriculture', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 178–98).

³³ H. Grabbe, 'Regulating the Flow of People across Europe', in F. Schimmelfennig and U. Sedelmeier (eds.), *The Europeanization of Central and Eastern Europe* (2005: 112–34).

engaged the NMS in processes of deliberation and socialisation to persuade them of the appropriateness of these rules, these rules do not enjoy the same legitimacy as rules which the NMS have participated in creating. Such rules are therefore likely to remain contested after accession. From a rationalist perspective, the changing incentive structure after accession will condition post-accession compliance. Compliance should not become problematic where rules do not create high adjustment costs after accession, and for which the governments' implementation capacities are sufficient. In all other cases, the key question is whether the EU's compliance system will be able to compensate for the absence of conditional incentives. An important difference is between compliance problems that arise from high adoption costs and those that stem from capacity limitations. The former create typical enforcement problems while the latter present management problems.

In view of the obstacles to compliance arising from adoption costs and veto players, governments calculate whether the costs of behavioural rule adoption outweigh the costs arising from the sanctions entailed in the EU's compliance system. The key factors in this calculation are (a) the threat of potential sanctions, and (b) the likelihood that non-compliance will be detected. The former relates to the sanctioning instruments at the EU's disposal and the latter to the EU's monitoring capacity.

Monitoring and detection

The risk of detection of non-compliance relates in a large part to the Commission's monitoring of implementation. Accession leads to a considerable change in the Commission's monitoring. The Commission no longer issues 'regular reports', but will rely on the regular monitoring instruments that it uses *vis-à-vis* the Member States, such as the annual 'internal market scoreboard'. These scoreboards assess the transposition of internal market directives by Member States.

Other than registering cases of the non-notification of the transposition of directives, the EU's compliance system relies essentially on decentralised monitoring at the national level to detect cases of non-compliance, including from citizens and companies who expect benefits from the correct application of EU rules. Detection then depends on the awareness of actors of EU rules from which they benefit, as well on their capacities to mobilise in cases of non-compliance. According to the logic of collective action, such mobilisation is more likely in the case of rules that benefit companies, rather than diffuse 'civic' interest. From a rationalist perspective, post-accession compliance is therefore less likely in

the case of the latter rules, especially if it does not create negative externalities for firms in other Member States.

In sum, low monitoring capacity in combination with rules that empower diffuse interests with low organisational capacity are most likely to lead to sustained, undetected non-compliance, either because of management problems or as a governmental choice in response to high adoption costs.

Compliance instruments and sanctions

Among the sanctions available in the EU's compliance system, rationalist materialist approaches stress the importance of material sanctions, while sociological and ideational approaches also focus on social sanctions. Among the material sanctions, the management approach focuses on the importance of resource transfers, the provision of information and capacity building to overcome compliance problems stemming from capacity limitations. If compliance problems do not arise from deliberate government choices, but are the unintended result of administrative capacity limitations, they might be overcome through specific support measures from the Commission, such as Technical Assistance Information Exchange (TAIEX) training, twinning (light) projects or funds available under the Transition Facility.

Enforcement approaches focus on the punitive sanctions to overcome strategic non-compliance by governments. With regard to such negative sanctions, the EU's compliance system allows Member States, citizens, or companies to take legal action, which may ultimately lead to the imposition of a fine by the ECJ. In addition, the EU created specific sanctions and safeguards in the context of the 2004 eastern enlargement. These safeguards are included in Articles 38 and 39 of the Accession Treaty signed in April 2003. During the first three years of membership, the Commission can take measures if the failure of an NMS to apply the *acquis* properly risks causing a serious breach of the functioning of the internal market. Such measures include the temporary exclusion of a NMS from the benefits of certain internal market legislation and other benefits of membership in certain areas.

However, the availability of these sanctions depends on the type of EU rules involved. The prospects are then particularly daunting for the rules of the so-called 'enlargement *acquis*', such as minority rights, which were included in the EU's accession conditionality, but where EU institutions have no power *vis-à-vis* full members. From a rationalist perspective, these rules are therefore a particularly hard case for post-accession compliance, unless the EU starts to institutionalise them internally.

Approaches that take social factors seriously also emphasise the importance of non-material sanctions. Among the positive sanctions, this includes processes of socialisation of the NMS to persuade them of the appropriateness of EU rules. Processes of socialisation might be triggered either pre-emptively, in the course of the EU's support measures designed to provide information about the rules and their application, but also after initial non-compliance has been detected.

Negative social sanctions include the act of shaming non-compliant Member States. The effectiveness of both positive and negative social sanctions should be facilitated the more an NMS (a) identifies positively with the EU, and (b) has a 'compliance culture'³⁴ in which the rule of (international) law enjoys high legitimacy. On the other hand, constructivist approaches emphasise further factors that might cause compliance problems with particular rules: the resonance of EU rules with national belief systems and political discourses.

In sum, a focus on the specific features of the process through which the NMS adopted EU rules suggests that the mode of pre-accession rule transfer leads to specific pathways of (non)-compliance after accession. Rationalist and constructivist approaches offer partly competing, partly complementary factors that are likely to result in initial (non)-compliance: mode of pre-accession rule transfer; domestic adjustment costs and veto players; rule resonance; EU monitoring; and the organisational capacity of actors empowered by EU rules. In cases of detected initial non-compliance, management and enforcement approaches on the one hand, and material and social approaches on the other, emphasise the effectiveness of different instruments in the EU's compliance system (see Table 8.3). In practice, different types of instruments are rarely used in isolation and it might be precisely their combination which accounts for their effectiveness.³⁵

Table 8.3: Instruments in the EU's compliance system:

	Positive sanctions	Negative sanctions
Social instruments	Persuasion, deliberation	shaming (scoreboards, etc.)
Material instruments	Financial support, training	safeguards, fines

³⁴ D. Beach, 'Why Governments Comply: an Integrative Compliance Model that Bridges the Gap between Instrumental and Normative Models of Compliance', *Journal of European Public Policy* (2005) 12/1: 113–42; G. Falkner *et al.*, *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States* (Cambridge: Cambridge University Press, 2005).

³⁵ J. Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union', *International Organization* (2002) 56/3: 609–43.

Chapter 9

Enlargement and EU Constitutionalism in the Balkan Periphery

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I. Introduction

The processes of EU enlargement and the constitutionalisation of the EU as a separate political entity were supposed to go hand in hand, supporting and reinforcing each other. This is no longer the case. The French negative vote on the Constitutional Treaty revealed that enlargement, and especially further enlargement, is seen by many as a problem for the constitutionalisation of Europe. French voters, by no means alone in their rejection of the Treaty, seem to worry that enlargement may undermine the French welfare state and dilute European values and identity, especially if countries like Turkey are admitted to the club. If anything is clear after the French and the Dutch referenda, it is that enthusiasm for further south-eastern enlargement with Turkey and Ukraine has been largely exhausted. In other words, regardless of the direction the EU goes regarding its constitutional future, there is unlikely to be any serious future enlargement steps any time soon. Indeed, many now see any future enlargement as an obstacle to the process of constitutionalisation.

Against this background, Bulgaria and Romania are in a dubious position. They are either the last to benefit from the old enlargement policies, or the first to experience the novel, and expectedly more restrictive, stance of the EU to the admission of new members. On the one hand, there are a number of (positive) signs that the door will only shut after these two countries become full members. Most importantly, on 25 April 2005, just a month before the French and the

Dutch referenda, Bulgaria and Romania signed an Accession Treaty with the European Union according to which they are going to join the EU family in 2007.

The signing of the Treaty took place at a solemn and beautiful ceremony in Luxembourg, welcoming the two countries and stressing the historic importance of the event with which yet another significant part of the European continent became a part of its political union. There was something in the air of this ceremony, however, which revealed the genuine concerns of the representatives of EU bodies and the Member States about the future of the Union. Bulgaria and Romania were indeed warmly welcomed and congratulated on the successful completion of a long and difficult negotiation process, but the triumphant spirit of the previous accession ceremonies was missing. Many questions at the press conference after the ceremony were fraught with anxiety.

The ceremony, which was watched live on television by most Bulgarians and Romanians, had a certain sobering effect which counterbalanced the self-congratulatory speeches of the political leaders of the two countries. Up to that moment, the people of these two countries had been so preoccupied with the idea of joining the EU and the fulfilment of the accession requirements that they practically isolated themselves from the debates on the constitutional future of Europe and the necessity for reform in many of the policy areas of the EU.¹

Probably because of this isolation the negative vote of France and the Netherlands on the Constitutional Treaty took many in Bulgaria and Romania by surprise. There were more unpleasant surprises in store, however: immediately after the vote there were some troubling signs that the accession of the two countries could be delayed, or even postponed indefinitely. Firstly, on 2 June 2005 the European Commission showed 'yellow cards' to Sofia and Bucharest by sending letters stressing the 'insufficient speed' of reforms in the pre-accession period.² According to the Accession Treaty, if the two countries fail to implement

¹ Judging by the experience of other accession countries, this is quite normal, as the accession imperative also overshadowed other debates in the CEECs. As a result of this accession imperative, Bulgarian and Romanian societies still lack a genuine sense of the historic character of the moment. From their peripheral perspective, the moment was historic mainly because of *their* accession. From the perspective of the Union, the moment requires difficult constitutional decisions, which will determine the future functioning of the EU, as well as the possibilities for further integration and enlargement. The sobering effect of the ceremony did something to bridge the gap between the two perspectives, but this was just a very modest beginning.

² B. Melteva, *EU Sends 'Yellow Cards' to Sofia and Bucharest (EC праща „жълти картони“ на София и Букурещ* in Bulgarian, all translations by the author), 2 June 2005, <http://medapool.bg>.

some of the necessary reforms, their entry could be delayed by a year. Sticking to football terminology, the two countries soon received something closer to a 'red card': Angela Merkel, the leader of the German Christian Democrats, made it clear that if her party was called upon to form a government following the 2005 elections it would review the progress of Bulgaria and Romania, and in general, would slow down the enlargement process. The implications of her statement are that Germany may eventually block the accession of the two countries by not ratifying the Accession Treaty. Other senior representatives of the German right-of-centre parties also expressed the view that Croatia, Bulgaria, Romania, if successful, should be the last to join the Union for a long time.³ Despite upbeat statements from the European Commission that there is no link between the referenda on the constitution and the accession of Bulgaria and Romania and a statement by Chancellor Schroeder that there will be no change of accession plans,⁴ in the two countries there was a growing sense of unease. In an attempt to reassure the public, on 6 June 2005 the two foreign ministers, Solomon Passi (Bulgaria) and Mihai Ungurianu (Romania), signed a joint declaration expressing their conviction that the two countries would be responsible and reliable members of the EU, who would fulfil all duties related to their membership.⁵

One of the bitter ironies of this story is that Bulgaria and Romania are probably the two most pro-European countries on the continent at present. It would indeed be a pity if the failure to adopt the constitution comes at the price of postponing their accession in 2007, mainly because an eventual delay will certainly inspire significant Eurosceptic sentiment and a possible flourishing of nationalistic, identity politics. One wonders how this could help the two countries to prepare better for membership. In the present uneasy situation, the greatest challenge before Romania and Bulgaria is to avoid the transformation of their EU-phoria into EU-cynicism and disappointment.

³ *Merkel is Going to Delay EU Enlargement*, (Меркел ще забави разширяването на ЕС in Bulgarian, reprint from the International Herald Tribune), 7 June 2005, <http://mediapool.bg>. See also, *A German MP Calls for the 'Freezing' of Bulgarian and Romanian Membership in EU*, (Немски депутат иска да се 'замрази' българското и румънското членство в ЕС in Bulgarian), 1 June 2005, <http://mediapool.bg>.

⁴ *Schroeder: We Should not Look for Pretexts to Delay Romania and Bulgaria*, (Шрьодеp: не трябва да търсим 'претекст' за забавянето на Румъния и България in Bulgarian), 3 June 2005, <http://mediapool.bg>.

⁵ *Bulgaria and Romania Look for Hope in the European Debate on the Failure of the Constitution*, (България и Румъния търсят надежда в Европейския дебат за провала на конституцията in Bulgarian), 6 June 2005, <http://mediapool.bg>.

II. The problem

The negative vote on the Constitutional Treaty in France and the Netherlands triggered a process of rethinking of some of the basic principles of the EU. One such issue is the relationship between enlargement and constitutionalisation. The received wisdom was that, first, the link between them is contingent, and, second, that these two processes support and reinforce each other. These new developments obviously show that there is some tension between them. It is worthwhile therefore to examine again their logic against the background of recent events.

The hypothesis tested in this chapter is that EU enlargement and EU constitutionalisation are more intimately connected than has been previously thought. Both processes are inspired and justified by a specific ideal of the EU—an ideal of the Union as a *separate political entity*. Without this ideal, it will be argued, both processes—enlargement and constitutionalisation—largely lose their meaning. The paradox is that neither the accession process, nor the constitution-making process, stressed sufficiently and defended adequately the political ideal which makes them meaningful and justified. On the contrary, the political nature of the Union was consciously downplayed and it was presented as a legalistic body of commonly accepted rules and principles. On the one hand, enlargement conditionality and the emphasis on harmonisation and the adoption of the *acquis communautaire* was the emanation of this legalistic turn in the interpretation of the character of the Union. On the other hand, the presentation of the draft constitution as a tidying-up exercise in which a more simplified set of rules is being prepared was also meant to put the constitution-making process on the smooth track of legalism, far from bumpy political roads. The legalistic turn in both of the processes had its instrumental justifications; it made the accession of the first ten east European countries rather smooth, and also, it managed to avoid the thorny political disputes about the future of the Union for the better part of the constitution-making process.

Now we see the limitations of this formalistic, legalistic strategy, however. At this point in time, it is already counterproductive, because political actors are starting to question the meaning of both processes, and are no longer fixated on their form. Indeed, both enlargement and constitution-making may have been thoroughly transparent, orderly, smooth, and rule-governed processes, but what is their meaning? Legalism cannot give an answer to these questions.

Therefore, the legalistic ideal behind the EU is in urgent need of deconstruction, while the remains of the political substance of the Union are in

urgent need of resuscitation and reinforcement. This chapter is a modest attempt to address these needs.

The following section clarifies the meaning of *political* and *legalistic*. Here, a distinction is drawn between the political and legal meaning of constitutions; the interplay between these two dimensions in constitutional and everyday politics is also briefly explored. The section after this outlines the main features of the overly legalistic image of the EU as constructed during the accession negotiations process especially regarding Bulgaria and Romania. Then I argue that this ultimately false image has created a set of unjustified public expectations in Bulgaria concerning issues of judicial reform, and has largely failed to rationalise the policy-making processes in these two areas. In the conclusion I argue that the emphasis on legalism has ultimately become counterproductive both at the level of accession candidates and the level of the EU as a whole.

III. Political and legal dimensions of constitutionalism

Constitutions are both political and legal acts. From a narrow legalistic point of view constitutions are the most basic set of rules and principles of a given community. From a political point of view, they are a commitment to a substantive ideal of government, that is, the ideal of limited power, divided among various constitutional bodies.⁶

Political constitutionalism is not about the relationships among sovereign powers (as arguably international law is). It concerns the relationships among different branches of non-sovereign power, each of which enjoys only a portion of the totality of power. Indeed some combination of the different branches may be invested with almost sovereign powers (like the Queen-in-Parliament) but even in such models there are usually important limitations introduced by law, convention or practice, which constrain the exercise of sovereignty in important respects. The ultimate idea behind the political ideal of constitutionalism is that sovereignty is gradually diffused, dispersed, and shared by institutions, groups, and persons affected by government.⁷ Sovereignty becomes an abstract ideal,

⁶ A. Sajó, *Limiting Government* (Budapest: CEU Press, 1999). For a more general discussion of different types of constitutionalism, see J. Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), pp. 152–93. See also, P. Craig, 'Constitutions, Constitutionalism, and the European Union', *European Law Journal* (2001) 7/2: 127.

⁷ In the context of European integration this rather basic idea has been discussed under a variety of concepts and doctrines. Republicans tend to present it under the currently

which is metaphorically attributed to the constitutional structure as a whole; the sub-sovereign constitutional powers are invested with limited prerogatives and are meant to check each other. This division of power, which is inherent in the political ideal of constitutionalism, reflects the understanding that governance should be sensitive to a plurality of interests, and should not be monopolised by a single centre of power. Different interests should be given expression in the constitutional structure mainly through procedures of joint decision-making.

The political ideal of constitutionalism, as limited, divided power, differs from a legalistic understanding of constitutionalism as a set of rules and principles most starkly, at the level of the decision-making they presuppose. The latter views the decision-making as generally rule-bound, in the sense that pre-existing rules completely determine the outcome of the decision. In contrast, the former does not place such an emphasis on the following of pre-set rules. Political constitutionalism implies both rule governed decisions, and decisions which are all-things-considered judgements on the merits of specific situations.

Accordingly, the legalistic and the political ideals of constitutionalism differ in their understanding of the success of constitutionalisation. From the perspective of the latter, the mark of success is the division and limitation of power, and the creation of a plurality of authoritative centres. From the point of view of the former, success is marked by compliance with rules.

Table 9.1: Types of constitutionalism

	Political constitutionalism	Legalistic constitutionalism
Nature	Divided, limited powers	Sets of rules and principles
Decision-making	All-things-considered decisions + rule-bound decisions	Rule-bound decisions
Criteria of success	Plurality of authoritative centres of power	Compliance with rules

The two types of constitutionalism discussed above are ideal-types and most liberal-democratic constitutional regimes are a combination of the two. Deviant

fashionable idea of ‘non-domination’: see, for instance, R. Bellamy and D. Castiglione, ‘Legitimizing the Euro-‘Polity’ and its ‘Regime’’, *European Journal of Political Theory* (2003) 2/1: 7–34. The problem is often presented as a problem of ‘juridification’, i.e. the possibility of legal domination where there is no unified sovereignty. See J. Bohman, ‘Constitution Making and Democratic Innovation: The European Union and Transnational Governance’, *European Journal of Political Theory* (2004) 3/3: 315–37.

cases, such as communist constitutions, could only aspire to the legalistic type of constitutionalism: whether they have lived up to their claims is clearly a different matter. An interesting theoretical question is the extent to which one can have a purely political constitutional structure in which decision-making is not rule-governed and rule-determined at all, but is largely discretionary. It seems that such a structure would be highly unstable and inefficient in dealing with the complex coordination problems in modern societies. Yet, if we focus at the highest level of the division of powers in liberal societies—the relationships among parliaments, constitutional and high courts, and governments—it will become clear that a large part of their inter-relationship is not completely governed by established rules and principles: there are many situations in which the ultimate resolution of a dispute involves a political, all-things-considered judgement on the merits of specific issues.⁸

These points are so indisputable as to seem trivial. Yet, it is surprising how often practical discussions of constitutionalism engage mainly with the legalistic aspect of this phenomenon, and discard its political aspects. This has been, as this chapter argues, one of the systematic problems plaguing the European integration process, both in terms of constitutionalisation and enlargement.

In the following section I discuss in some detail the legalistic turn regarding the accession process, the Copenhagen criteria, and the pre-accession monitoring. Here, I will attempt to show how important the political aspects of constitutionalism actually are for the success of the European project. In fact, if this project is no longer understood as a division of powers among the Member States, and as a limitation of their own sovereign powers, there is very little of substance left in this project. Most importantly from the point of view of our discussion, any further enlargement and constitutionalisation would be plainly meaningless. Indeed, fragmentation and de-constitutionalisation would be the order of the day.

Historical detour

Constitutionalism emerged as a solution to the problem of divided societies: confrontation between King and Parliament, as well as between different religious groups required the sharing and limiting of power by the means of rights, liberties, principles of tolerance, etc. It is important that constitutionalism is understood as exactly what it is, that is, an imperative of political morality in

⁸ See D. Smilov, 'The Character and Legitimacy of Constitutional Review: Eastern European Perspectives', *International Journal of Constitutional Law* (2004) 2/1: 177–94.

divided, polarised societies. In this sense, it is not just an instrumental solution to a problem, but is better thought of as a duty justified by political morality. The political ideal of constitutionalism preceded the ideals of democracy and the nation state in the history of modern Europe, and in a certain sense, it is a *more* fundamental European ideal than the other two.

This is so, mainly for two reasons.⁹ Firstly, contrary to the ideal of democracy, constitutionalism, as a political solution, does not require fixed borders for its operation. It is a well known paradox from democratic theory that the decision of who belongs to the *demos* cannot, itself, be taken democratically.¹⁰ This paradox is not applicable to a government of limited and divided powers, irrespective of where the boundaries of its jurisdiction are drawn, its decisions will remain legitimate as long as they are based on a political process of divided powers, as long as there is a plurality of authoritative, competing centres of power.

Secondly, contrary to the requirements of the nation state, constitutionalism does not require any special, pre-political identity of a political community: neither history nor language nor religion necessarily play a role in it. On the contrary, constitutionalism contains a number of mechanisms which are designed to make the cohabitation of groups with different identities possible.

The point here is not to demonstrate the superiority of constitutionalism over representative democracy as a theory of the legitimation of government as there are good reasons to believe that, generally, all legitimate governments of political communities should conform to a certain minimum of democratic standards. When it comes to a continental government ruling over diverse communities (a diversity of which they are very proud) however, it turns out that the political ideal of constitutionalism (the ideal of divided and limited power) *must* always be followed, whereas a continental democracy could be pursued only if some

⁹ There is also a third aspect in which constitutionalism is a European ideology more than democracy and the nation state. Historically, constitutionalism has emerged mainly as a response to a problem affecting a significant part of the continent, that is, religious wars. It has contributed immensely to the appeasement of Europe after a period of civil strife and violence. Curiously, the advent of mass democracy and the nation state brought unimaginable amounts of civil strife and violence at the continental level, as it also brought intense economic and societal development at the level of the different nation states.

¹⁰ The problem of the lack of a European *demos* has been extensively discussed in the literature. For a concise presentation of the issue see J. H. H. Weiler, 'European Neo-Constitutionalism: in Search of Foundations for the European Constitutional Order', in R. Bellamy and D. Castiglione (eds.), *Constitutionalism in Transformation: European and Theoretical Perspectives* (London: Blackwell, 1996).

additional conditions, such as a suitably defined *demos*, for instance, and possibly some deeper sense of value-based identity are present.

Now we can appreciate the more basic character of the ideal of constitutionalism. The duty that it imposes to divide and limit power, is present whenever political communities live sufficiently closely so that they affect each others' lives in important ways: no fixed *demos*, no thick sense of common identity is necessary for such a duty to obtain.

A comparison between the US and the EU will arguably facilitate a better understanding of the duties of constitutionalisation. The American Revolution and the creation of a single union by former colonies conflated three distinct processes: constitutionalisation (the sharing of power by different entities), the setting up of a republic (some form of democracy), and the creation of a nation state. This conflation is sometimes taken to suggest that *true* constitutionalisation always requires a republic or a nation state (or even both). But it is not clear why this should be the case and induction-based on examples, albeit prominent, could be misleading.

In the European historical experience continental constitutionalisation has been prevented by the rise of aggressive nationalism: the duties stemming from the political ideal of divided powers have been overshadowed by the imperatives of nation-building exacerbated by the advent of mass democracy at the national level. This does not mean, however, that the imperatives of national democracy *always* trump the duty to apply constitutionalisation at the continental level. After all, European nations have greatly impacted each others' destinies, especially during the turbulent twentieth century. The fact that some of them do not feel the duty of constitutionalisation—the duty to share power—is mostly due to specific path-dependency blindness.

IV. Europe as a constitutional project

In its famous 1993 *Maastricht* decision,¹¹ the German Federal Constitutional Court seemed to hold that from the point of view of political legitimacy, there are only two acceptable options for Europe: a *European continental democracy*, or the preservation of *sovereign powers by the nation states*. The political ideal of constitutionalism questions the soundness of this dichotomy, by suggesting that political communities whose self-governing actions have always directly affected the lives of their neighbours in a relatively small continent *owe* a certain division

¹¹ German Constitutional Court, Judgment of 12 October 1993, 89 BVerfGE 155.

of power to each other. Even if the idea of a continental democracy is impossible or non-desirable (at present) for some reasons, continental constitutionalism (or some form of shared sovereignty) is still a *must*, a valid duty.

One can say that the European Union is *the* most significant attempt by European states to fulfil their duty stemming from the political ideal of constitutionalism (the other significant attempt is the Council of Europe and its human rights instruments). The hope was that the failed Constitutional Treaty would produce a clear and relatively coherent system out of the various constitutional documents of the EU, and was meant to be the crowning act of the process of continental constitutionalisation.

Against the background of the preceding discussion, it is surprising to observe that instead of being seen as the fulfilment of a *duty* grounded in political morality, European constitutionalisation (and not only *this concrete* constitutionalisation) is now increasingly seen as *optional* and even inferior to other arrangements, such as the restoration of fully sovereign European nation states. This curious intellectual twist, which is gaining popularity as seen in recent events in France and elsewhere, seems to be based on a retrograde and questionable understanding of political theory.

Rescuing intellectually political constitutionalism from its conflation with theories of democracy and the nation state makes it possible to discuss two of the most idiosyncratic features of the EU without the usual sense of confusion and embarrassment. Firstly, raising the question of the *borders* of Europe has always sparked controversies. There is, as a rule, someone waiting in the wings, be they Hungary, Bulgaria, Macedonia, Turkey, Ukraine or even some more exotic candidates for membership. Many exotic candidates sooner or later become genuine candidates with realistic chances, and some of them even join the Union. From the point of view of democratic theory and the theories of the nation state, such a state of affairs is embarrassing and problematic as borders and identities must be fixed in order for their concepts to be able to function.

Europe's moving and flexible border is not a problem for constitutionalism as a political ideal though, on the contrary, it is required by it. The EU exerts serious influence on its neighbouring political communities, and *this fact* eventually requires the introduction of some form of shared powers and sovereignties, in order to avoid monopolisations, excessive concentration of power, and ultimately, unfair domination. Taking this constitutional logic into account, setting a firm boundary to Europe is pointless and ultimately impossible, even the most exotic

candidate might one day become a member, if there is goodwill for peaceful coexistence and cooperation.

Secondly, constitutionalism, as a political ideal, removes another difficulty; that of European exceptionalism, or the *sui generis* character of the Union. The logic of divided powers and shared sovereignty in fact portrays the EU not as the exception, but as the central case of legitimate government in a continent where a wide variety of different political communities co-exist. In such circumstances, constitutionalism would prescribe an arrangement similar to the EU in essence. Indeed, from this perspective other governmental models, like the US one, would appear as an aberration; an explanation would be required of the processes by which a diversity of different political communities has been reduced to the relative homogeneity necessary for a *demos* or a *nation*. From this perspective, the US appears as a successful experiment due to a lucky coincidence of rare circumstances. In an increasingly pluralistic world, the EU rather than the US will be the general model of government.

This detour into the merits of constitutionalism as a *political* ideal was necessary to show two things. Firstly, that it is a powerful political ideal, which seems very helpful in our modern, pluralistic world. Secondly, it is an ideal which helps us to better appreciate some of the features of Europe as a political project, features, which other conceptions have difficulty explaining, and indeed see them as weaknesses of the project as a whole.

V. The legalistic image of the EU in the accession process

No matter how appealing the political ideal of constitutionalism, it did not become a major theme in the enlargement process. Neither the old Member States, nor the post-communist accession countries found it necessary to invoke this ideal and put it to some practical use. On the contrary, it was, for the most part carefully avoided by all parties. This avoidance reached curious proportions in the case of Bulgaria, for instance. In the spring of 2005, when a final set of amendments to the Bulgarian constitution needed to be made in order to clear the way for accession, public debates focused exclusively on the right of foreigners to possess agricultural land, and there was virtually *no* discussion of the amendment introducing the principle of the transfer of sovereignty. The Bulgarian case was rather graphic, but it would not be an exaggeration to say that there was little interest in the logic of shared powers at the accession stage in all post-communist countries. Raising and discussing this issue would have almost been in bad taste.

The transfer of sovereignty is the most important aspect from the point of view of Europe as a constitutional project. The lack of any meaningful discussion of this principle in the pre-accession period reveals the popular understanding that actually, the EU is not fundamentally about a sharing of powers. The avoidance of the problem also reveals the fear of national political élites that whenever they have to discuss the issue in public they have to give priority to national sovereignty, the interests of the nation-state and the attendant legitimacy accruing thereto from the democratic process. So, speaking of a sharing of sovereignty in the pre-accession period had all the awkwardness of speaking about the deceased: you either say a few good clichés or nothing at all.

The virtual absence of the political ideal of constitutionalism in the pre-accession negotiations was counterbalanced by the ubiquitous presence of the other aspect of constitutionalism—the *legalistic* one. Understood as a set of rules and principles, constitutionalism is practically identical with the rule of law and *Rechtsstaat* ideals. Constitutionalism, understood in these terms, requires well developed, dense legal systems, which ensure predictability, and reduce legal uncertainty, limit officials' discretion, and avoid retroactivity. On this reading, constitutionalism is a formalistic ideal, an instrument which improves the efficiency of a system of government, and ensures a certain level of formal justice, that is, fairness.

This formalistic understanding came to dominate the accession process through a variety of means. The strong emphasis on the harmonisation of the legal systems of old and new members was the most direct reflection of this domination. The problem was not the fact, as some may think, that the candidates had to do all the work and change *their* systems. Rather it was the implicit understanding that there are rules, principles and standards for all problems, which was troubling. Elsewhere I have shown that this implicit understanding led to the creation of myths, such as the myth of a common theory (rules and principles) of judicial independence.¹² I have suggested that the creation of such myths is dangerous because it conceals unresolved political problems. In what follows, I will continue with this theme and in the ensuing case study will attempt to analyse certain concealed political problems more systematically, by drawing on the Bulgarian experience of the reform of its judicial system, comparing it with the case of Romania.

¹² D. Smilov, 'EU Enlargement and the Constitutional Principle of Judicial Independence', in W. Sadurski, A. Czarnota and M. Krygier (eds.), *Spreading Democracy and the Rule of Law? Implications of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer Academic, 2005 forthcoming).

Before proceeding to the case study, however, we should take a more structured look at the character of constitutional legalism and its implications for European enlargement and constitution-making policies. Legalism is intimately related to the following, more specific positions.

Resolving problems through norms, or sets of norms (institutions)

This is probably the central conviction of legalism. In the enlargement context, it has played a key role in resolving the following basic problem. Enlargement presupposed the integration into the EU of countries with diverse historical backgrounds, which immediately raised the question of trust between old and new members. In fact, the question of trust was and is the fundamental issue at stake in enlargement politics: to what extent could countries with different traditions, legal and political cultures be trusted to fulfil their duties as EU members? (It is not surprising, therefore, that the first reaction of Bulgaria and Romania after the unfolding of the French and Dutch referenda results was to issue a declaration, through their foreign ministers, that they are going to be trustworthy members).

Legalism gives a simple answer to the issue of securing trust: new members are to be trusted only to the extent that they follow the rules set by the Union or common for the Union. This seems to have been the dominant interpretation of the famous Copenhagen criteria. In an essentially bureaucratic process of communication between national governments and the EU Commission, these criteria have been broken down for each of the countries into sets of very specific rules and commitments for fundamental institutional reforms. Sometimes, there have been requirements for some countries which cannot be derived from common European standards, and have not been justified as such. For instance, Bulgaria has been forced to commit itself to close down two of the reactors in the Kozloduy nuclear power plant, even though apparently these reactors are not of the Chernobyl type, and are considered safe by international nuclear power agencies. Moreover, Bulgaria has invested heavily in the safety of these two reactors over the last few years, which will make their premature closure economically painful.

More typically, however, the interpretation of the Copenhagen criteria has resulted in commitments about specific institutional reforms: the adoption or revision of pieces of legislation. As a result, national parliaments have been very busy indeed. It is important to note, however, that the building of trust could have taken a different path. For instance, representatives of the candidate countries could have taken part in the political decision-making of the Union on specific

topics as a trial measure, especially in the European Parliament, but possibly in the Council as well. This is also a way of building trust and testing the trustworthiness of potential candidates. The fact that such approaches have not been the mainstream of pre-accession trust-building can be explained by the triumph of legalism.

In the area of European constitution-making, the legalistic bias towards rules and principles has also been quite visible. It is often argued that the Constitutional Treaty is very long and detailed, revealing some sort of rule-fetishism not typical of workable constitutions. But this is hardly a serious problem. Rather, it was the assumption that all deeper political problems could be resolved through the introduction of rules and principles. This issue is readily discernable with respect to the issue of European identity. The predominant interpretations of the constitutional effort were constructivist: namely, an attempt to generate a common identity through cataloguing sets of common values and principles.

Where no common rules and principles exist, it is better to construct a myth?

Another feature of legalism is legitimation through existing common rules for all Member States rules and standards. On this conception, the Union can act *vis-à-vis* a particular Member State only in as much as it bases its action on a specific rule. This, trivially, is the concept of the limited, enumerated competences of the Union. Yet, if taken too far, this otherwise reasonable principle turns into rule-fetishism by prohibiting EU bodies from making political judgments, even in areas which are supposed to be in their domain.

In order to avoid these difficulties in the pre-accession period, the European Commission, helped by national governments, had resorted to liberal usage of the language of ‘common standards’, ‘common European models’, etc. This led to the construction of curious doctrines, justified as ‘commonly European’ on certain occasions.¹³ Some see this as a justified attempt to mobilise national governments to undertake reforms in difficult areas such as anti-corruption and the administration of the judiciary. And within limits, this argument is valid. However, the problem is that it reinforces a wrong image of the Union, that is, that the EU is essentially about common rules. This image has now started to backfire given that it implies that whatever cannot be grounded in common rules

¹³ EUMAP Reports, *Monitoring the EU Accession Process: Judicial Independence* (Budapest, Open Society Institute, 2001); see Section on ‘Regional Overview’, p. 26.

should be left within the domain of the Member States. In practise this means that the EU ceases to be a political union, but becomes a legalistic construction.

Table 9.2 may create the impression that legalism is a doctrine of non-intervention of EU bodies in the affairs of the Member States or candidate countries. This is incorrect, however. On the contrary, legalism is interventionist, but unfortunately this often happens on largely mythological grounds—the claim of the existence of common values, rules and principles, even when their existence is contested and controversial. It is plausible to argue, that it is exactly this feature of legalism in the area of EU constitution-making that inspired such a strong negative reaction against the Constitutional Treaty. On the one hand, the Treaty pretended to be nothing more than summing up of existing rules and principles. On the other hand, it was a constructivist enterprise aimed at generating a more robust European identity (more common values and principles).¹⁴ It is not surprising that this ambiguity created a fear that the Constitutional Treaty would become the grand mythological justification for interfering in the domain of the Member States. Some (mainly in France) thought of this myth as a neo-liberal, threatening national welfare systems; others, saw it as insufficiently liberal (UK, the Netherlands), threatening the national economy from a different angle. All of them, however, feared the myth as a license of intervention.

Table 9.2: *Legalism deconstructed*

Ideology	Problems are to be resolved on the basis of rules
Mythology	If there are no rules in a certain area, the myth of their existence should be employed
Measuring success	Success is measured on the basis of the implementation of rules and their enforcement
Deference to the Member States	All issues which could not be resolved on the basis of common rules or the myth thereof should be deferred to the Member States

¹⁴ See N. Walker, 'Europe's constitutional momentum and the search for polity legitimacy', *International Journal of Constitutional Law* (2005) 3/2–3: 211–38; P. Pettit, 'Comment on Walker: Europe's constitutional momentum', *International Journal of Constitutional Law* (2005) 3/2–3: 239–42. One of the most prominent defenders of the constructivist interpretation of the European constitution has been Jürgen Habermas. See, for instance, J. Habermas, 'Why Europe Needs a Constitution', *New Left Review* (2001) 11 (Sept.–Oct.): 5–26.

The most serious problem is that all these interpretative battles are fought in the field of legalism and they do not challenge one of its major assumptions: that whatever is not specified by existing rules and principles is in the domain of the nation state. As long as this assumption exists (dressed up as enumerated powers, subsidiarity, or in some other way) the EU would remain a legalistic construction and would fail to be a political union of divided, shared powers.

VI. Legalism in action: the reform of the judiciary in Bulgaria

This case study shows in miniature the problems which can arise when legalism is used in the exchange between national governments and EU bodies in specific policy areas.

The argument developed here has a simple structure. Firstly, I briefly show that the existent common rules, principles and standards in the area of judicial system reform are not sufficient to provide solutions to the challenges that the accession countries, and more specifically Bulgaria, currently face. Secondly, I show that these challenges also need specific policies, the making of specific *political choices*, which are not fully determined by pre-existing (not to speak of common) rules. Thirdly, I show that the EU (in the accession negotiations) has been reluctant to openly criticise specific policy choices if this criticism has not been grounded in common rules and principles. If such principles were missing, they have either been invented as myths, or criticisms have not been accompanied by reasons, both of which, as I show, have on occasion led to a great deal of confusion and public frustration. Fourth, I explain the reluctance of the EU to engage in reasoned substantive policy criticism with its general reluctance to understand itself as a political constitutional project of divided, shared powers.

Such a criticism would have actually opened the question of the jurisdictions of the different bodies within the EU, which is probably its best kept secret and most sensitive issue. It is impossible to argue that the reluctance to enter into substantive argument was an expression of the EU's desire to leave the issue to the accession states, given the fact that negative assessments both concerning judicial reform and anticorruption have been and are regularly produced, without a clear indication of the reasons for these criticisms and directions for future action. This curious situation has produced exciting accession politics in Bulgaria and Romania, which unfortunately has significantly confused and frustrated the public, as I argue. Finally, the case study suggests that this frustration could be abused in the future by political entrepreneurs, who may attempt to turn it into anti-European sentiment.

The judiciary—a difficult nut to crack

Judicial reform in Bulgaria has proven to be one of the most difficult issues of transition politics. Generally, the Bulgarian judicial system is seen as slow, cumbersome, and inefficient. Trials and proceedings last for years, prisons are overcrowded, there is little public trust in the system as a whole, and it has been in a process of constant reform since the mid-1990s.

These criticisms could be found in all of the Regular Reports of the European Commission regarding the progress of Bulgaria in the implementation of the Copenhagen criteria.¹⁵ Unfortunately, these reports do not provide a reliable comparative framework for the assessment of these problems. Paradoxically, it is not clear to what extent the above-mentioned problems are worse in Bulgaria (and Romania) than in the other transition countries. Evidence for such a conclusion is at best anecdotal, and is not based on any sort of in-depth empirical study.

Nevertheless, as things now stand, progress in the area of judicial reform is *the* key element which the EC will take into account in its upcoming evaluation of accession preparation in Bulgaria: this evaluation is essential for timely accession to EU in 2007. If the result of the evaluation is negative, the country's accession will be postponed for at least a year. However, such a development might discourage some Member States from ratifying the Bulgarian Accession Treaty, which would lead to the postponement of EU membership indefinitely.

Having said that, it is interesting to examine what kind of criteria and requirements Bulgaria has to fulfil in order to avoid a negative assessment. Judging by the official discourse on the issue, there must be some common European criteria, rules and principles, which the country needs to comply with; the question is: what are they?

Firstly, the European Commission has adopted a two-pronged approach to judicial reform in the accession countries. On the one hand, there was the issue of the improvement of the administration of the judiciary, or building judicial capacity. Mostly, this has been pursued through the provision of funding for equipment, technology, training, and external expertise (consultants). Successive Bulgarian governments have undertaken obligations to increase judicial salaries,

¹⁵ For an analysis of the parts of the Copenhagen criteria relevant to the assessment of judicial reform see EUMAP Reports, *Monitoring the EU Accession Process: Judicial Capacity*, Section 'Overview' (Budapest: Open Society Institute, 2002), p. 19. The Regular Reports (1998–2004) of the EU Commission for Bulgaria are available at: <<http://europa.eu.int/comm/enlargement/>>.

improve material resources and equipment, train magistrates, etc. There have been numerous EU-sponsored initiatives in this area as well. For instance, Bavarian experts have consulted the Bulgarian prosecutorial office within the framework of EU-sponsored assistance programmes.

On the other hand, technical assistance and training programmes for the judiciary have been supplemented by pressure for institutional reform. The declared goals of this reform have been harmonisation with EU legal systems, improved efficiency, and last but not least, increased judicial independence.

Here, the efforts of the EU to press for certain reforms have often run up against principles of Bulgarian domestic constitutional law. For instance, it has been a firmly held position of the EU that Bulgarian investigators should become part of the executive branch: currently, they are part of the judicial system and enjoy the status of magistrates. The problem is that if investigators are placed within the executive branch, it would require a complex constitutional amendment involving the convocation of a special constituent assembly, that is, a Grand National Assembly. This would undoubtedly disrupt normal politics in the country, which has made virtually all major political parties reluctant to organise extraordinary elections for the sake of this special constitutional amendment.

The EU justifies its rigid position on the investigators mostly on the basis of a 'common European model' in which they are supposed to be part of the executive branch. In this case, the model is not mythological; the fact is that the Bulgarian arrangement is out of tune with the rest of the EU. But one wonders whether the position of the investigators within a model of the separation of powers is something so essential for the European model that it should be read into the Copenhagen criteria. Furthermore, in the Bulgarian context there have been attempts to transfer some of the work (that is, the bulk of the investigative work for the most common crimes) from the investigators to the police. This revised model, despite its dubious constitutionality from a Bulgarian point of view, has been in place for the last several years in the country: investigators are now responsible for more serious crimes, which constitute a fraction of all crimes.

However, European pressure for further reform has not receded. This pressure has transformed itself into a special requirement for the urgent adoption of a completely new Code of Criminal Procedure. It is now understood that Bulgaria needs to adopt this piece of legislation before November 2005 in order to receive a positive evaluation from the Commission. As a response to this requirement, the outgoing Minister of Justice, Anton Stankov, presented a draft of a new code in the spring of 2005 after virtually no consultation with the judiciary and the Supreme Judicial Council (mostly because of time restraints, but also because of

fears that they would block the draft at an early stage). One of the key elements of the new draft code was the practical dissolution of the investigation service: its jurisdiction was to be dramatically shrunk to cover only a few rare crimes (such as crimes against humanity, for instance). Most of the investigators, according to the logic of the code, were to become either prosecutors, or join the police force.

Not surprisingly, the draft code stirred a mini-revolution within the judiciary. The Supreme Judicial Council rejected it on the grounds that there had been no proper consultations. Prosecutors and investigators rejected it as unconstitutional and threatened to bring it before the Constitutional Court.¹⁶ Politicians also got cold feet about the draft code, and Minister Stankov failed to secure himself a place on his party list in the upcoming parliamentary elections in June 2005. The expected winners of these elections (the Bulgarian Socialist Party) declared that they are going to present a new draft code if they are part of the next government. Ultimately, in order to secure a positive report, Bulgaria will need to adopt a brand new Code of Criminal Procedure in less than five months. Actually, in a self-sacrificial manner, Bulgarian parliamentarians have declared that they are not going to have a summer break in order to meet the EU deadline.

All this activity is impressive, but one wonders to what extent, if at all, it is related to the problems of the Bulgarian judicial system. Here, I argue, we see the limits of the legalistic approach. It is true, that it has produced certain positive results, like the adoption of a new Administrative Code, for instance. But more generally, despite the flurry of activity and the urgency in adopting legislation (including some constitutional amendments), the legalistic approach has failed to address some of the most fundamental problems of the Bulgarian judiciary.

Firstly, a big problem for the system as a whole is that it is practically ungovernable, because there is no authoritative systematic data on its performance. There is no single centre for the collection and analysis of

¹⁶ The Bulgarian Constitutional Court has made a series of decisions arguing that the transfer of prerogatives from one branch of power to another constitutes a change in the regime of governance. Such constitutional amendments, in the view of the Court, must be made by a specially appointed legislature, the Grand National Assembly (GNA). The convocation of a GNA requires extraordinary elections and the dissolution of parliament. What is more, the mandate of the GNA expires once the amendments have been adopted and new elections for an ordinary parliament must be held again. This is an extremely cumbersome procedure, which strongly discourages political parties from using it. See especially Decision No. 13 of the Bulgarian Constitutional Court, 2002, *Official Gazette* No. 118, 20 Dec. 2002, for its position on the possibilities of reform in the judicial system; this position actually prevents the transfer of either investigators or prosecutors from the judiciary to the executive without a GNA.

information, and performance indicators are not taken seriously when adopting new policy decisions and implementing institutional reforms. As a result, what is going on could be described as blind experimentalism, and unfortunately, the EU has enthusiastically joined in and even exacerbated this process.

Secondly, and more importantly, the Bulgarian judiciary is not accustomed to taking responsible choices in the designing of specific policies. Senior magistrates are willing to hide behind the precepts of the law, and deny the fact that often they take decisions which are not fully rule-bound, but also contain all-things-considered judgements on the merits of specific issues. In other words, the decisions of senior magistrates often contain a political element, and they need to be held accountable for these decisions in one way or another. The politicisation of the work of magistrates has been most visible in constitutional and high appeal courts, and Bulgaria is no exception to the trend. What is specific to the country, however, is the systematic denial of this phenomenon not only concerning the core of judicial work—adjudication—but also in other more peripheral areas, like the administration of the system of justice (personnel policy, budgeting, etc.), and the exercise of prosecutorial powers (which in many jurisdictions openly contains discretionary elements).

In Bulgaria, magistrates systematically hide behind the law even for openly policy-oriented questions. The case of the Prosecutorial Office is a good example. It is a commonly held opinion that the Bulgarian Prosecutor General, Professor Nikola Filchev, has failed to design a proper policy for his institution. The public believe that prosecutions have often been politically motivated, and that the resources of the Office are not focused on meaningfully addressing problems like corruption and organised crime. The Prosecutor General has failed to adequately explain the policy of his institution to the public; in fact, he has been reluctant to discuss policy decisions at all arguing (formally correctly) that prosecutors are obliged by law to prosecute all crimes. The lack of systematic data on the performance of the Office, combined with a reluctance to discuss its priorities and policies in resource management and allocation, has produced a non-transparent environment which has created an extremely negative image of the institution as a whole.

The EU response to the problem has been predictable: pressure for institutional reform, i.e. the transfer of prosecution from the judiciary to the executive. The justification used—this time fully mythological—was the existence of ‘a common European model’. After the mythological character of the model became clear (after all, prosecutors are not part of executive everywhere in Europe), EU pressure for institutional transfers receded and was eventually dropped from the

language of the Regular reports, leaving a vague reference to ‘necessary reforms’ within the Prosecutorial Office.

Here we see graphically the pitfalls of legalism:

- while political in their essence, problems are reshaped as legalistic, institutional ones;
- proposed institutional solutions are justified on the basis of ‘common models’;
- if such models do not exist, mythological substitutes are created;
- if the mythological character of the substitutes is revealed, pressure for specific reforms recedes or is substituted by general, unhelpful criticism.

It is worth contrasting the approaches of the EU and that of the US to judicial reform in Bulgaria. The US Ambassador, James Pardue, has often openly criticised the politics of the Bulgarian Prosecutor General: and in fact the prosecutorial office has, albeit reluctantly, tried to come up with a response to these criticisms. The EU, in contrast, has dressed up its position as a call for institutional reform, which the prosecutors have managed to actively resist with the help of the Constitutional Court. After all, it is not at all clear whether transferring prosecutors to the executive will automatically resolve the problem of poor prosecutorial policy-making, and the avoidance of responsibility for essentially politically motivated choices. By failing to define the problem correctly, that is, as a problem of policy accountability, the EU has opened the Pandora’s box of judicial corporate solidarity in Bulgaria, without the prospect of improvement in the near future.

Finally, it has to be said that I have focused on the limits and deficiencies of the legalistic approach as regards the Bulgarian case study. Undoubtedly, there are also many positive elements related to this approach, as for instance the incredible adoption of an enormous amount of legislation within a short period of time, the responsiveness of the politicians to engage with difficult reforms, etc. But the approach also has its serious downsides. It is insensitive to problems which are in their essence political, or at best, it offers inadequate solutions to them. Curiously, the US has not been shy in openly criticising the policies of the Bulgarian magistrate (‘interfering with domestic politics’), while the EU as an organisation with which Bulgaria is supposed to share powers and sovereignty, has been reluctant to do so, even in circumstances in which this would have been supported by many in the country. This problem, no matter how insignificant at first sight, reveals a deeply troubling feature for the EU as a whole: its reluctance to see itself as a political union.

VII. Conclusion

The transformation of EU constitutionalism into formalistic legalism during the accession process may have a serious price, and not only in terms of a few more twists and turns on the individual roadmap to membership of given countries. On the one hand, it has stimulated the old Member States to perpetuate the illusion of a Union which is only about following common rules and almost never about sharing political power on sensitive questions. On the other hand, it has sent the wrong signals to new members: many were probably left with the impression that whenever it comes to taking sensitive decisions, the Union is either helpless or indecisive or even lacks a conception of how to approach them. No doubt, local democrats or nationalists will capitalise on this weakness.

In short, the major fault of the legalistic view of the Union and its constitution is that it has completely eclipsed the core of the European project—its political nature as limited, divided, shared powers. The eclipse is so complete that in fact few are willing to defend this project as an *imperative of political morality*, which it well might be. When Václav Klaus in the Czech Republic or some others elsewhere argue in favour of a Europe of sovereign states, virtually no one would reply that such a position is contrary to fundamental principles of political morality. In the UK, such an argument would be possibly taken as ludicrous. But if the analysis above is correct, post-war Europe and post-communist Europe may indeed be *morally* obliged to opt for a constitutionalised political union.

If this argument does not hold, the future of a political Europe will have to rely either on the construction of a *demos*, or the construction of a common identity (whatever this means), or on the even more questionable assumption that such a union will be to the economic benefit of all members at all times. Such a future seems bleak.

Regarding Bulgaria and Romania, their accession process could be described as a missed opportunity from the point of view of entrenching the political constitutional ideal of Europe in their domestic public culture. It is a missed opportunity because probably these were two of the countries which were most ready to adopt wholeheartedly the ideal of shared sovereignty and divided powers—there is virtually no significant opposition to the EU in these countries at present. Curiously, even in such a beneficial environment, the EU chose to show its legalistic face. This might have been convenient for various reasons. But in the long run, domestic political entrepreneurs might capitalise on legalism as a political impotence of the EU.

One of the main parties in Bulgaria has already adopted the name Democrats for a Strong Bulgaria (DSB). The ideology of the party is to defend Bulgarian interests within the EU. If the EU continues to insist on its legalistic face, sooner or later such parties are going to come to the position that all politically sensitive questions should be left to Bulgarian democratic institutions. Such political dynamics are not going to be helpful for the constitutionalisation of Europe as a political entity. The possibility of such a dynamic, however, suggests that the enlargement and constitutionalisation of the EU are more intimately related than previously thought.

Part 3

Institutional and Legal Changes in the New Member States

Chapter 10

The Impact of Enlargement on National Institutions:

A Comparative and Retrospective Overview

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I. Introduction

The purpose of this chapter is to see how much we can learn as academics from previous enlargements, in order to better understand the present one. It is mainly based upon personal experience of training programmes designed in the mid-1980s and mid-1990s for the officials of New Member States (NMS). There is also quite a lot of literature about previous enlargements,¹ which may be used by scholars who intend to explore the issue more deeply. One of my fundamental assumptions, which I have developed elsewhere,² is that enlargement and deepening are not alternatives in the development of European integration, but on the contrary, go hand in hand. This implies a strong limitation to the lessons which can be learned from previous enlargements in order to assess the impact of the present enlargement on the European Union (EU) itself. As far as national institutions are concerned, on the other hand, it seems to me that some useful elements may be taken from the enlargements of 1973, 1981, 1986 and 1995 (see Table 10.1), with a preference for the 1986 enlargement Portugal and Spain, and

¹ See, for instance, K. Laski and R. Römisch, *From Accession to Cohesion: Ireland, Greece, Portugal and Spain and lessons for the next accession* (Vienna: WIIW, Wiener Institut für Internationale Wirtschaftsvergleiche, 2003).

² J. Ziller, *The Challenge of Governance in Regional Integration: Key Experiences from Europe* European University Institute Working Papers Law, 2005/11.

that of 1981 to Greece. This is due to the fact that there are more common elements between those countries at the time of their accession and the ten New Member States, than was the case for the enlargements of 1995 and 1973, that is, far lower economic development than the old Member States and a recent return to liberal democracy. After a rapid look at what is common to all enlargements and what is specific to the 2004 enlargement, this chapter examines four specific dimensions of the impact enlargement has had on national institutions.

II. All enlargements are different, but all are enlargements?

The learning curves of enlargement

In order to understand the impact of time upon institutions—a key factor in trying to assess enlargement one year after it has taken place—the concept of learning curves is one of the most useful tools, and has been used successfully in analysing Portugal and Spain's accession to the European Communities (EC) in 1986.³ The concept stems from child psychology and has been quite successfully transposed into organisational theory. It is based upon observations of the ways in which children learn new skills or acquire new knowledge, but may be applied to all learning processes. The idea is that, when presented with a new environment—for instance, a new class for a child at the beginning of the school year—the way skills develop during time may be presented as a curve. Figure 10.1 shows that progress is slow at the beginning—the child experiences difficulties—after which a phase of acceleration occurs due to the cumulative effect of learning, until a moment comes where the acquisition of new skills becomes again slower—due to both tiredness and the lack of sufficient incentives.

Organisational theory acknowledges that institutions go through the same type of learning curves when faced with changes in membership or environment. What is most interesting is to see how successive changes impact upon learning capacities. In a smooth development, successive changes produce new learning curves which bring skills to an increasingly developed level because of the accumulation of learning experiences. Progress tends to be slow at the beginning of the year, followed by more rapid learning in the winter and spring, and slowing down in the early summer (Fig. 10.1a). This also occurs with institutions.

Another prospect, applicable to both human learning and organisations, is that instead of a more or less rapid and constant increase of skills, there are losses of

³ L. Metcalfe and E. Zapico Goñi, *National Adaptation to EC Participation* (Maastricht, European Institute of Public Administration, 1987), unpublished manuscript.

skills which bring a person or organisation back to a lower level (Fig. 10.1b). This may be due to accidents affecting an individual's health, or dramatic changes in the environment such as changing city, family problems, etc. Usually, however, the level of skills at which the fall back stops is higher than the level at the beginning. Development occurs over time, but is simply less smooth (see Fig. 10.1c).

Understanding this type of development is particularly useful in order to avoid drawing the wrong conclusions from a temporary decline. Applying this type of scheme to what has happened with enlargements is particularly useful.

Figure 10.1a

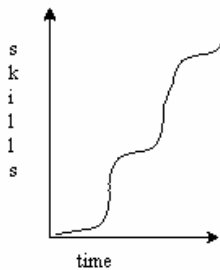


Figure 10.1b



Figure 10.1c



What makes the 2004 enlargement different?

The last enlargement differs from previous ones for a number of reasons, which are not simply linked to the economic and political characteristics of the new Member States. A first important difference are the mechanisms set up by the Europe Agreements, and especially the obligation to transpose the *acquis communautaire* before accession. Something comparable occurred with the enlargement to Austria, Finland, and Sweden, but on a very different basis: the countries of the European Free Trade Association (EFTA), which joined the EU in 1995, had already transposed a big part of the *acquis* in the framework of the EFTA–EC association agreement, which had been in force for a decade. But in this case, there was much more equality between both sides: there was no unilateral monitoring mechanism, and the agreement was between two groups of countries, as opposed to the Europe Agreements which were a series of bilateral agreements between the EU and a specific country, with no effort of coordination on the side of the associated countries. In the framework of Europe Agreements, the Commission exercised a monitoring function *vis-à-vis* the development of candidate countries, culminating in its yearly assessments which were published as Commission's Opinions (the Commission's *avis*, in 'Eurospeak').

Figure 10.1: *Enlarging and deepening integration in Europe*

Negotiation period	Signature	Treaties	Entry into force	Countries	Population (in millions)
May 1950-April 1951	1951	Treaty of Paris establishing the European Coal and Steel Community (ECSC)	23 July 1952	<i>Founding 6</i>	209.9
				Belgium	10.4
				France	59.6
				Germany (<i>West</i>)	66.0
				Italy	57.3
				Luxembourg	0.4
				The Netherlands	16.2
1952-1954	25 March 1957	Treaty of Rome establishing the European Economic Community (EEC) and EURATOM	1 Jan. 1958	<i>Founding 6</i>	209.9
Dec. 1969-Dec. 1970	22 Jan. 1972	Treaty of Accession, Denmark, Ireland and the UK	1 Jan. 1973	<i>Nine members</i>	278.6
				Denmark	5.4
				Ireland	4.0
				United Kingdom	59.3
Oct. 1974-May 1979	28 May 1979	Treaty of Accession, Greece	1 Jan. 1981	<i>Ten members</i>	289.6
				Greece	11.0
1976-June 1985	12 June 1985	Treaty of Accession, Portugal and Spain	1 Jan. 1986	<i>Twelve members</i>	341.5
				Portugal	10.4
				Spain	41.5
June-Dec. 1985	17-28 Feb 1986	Single European Act (amending the Community treaties for the completion of the internal market)	1 July 1987		

1991	1991	German Constitution			(German reunification 16.5)	358.0
Jan-Dec. 1991	07 Feb. 1992	Treaty of Maastricht on the EU + 17 Protocols	1 Nov. 1993			
Nov. 1993-June 1994	25 June 1994	Treaty of Accession, Austria, Finland and Sweden	1 Jan. 1995	Fifteen members		380.1
				Austria		8.0
				Finland		5.2
				Sweden		8.9
	2 Oct. 1997	Treaty of Amsterdam + 13 Protocols	1 May 1999			
	26 Feb. 2000	Treaty of Nice + 4 Protocols	1 Feb. 2003			
March 1999-March 2003	16 April 2003	Treaty of Accession, Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia+ Act on conditions of accession, 14 Annexes, & 10 Protocols	1 May 2004	Twenty five members, EU-25		454.2
				Czech Republic		10.2
				Cyprus		0.7
				Estonia		1.4
				Hungary		10.1
				Latvia		2.3
				Lithuania		3.4
				Malta		0.4
				Poland		38.2
				Slovakia		5.4
				Slovenia		2.0
March 2003-June 2004	29 Oct. 2004	Treaty establishing a Constitution for Europe	not yet known			

Note: population figures in millions for EU-25 are based on estimates for 2004 published in *Eurostat Yearbook 2004*, Luxembourg Office for Official Publications of the European Communities, 2004

Furthermore, the Europe Agreements were the first association agreements containing an obligation to set up the administrative capacities needed for the implementation of the *acquis*. This was due not only to the fact that the new candidate countries were in a phase of transition from a centrally planned to market economy and from 'socialist' democracy to liberal democracy, but also to the fact that the importance of implementation had been neglected until the mid-1990s by the European institutions, which were far more interested in the adoption and formal transposition of derived legislation.

What is also new is the safeguard clause of Article 38 (for the first pillar), and Article 39 (for the third pillar) of the Accession Act of 2003, which to my knowledge had no equivalent in the Accession Acts of the previous enlargements.

Article 38

If a new Member State has failed to implement commitments undertaken in the context of the accession negotiations, causing a serious breach of the functioning of the internal market, including any commitments in all sectoral policies which concern economic activities with cross-border effect, or an imminent risk of such breach the Commission may, until the end of a period of up to three years after the date of entry into force of this Act, upon motivated request of a Member State or on its own initiative, take appropriate measures.

Measures shall be proportional and priority shall be given to measures, which disturb least the functioning of the internal market and, where appropriate, to the application of the existing sectoral safeguard mechanisms. Such safeguard measures shall not be invoked as a means of arbitrary discrimination or a disguised restriction on trade between Member States. The safeguard clause may be invoked even before accession on the basis of the monitoring findings and entry into force as of the date of accession. *The measures shall be maintained no longer than strictly necessary, and, in any case, will be lifted when the relevant commitment is implemented. They may however be applied beyond the period specified in the first paragraph as long as the relevant commitments have not been fulfilled.* In response to progress made by the new Member State concerned in fulfilling its commitments, the Commission may adapt the measures as appropriate. The Commission will inform the Council in good time before revoking safeguard measures, and it will take duly into account any observations of the Council in this respect. *[emphasis added]*

What is interesting to note is so much that there is a sanctioning mechanism—a post-accession sanction of pre-accession obligations—but that this mechanism perpetuates a 'two-tier Europe', because with Article 38, the Commission—if it

finds something wrong—may take ‘measures’ which are not defined and may thus cover a large range of actions, and it is up to the new Member State, if it is not happy with the measure, to apply to the ECJ and request the annulment of the measure. For old Member States, if the Commission is not happy with compliance with their Treaty obligations, it may only start the usual infringement procedure under Article 226 EC Treaty, according to which it is up to the Commission to apply to the Court if the Member State does not comply with its recommendations. This is not only a symbolic difference, it gives far more powers to the European Commission to monitor the behaviour of new Member States’ authorities than with old Member States.

The case of Article 39 of the Accession Act is even more striking as there is no judicial review in third pillar matters which would empower the Court of Justice, if necessary, to quash a Commission measure. Moreover, in the third pillar, the Commission cannot take any formal action against old Member States, given that the infringement procedure of Article 226 EC Treaty is not applicable.

It is true that these safeguard clauses may only be used for three years, although their effect can last longer. The permanence of a very strong asymmetry between old and new Member States is a *specific* feature of the 2004 enlargement. On the one hand, this difference may not have an impact, because the decision to take ‘measures’ will be taken by the present Commission, with one Commissioner from each Member State. On the other hand, however, the Commissioners from the new Member States may be *‘plus royalistes que le Roi’* when it comes to condemning the lack of enthusiasm of national authorities in complying with Treaty obligations.

III. Accession central government and the civil service

There are at least five elements which emerge from the previous experiences of enlargement which we are likely to find in the present one: i) coordination mechanisms for EU participation affairs; ii) turnover in the specialist of European affairs; iii) Changing the culture; iv) EU decision-making and comitology; and v) implementation of EC/U legislation and policies. What we do not know is in which point of the learning curve we are, and this impedes any comparison with previous enlargements.

Setting up coordination mechanisms embedded in the national tradition

All new Member States, as well as candidate states (Bulgaria, Romania and Turkey), already have coordination mechanisms which have been set up for the

pre-accession phase, often with the help of European or Member State's agencies. For instance, ten years ago Bulgaria set up a coordination system which had clearly been copied from the French coordination system of the SGCI.⁴ The Bulgarian civil servants who had set up the system had admittedly been talking to Commissioner Edith Cresson—a former French Prime Minister—who very much encouraged them, without having any specific knowledge of Bulgarian administration. Strikingly, when it was set up, the mechanism was ignored for quite some time by the Bulgarian civil servants in ministries dealing with European affairs. The French mechanism works quite well in France because it is tailored to the structures and culture of French administration developed over a period of fifty years. That does not make it fit in a country with totally different structures and culture.

Other countries, such as the United Kingdom and Spain, also have quite centralised coordination mechanisms for their public administration, but Germany for instance never set up a single centralised mechanism, and Denmark has set up a system which is particularly linked to the powers of the Danish Parliament in European affairs. The problem is that any member of the Council of Ministers from one of those countries will be prompted to recommend their own mechanism or to amend it because it does not work well at home, whereas the preliminary analysis of needs, structures and culture in the recipient country is only very rarely undertaken.

Turnover of Euro-specialists: two steps forward, one step back

One phenomenon has already been observed in most new Member States, which was very striking in the case of the Spanish accession to the EC. Spain had a large number of very experienced officials who had participated in the accession negotiations during the first half of the 1980s, some of them in Brussels, but most of them in Madrid. Up until 31 December 1985 there were excellent European affairs specialists in the Spanish public administration. From January 1986 onwards, most of these people went to Brussels or Luxembourg, joining the European Commission as Commissioners and staff members, the General Secretariat of the Council and the European Parliament as staff members. This led to a regression in the Spanish capacity to handle European affairs which can best be understood in terms of learning curves.

Commission officials were astonished by the phenomenon, not realising that the structure that had been set up for accession negotiations had been deprived of

⁴ Secrétariat général du Comité interministériel pour la coordination économique européenne.

those who made it work. It took at least two years for the Spanish administration to regain the previous level of skills and to increase it again—something which happened in the second half of 1988 due to the specific efforts made by Spain in order to face the challenge of its first Presidency of the EC Council.

Changing the culture: if you don't take Europe seriously, Europe will take you by surprise

Three past examples are specifically relevant. Firstly, with respect to Greece, after rather rapid negotiations, the Accession Treaty foresaw a transition period of five years for the transposition of the *acquis communautaire*. It does not seem that this was based on a specific assessment of the needs, the idea being 'five years is enough, we—or they—will manage...'. In 1985, Greece had a tremendous backlog of EC legislation to transpose, and thus had to ask the Council for an extension of its transition period. One of the key explanations was the culture of Greek public administration, where legislative reforms were announced without being implemented in a common fashion. A high price has been paid not only by Greece, which lost its credibility with its EU partners and with the Commission for quite a long period, but also by the entire Community in terms of the effectiveness of free movement. In the case of Portugal and Spain the negotiation phase was far longer than initially foreseen and in the case of the last enlargement, the monitoring mechanisms of the Europe Agreements and the extraordinary safeguard clauses of Articles 38 and 39 of the 2003 Accession Treaty were inserted.

The second example is Spain. According to Spanish officials working in the State Secretariat for European Affairs—in charge of coordinating Spanish positions in the EC decision-making process—during the first years of accession, over half the representatives of Spanish administrations which had been called to coordination meetings did not turn up. This was due to the lack of a culture of coordination in Spanish public administration which had been reinforced by vertical barriers due to the '*cuerpos*' structure of the Spanish civil service,⁵ the consequences of Franco's authoritarian regime, and the big changes which followed Spain's return to democracy. The price paid was that for a time those interests which officials thought they were defending by not showing up in

⁵ A structure very similar to that of the French '*corps*', which had led Jean Monnet and his collaborators to very carefully set up the SGCI and the *Commissariat general au Plan* at the time of the Marshall Plan, thus building a system which was embedded in the French public administration and was immediately effective when it came to coordinate EC policy-making a few years later.

coordination meetings were not defended, and their administrations and ‘*cuerpos*’ found out that they had better adapt themselves to the centralising mechanism which had been set up.

The third case is Sweden. This country has a remarkable system of independent agencies,⁶ based on a particular constitutional principle. The government system thus very clearly differentiates between policy-making—which is the task of the cabinet, supported by a small number of officials—and implementation, which is the task of independent agencies. It took a few years for the Swedish government to reduce the number of agencies and to set up a system of coordination that would both respect the constitutional principle of independence and the need to take into account the interests which were best known to agencies in the process leading to the adoption of EU decisions by the Council, whose members are government ministers.

EU decision-making and comitology: going to Brussels

Comitology is one of the most specific features of EU decision-making. In the strict sense it refers to committees set up by EC legislation when the Council delegates executive power to the Commission, in order to assist, monitor or control the Commission. In a broad sense it also refers to the fact that Commission proposals for EU legislation are prepared with the help of numerous expert groups, where national governments are usually represented, and to the fact that Council decisions on the Commission proposals are ‘negotiated’ in the framework of so-called ‘Council working parties’ which are again made up of representatives of the Member States. Whereas the founding members have incrementally developed their ways of participation in these expert groups, working parties and committees, new Member States often had to make choices without having much time to think about it. The alternatives are usually to send officials from the permanent representation in Brussels to those meetings, or send officials from the relevant ministries or central agencies. This is not an easy choice as it implies taking into account travel costs as opposed to the costs of maintaining numerous staff in Brussels, but also taking into account non quantifiable costs and benefits, for example, the expertise and contacts of the Member-State representative with the relevant partners both in the public and private sphere. This is a field where copying what other Member States do is probably most dangerous.

⁶ See J. Ziller, ‘European Models of Government: Towards a Patchwork with Missing Pieces’, *Parliamentary Affairs* (2001) 54/1: 102.

Implementation of EC/U legislation and policies: business as usual?

Implementation studies have shown that in most old Member States, European legislation is not treated differently from national legislation, especially when it comes to enforcement:⁷ this is probably the main reason for the marked differences in compliance between Member States. The pressure exercised by the European Commission may impact more or less on the priorities given to the transposition of EC directives and the enforcement of transposed legislation and EC regulations. It may lead to a change of culture of the legislator and of public administrators. Experience shows that problems tend to appear only once the specific effort of transposing the *acquis communautaire* has been done. In the case of the present enlargement, the impact of Articles 38 and 39 of the Accession Agreement may play an unprecedented role, even beyond the period of three years which they foresee for safeguard measures.

IV. Accession and the separation of powers

Participating in the processes of EU decision-making and implementation has quite a clear effect on the balance of powers between the major state institutions, and even the separation of powers. While all Member States experience an increase in the powers of the judiciary after joining, the impact of accession on parliaments varies markedly from one country to another, according to the relative strength of the legislative and executive branches of government.

The judiciary's new powers

While the role of the judiciary increases due to the mechanisms of EC law, especially through the combination of the principles of direct applicability and primacy with the mechanism of preliminary rulings, the change of role tends to be far more brutal with accession. EU Member States experience an empowerment of the judiciary as a whole, but also, and more interestingly, of 'the little judge' which is due to the capacity of all courts and tribunals to ask for preliminary rulings by the ECJ.

There are huge differences between Member States, which are due to two factors which to my knowledge have not been examined thoroughly in a comparative way. One factor is linked to the types of training programmes for judges that are set up just before and immediately after accession. If there are broad training programmes, addressing a large number of judges and practicing

⁷ See H. Siedentopf and J. Ziller (eds.), *Making European Policies Work: The Implementation of Community Legislation in the Member States* (London: Sage, 1988).

lawyers, the more likely it is that accession will be quickly followed by a number of questions for preliminary rulings. The other factor, which is even more difficult to study, is the role of ‘Euro-agitators’ in the legal profession, be they judges or advocates. A study of the geographical origins of questions for preliminary rulings⁸ shows that there are concentrations of questions originating from the same courts or the same regions. It is even possible to track back some cases where questions emanate from different courts where the same person has been serving as a judge or has been pleading as an advocate.

The dawn (and re-birth?) of national parliaments

With the possible exception of Denmark, EU membership usually leads to a kind of dawn of national parliaments, which is often a kind of optical illusion. With European legislation, it becomes apparent that parliament is not that important in terms of the origin of legislation, which becomes the result of initiatives of the executive and of lobbying. This is especially clear with the transposition of the *acquis communautaire* which needs to be done in a short period thus impeding any solid role for parliament in drafting the wording of the corresponding statutes.

In the case of Spain and Portugal, their accession coincided more or less with the change from a very unstable parliamentary democracy—with constant changes of cabinets and prime ministers—to a stable Westminster type of democracy. With a stable parliamentary majority, the impression prevails that parliament has a far less important role than government offices.

In some countries, however, EU membership may lead to a re-birth of national parliaments, or especially of one of their chambers. This is clearly the case in countries which have two parliamentary chambers and a strong asymmetry in their powers: quite typically the British House of Lords has acquired a strong position in European matters due to the excellent quality of its reports and opinions on EU policy, whereas its role in legislation is of a subsidiary nature.

V. Accession and the centre-periphery relationship

The question of centre-periphery relationships is dealt with in more detail by Michael Keating’s chapter in this volume. I would like to underline two aspects which will be interesting to look at with the present enlargement.

⁸ The court which refers the question is always indicated in the proceedings.

Regions in the quest for autonomy: the temptation to by-pass national government and the discovery of national interests

What we have witnessed with previous enlargements is that in countries where regions, or sometimes municipalities have a strong will for increased powers, there is a temptation to by-pass central government in order to establish direct links with 'Brussels'. This was particularly obvious in the case of Spain in the late 1980s, where the Basque Country and Catalonia tried to explore the possibilities of direct links with the European Commission. It took them quite some time to understand that the institutional setting of the European Communities was such—due to the representation of Member States' central government in the Council of Ministers, which is the central institution in terms of legislation—that the right strategy was to have better relations with central government in order to influence the EU.

The Austrian case is very specific and important: in this country there was an important constitutional change in the pre-accession phase, where the *Länder* gained powers, because the leading politicians in the *Länder* used the period of negotiation of Austria's accession to the EU in order to influence the less convinced federalists that an increase in decentralisation was needed in order to counterbalance the country's participation in the EU. This was partly based on the argument that the Austrian *Länder* needed to be the peers of the German *Länder*—Germany being a far less centralised federal system than Austria—in order for Austria to be a peer to Germany in the EU.

Regional policy and institutional change: the NUTS 2 mythology

The link between European regional policy and decentralisation tends to be overemphasised in literature as it has been overemphasised by Commission officials in charge of monitoring the Europe Agreements for some years. This is due amongst other things, to the fact that EU documents refer to 'NUTS 2' regions as a basis for the allocation of structural funds. Some scholars deduct from this reference that there is something like a European concept of region, while NUTS is only a reference to statistical units (*Nomenclature des Unités Territoriales Statistiques*) which correspond only in some cases to institutionalised regions in a given Member State, and sometimes simply refer to a geographical zone of state administration. The literature sometimes refers to the fact that Portugal or Ireland have set up regions in order to benefit from regional policy. This is simply not true: these countries have merely strengthened their administrative capacities to cover those geographical units which they had agreed to be taken into account by

European statistics, but they have not created a new tier of government with its representative institutions.

As Michael Keating explains in his chapter, the Commission's officials have pushed accession countries under the Europe Agreements to set up regional and local government—on the pretext that these were needed for the implementation of regional policy—before making a U-turn and insisting on the centralisation of the apparatus which will have to manage structural funds. A good understanding of how regional policy has functioned in Greece, Portugal and Ireland would have prevented such a confusion.

VI. Implementation of EU policies and the modernisation of government

There is no clear evidence of the real influence of enlargement upon the modernisation of government. EU membership certainly has had some influence in the sense that it pushes towards modernisation, and it has often been used in countries as diverse as Portugal and Sweden in order to change administrative structures and routines as accession created a momentum which was useful for reforms. In the case of Sweden, it seems that most of the changes were introduced immediately before and immediately after accession, whereas in the case of Portugal the era of government reform only really started after a longer period of economic stabilisation and growth. These differences bring us back to our starting point: the institutional impact of enlargement largely depends upon learning curves which are the result of a changing environment; the extent to which accession to the EU is the main factor of change, or only one factor, varies quite evidently from country to country.

Chapter 11

The Europeanisation of National Administration in Central and Eastern Europe:

Creating Formal Structures Without Substance?

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Despite the adoption of Western Institutions, the economic backwardness in the Balkans, the pre-modern, traditional societies with their restrictive communal structure, and the existence of wide-spread poverty created genuine obstacles to modernisation. Consequently, most of the institutions adopted from the West lacked relevance in the Balkan context and remained formal structures without substance.¹

I. Introduction

National administrations represent a crucial part of the political architecture of the European Union. Although formally not regulated by the *acquis*, they execute the vast majority of European regulations and directives. Approximately 80% of the EU budget is made up of different forms of shared management programmes, where the Commission and the Member States share administrative tasks. Only about one sixth of the EU budget constitutes so-called direct management areas,

¹ Ivan T. Berend, *Decades of Crisis: Central and Eastern Europe Before World War II* (Berkeley, Los Angeles/London: University of California Press, 1998), p. 10. See also Ivan. T. Berend, *History Derailed: Central and Eastern Europe in the Long Nineteenth Century* (Berkeley, Los Angeles/London: California University press, 2003), xiii.

where the Commission itself directly executes a programme.² In addition, national administrations make an important contribution to the development and shaping of EU rules through participation in a complex web of committees and working groups. It should come as no surprise that the daily life of European citizens heavily depends on the faithful execution of regulations, directives and other European rules by national administrations. Because of their position in the overall EU political architecture, the national administrations of Member States are often referred to as a 'fourth' or 'invisible' pillar of the European Union.³

With the most recent enlargement in May 2004, ten new Member States joined the European Union. Central and Eastern European countries (CEECs) had to undergo a substantial process of reforms and adaptations to the EU *acquis*, before joining the EU. In a very brief period of time they had to accept the entire *acquis communautaire*, now ranging from 80,000 to 100,000 pages. The entire process was marked by several distinguishing features. Many authors emphasise the power asymmetry during the enlargement process. Namely, that there was an asymmetrical bargaining position between the EU and the candidate countries in favour of the EU. If the past enlargements involved real negotiations, the last enlargement offered little space for bargaining for the candidate countries. The speed and complexity of the process was also unprecedented.⁴ In a few years, the candidate countries had to reform and adjust their entire legal systems to the requirements of the *acquis*. As Cameron succinctly argues,

[u]nlike the experience of most if not all of the current EU Member States, which accumulated the regulatory institutions, norms, and policies appropriate to a market-oriented economy over a long period of time, most of the candidate countries have had to develop those institutions, norms and policies in a very short period and without the benefit of a long prior accumulation of appropriate institutions, norms, and policies.⁵

² U. Sverdrup, 'Towards a European Public Administration Policy', (2002) ARENA, Oslo, unpublished manuscript, p. 4.

³ J. Voskamp, 'An Invisible Pillar of the European Union', *Eipascope* (2001/3), Special Edition for EIPA's 20th anniversary, pp. 9–10.

⁴ A. Grzymala-Busse, 'The New Dysfunctionism? Paradoxes of EU Enlargement and the Postcommunist Candidate Countries', paper prepared for the Conference of Europeanists, Chicago, 11–14 March 2004, pp. 20–25.

⁵ D. R. Cameron, 'The Challenges of EU Accession for Post-Communist Europe', paper prepared for the Conference on The Dilemmas of Europeanisation: Politics and Society in Eastern and Central Europe after EU Enlargement, Minda de Gunzburg Center for European Studies, Harvard University, Dec. 2003, p. 7.

Another key consequence of speed, complexity and power asymmetry in the enlargement process was the limited nature of institutional innovation in the region. The process of institution-building was, contrary to the experience of the old Member States, a short one with very limited sets of institutional and policy choices. As Grzymala-Busse reports, the most famous case is when the Hungarian parliament adopted half the *acquis* in five minutes. She goes on to argue that, “Ready-made models and standards are presented, and accepted, by necessity. This pace leaves very little time for judgment of possible consequences, for disentangling causes from outcomes, or for institutionalising and consolidating properly all the policy innovations that are being brought on the board”.⁶

One of the key questions is then how well CEE administrations are prepared for their vital role of rule-making and rule execution inside the Union? Have they created adequate, well-functioning institutions, comparable to those in the old Member States? Or have they, as has often occurred in their recent history,⁷ constructed ‘formal structures without substance’, that look just like their Western European counterparts on the surface, but lack relevance or substance in their CEE context? Are the new institutions created during enlargement sustainable over a longer period of time? Since we are dealing with the biggest EU enlargement ever, this aspect is particularly pertinent. Many have expressed scepticism about the administrative capacity of the new Member States to actually implement the *acquis*; namely, the huge differences between old and new Member States as regards the ability to implement the *acquis*. The Commission itself has highlighted this problem in several Regular Reports on Progress and Opinions.

How exactly has the process of Europeanisation affected institution-building in CEE? As mentioned, the process of institution-building in CEE has certain distinctive features such as complexity, speed, power asymmetry, absence of institutional innovation and experimentation. As Grabbe has shown, this constellation has contributed to a stronger degree of Europeanisation of CEE institutions “that goes beyond the Union’s remit for its current member-states”.⁸ The EU used several mechanisms for this: gate-keeping as regards access to negotiations and further stages in the accession process, benchmarking and

⁶ A. Grzymala-Busse, ‘The New Dysfunctionalism? Paradoxes of EU Enlargement and the Postcommunist Candidate Countries’ (2004: 23).

⁷ I. Berend, *Decades of Crises: Central and Eastern Europe Before World War II* (Berkeley, Los Angeles, London: California University Press, 1998).

⁸ H. Grabbe, ‘The Implications of EU Enlargement’, in S. White, J. Batt and P. G. Lewis (eds.), *Developments in Central and East European Politics 3* (New York: Palgrave Macmillan, 2003), p. 258.

monitoring, provision of institutional models, financial aid and technical assistance, advice and twinning.⁹

But, as Sadurski argues, conditionality isolated from domestic needs and interests, seldom worked. Furthermore, it cannot be easily separated from other outside sources and pressures. When certain solutions were offered, they rarely came in the form of specific institutional models. Even if CEE countries have had little time for institutional tinkering, their domestic interests frequently overlapped with the requirements of the EU.¹⁰ There were many examples where CEE political élites disguised their domestic political needs as EU requirements. In several countries important administrative reforms were made with reference to 'Europe'. New bodies, such as Office for the Fight Against Corruption (OLAF) were established because the *acquis* purportedly required it.¹¹

On the other hand, during the negotiations with the candidate countries the Commission interpreted the *acquis* so as to embrace things not even remotely linked to the Copenhagen criteria for conditions of membership, and even less to any legal provision of the *acquis* itself.¹² Well known examples include the closure of nuclear power plants in Bulgaria, Lithuania, and Slovakia, or the reform of the system of institutional state childcare in Romania.¹³ The open-ended nature of the main Copenhagen criteria sometimes allowed the EU more leverage to impose conditionality unilaterally. It seems thus that Europeanisation and conditionality worked in many different directions and constellations.

⁹ H. Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* (2001) 8/4: 1020.

¹⁰ W. Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the new Member States of Central and Eastern Europe', *European Law Journal* (2004) 10/4: 376–77.

¹¹ This was the case in Slovenia. On a closer reading of the *acquis*, one can see that only an effective fight against corruption is required. The *acquis* does not predetermine the form of organisation or office to be charged with such an issue. It is left to the Member States to decide in what form to organise the fight against corruption.

¹² As chief negotiator for Slovenia (Justice and Home Affairs), I vividly remember many cases of such arbitrary intervention from Commission officials. The *acquis* does not say a word about how a Member State should organise and construct facilities such as asylum centres or centres for detained illegal migrants. Yet, Commission officials insisted that Slovenia should separate these two facilities and create two new separate centres.

¹³ H. Grabbe, 'The Implications of EU Enlargement', in S. White, J. Batt and P. G. Lewis (eds.), *Developments in Central and East European Politics* (2003: 255).

II. Europeanisation and public administration

Radaelli defines Europeanisation as:

[p]rocesses of (a) construction (b) diffusion and (c) institutionalisation of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things', and shared beliefs and norms which are first defined and consolidated in the EU policy process and then incorporated in the logic of domestic (national and subnational) discourse, political structures, and public policies.¹⁴

In other words, if European integration is about the transfer of sovereignty to the EU level, Europeanisation depicts what happens once the EU institutions are in place and produce certain results. One of the most interesting issues in research dealing with Europeanisation is the question how European rules, policies, and regulatory styles affect structures and policies at the domestic (national) level. There are many different aspects of Europeanisation. It affects national political and policy-making processes, national administrative cultures, discursive frameworks which shape the work of public administrations, and structures of national administrations. Most of the research so far has been done on the first aspect of Europeanisation. There is good evidence on how Europeanisation influences a style and content of national policy-making in various fields of regulation.¹⁵ While some of them are being increasingly Europeanised, others remain distinctively national. The examples of the first category are media and telecommunications regulation. Monetary and tax policy are also more Europeanised. A significant degree of Europeanisation is found in competition policy and new regulatory models such as regulation by independent regulatory agencies. But even here more recent studies have found an important degree of variation among different countries. Although strongly harmonised in the European legal context, competition policy produces different results in different countries.¹⁶ Thatcher reports that independent regulatory agencies (IRAs) represent a key feature of the new regulatory state model in Europe. But again, there is a variation among different models of agencies, their powers and their importance.¹⁷ Debate on Europeanisation ultimately raises the question of the

¹⁴ C. M. Radaelli, 'The Europeanisation of Public Policy', in K. Featherstone and C. M. Radaelli (eds.), *The Politics of Europeanisation* (Oxford: Oxford University Press, 2003), p. 30.

¹⁵ Ibid., pp. 27–52.

¹⁶ S. Eyre and M. Lodge, 'National tunes and a European melody? Competition law reform in the UK and Germany', *Journal of European Public Policy* (2000) 7/1: 63–79.

¹⁷ M. Thatcher, 'Delegation to Independent Regulatory Agencies: Pressures, Functions and Contextual Meditation *West European Politics* (2002) 25/1: 125–47.

persistence of different models of capitalism. Despite the strong offensive of those who argue that globalisation erodes the differences between various models of capitalism, authors like Hall, Soskice and Schmidt raise strong arguments for the defence of 'varieties of capitalism'.¹⁸ A special issue of the *Journal of European Public Policy* was devoted to an analysis of regulatory reforms in Europe. Its conclusions confirm that differences among various regulatory regimes in Europe persist.¹⁹

Europeanisation is much weaker when it comes to the structure of national administrations. Administrative structures remain deeply embedded in local political, cultural and economic contexts and are strongly resistant to pressures for change. They remain a distinct national legal and political category. The differences between the national administrations of Member States remain significant. One of the earlier studies in this field found only a modest effect of Europeanisation on public administration.²⁰ Hix and Goetz argue that there is no conclusive evidence about how Europeanisation affects administrative change. Its importance should be studied alongside other relevant factors.²¹ Several other studies show that national administrations retain their distinct national 'styles' of policy-making and their organisational structures.²² They seem to confirm the insight of those authors who are described as 'historical institutionalists': namely, the adaptation of national administrations to Europeanisation and other pressures from the international arena are mediated by several factors which include a variety of national specific institutional, historical, political and cultural factors.

¹⁸ P. Hall and D. Soskice (eds.), *Varieties of Capitalism, The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); V. A. Schmidt, *The Futures of European Capitalism* (Oxford: Oxford University Press, 2002).

¹⁹ M. Thatcher, 'Analysing Regulatory Reform in Europe', *Journal of European Public Policy* (2002) 9/6: 867–70.

²⁰ E. C. Page and L. Wouters, 'The Europeanisation of the National Bureaucracies?', in J. Pierre (ed.), *Bureaucracy in the Modern State: An Introduction to Comparative Public Administration* (Aldershot: Edward Elgar, 1995), p. 202.

²¹ S. Hix and K. H. Goetz, 'Introduction: European Integration and National Political Systems', in K. Goetz and S. Hix (eds.), *Europeanised Politics? European Integration and National Political Systems West European Politics* (Special Issue) (2000) 23/4: 20.

²² D. Vogel, *National Styles of Regulation. Environmental Policy in Great Britain and the United States* (Ithaca and London: Cornell University Press, 1986); S. Vogel, *Freer Markets, More Rules: Regulatory Reforms in Advanced Industrial Countries* (Ithaca and London: Cornell University Press, 1996); C. Knill, *The Europeanisation of National Administrations: Patterns of Institutional Change and Persistence* (Cambridge: Cambridge University Press, 2001); R. Ladrech, 'Europeanisation of Domestic Politics and Institutions: The Case of France', *Journal of Common Market Studies* (1994) 32/1: 69–88.

As a result, and as Vogel argued of the first studies on this issue, despite internationalisation and Europeanisation national 'styles of regulation' remain a distinct category and are heavily influenced by a host of national factors.²³ We should not be surprised by such a conclusion. It was Montesquieu who argued in his *The Spirit of the Laws* that "laws should be so appropriate to the people for whom they are made that it is very unlikely [the French original 'une grand hazard'] that the laws of one nation can suit another".²⁴ His idea of 'the spirit of the laws' involves laws and legal institutions having a strong imprint of national legal and political tradition that makes them not easily transferable to other nations and cultures. Several other accounts of modern comparative history of legal institutions have reached similar conclusions.²⁵

This chapter offers a legal-institutionalist analysis of the Europeanisation of national administrations in CEE. We know more about the Europeanisation of public policy, cognitive and normative structures, and less about the Europeanisation of domestic legal and political structures. Current research reveals a modest or small impact of Europeanisation on national administrative structures. Yet, there is a growing body of literature arguing that Europeanisation, together with globalisation, privatisation, and liberalisation, has contributed to the rise of the regulatory state in Europe which has, arguably, replaced the Keynesian interventionist state.²⁶ As Majone argues, the emergence of the new model of regulation, i.e. the regulatory state, has also importantly changed the regulatory institutions and structures throughout Western Europe.²⁷

This chapter provides some preliminary answers to three types of questions. First, how does Europeanisation work in the CEE context? I use the example of administrative reforms, and more particularly but not exclusively, the example of civil service reforms. As Goetz argues, the theoretical model explaining

²³ D. Vogel, *National Styles of Regulation. Environmental Policy in Great Britain and the United States* (Ithaca and London: Cornell University Press, 1986).

²⁴ C. S. de Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989), Book 1, Chap. 3, p. 8.

²⁵ O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', *Modern Law Review* (1974) 37/1: 1–27; J. Schwarze, 'The Europeanisation of National Administrative Law', in J. Schwarze (ed.), *Administrative Law under European Influence* (Baden-Baden: Sweet & Maxwell, 1996), p. 800; C. Nizzo, *National Public Administration and European Integration*; OECD-SIGMA, 2000: 1 <http://www.unpan.org/>.

²⁶ G. Majone, 'From the Positive to the Regulatory State: Causes and Consequences of Changes in the Mode of Governance', *Journal of Public Policy* (1997) 17/2: 139–67.

²⁷ *Ibid.*, pp. 139–67.

Europeanisation was developed in the Western European context.²⁸ Several specific factors (conditionality, speed, complexity, power asymmetry, and past legacy) make the CEE case different and raise the question about the limitations of that model for its use in the CEE case.²⁹ Second, we know less about the Europeanisation of national administrations than about other areas of Europeanisation. How exactly Europeanisation affects rules, structures, and procedures used by different national administrations? Grabbe and several other authors have found that Europeanisation has a stronger impact on CEEs compared with the impact on the old Member States.³⁰ Then, another important question is how precisely Europeanisation changes legal and political structures and procedures governing the work of national administrations? National administrative systems are closely linked with political, cultural, social and legal characteristics of a particular society. As many administrative law scholars argue, they are quite resistant to outside pressures.³¹ Yet, as Grabbe and others have shown, this was not necessarily the case in the CEE context. To what extent was the EU able to exert pressure and influence the national administrative systems of CEEs? And third, how well are the national administrations of CEEs prepared to actually implement the *acquis*? Several authors argue that what we find is a strong discrepancy between formal structures and their actual results. They also question the long term sustainability of administrative institutions created during the enlargement process. What are the consequences of such findings for the EU's multilevel system of governance where national administrations play so important a role?

²⁸ K. H. Goetz, 'Europeanisation in West and East: A Challenge to Institutional Theory', paper prepared for 1st Pan-European Conference on EU Politics, Bordeaux, 26–28 Sept. 2002, pp. 3–4.

²⁹ H. Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* (2001) 8/4: 1013–15; K. Goetz, 'Europeanisation in West and East: A Challenge to Institutional Theory', (2002: 12).

³⁰ H. Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', (2001: 1013–31).

³¹ O. Kahn-Freund, 'On Uses and Misuses of Comparative Law', *Modern Law Review* (1974) 37/1: 1–27.

III. The Europeanisation of national administrations: the persistence of administrative systems in Western Europe?

A vast majority of EU rules are implemented through ‘indirect implementation’,³² where national administrations carry out the execution of EU rules in their domestic legal contexts. There are very few fields of regulation where the EU institutions directly implement the EU law. The best known example of the direct implementation of EU law is competition law, where the Commission directly enforces competition law at the EU level. There is accordingly a strong interdependence between the EU institutions and the domestic administrative institutions. On the other hand, there are no general EU rules on the administrative *acquis* that would regulate a design or structure of national administrations.

There are few provisions in the EC Treaty and in the Treaty on European Union (TEU) that indirectly affect national administrations.³³ There are several other provisions in the secondary EU legislation that in one way or another affect the national administrations. In certain areas, the EU rules, both regulations and directives, require the formation of particular forms of regulatory bodies. The examples include such fields as common agricultural policy and environmental protection where the creation of national regulatory authorities is required.³⁴ It should be mentioned that examples of the direct effect of EU law on the very structure of the national administration are rare. A particularly strong form of Europeanisation is the creation of certain common rules that bind all national regulatory authorities. The example here is public procurement rules in the EU which establish a common administrative law of the Community. A more common pattern of Europeanisation can be found in all those areas where EU law prescribes common policies, while the impact on administrative structures and practices comes from the implementation requirements of these policies.

One would expect stronger Europeanisation in those areas which are more tightly regulated by EU rules, such as the common agricultural policy, environmental policy, competition policy, etc. Yet the research does not support such a proposition. In areas such as environmental pollution, which is subject to a

³² J. Schwarze, ‘The Europeanisation of National Administrative Law’, in J. Schwarze (ed.), *Administrative Law under European Influence* (1992: 34).

³³ Examples include Arts. 10 and 280 (EC Treaty), or Art. 6 (TEU).

³⁴ C. Demmke, ‘Undefined Boundaries and Grey Areas: The Evolving Interaction Between the EU and National Public Services’, *Eipascope* (2002) 2: 10–11. Another example is the Electricity Directive which explicitly requires the establishment of independent regulatory authorities.

substantial body of detailed directives and regulations, one study finds two different regulatory concepts in Britain and Germany. Further studies reveal important differences in competition policy where there is an EU model of competition policy.³⁵

There is also important case law from the European Court of Justice (ECJ) that has established several general legal principles regulating the work of national administrations. The ECJ has developed, through its case law, numerous general principles such as proportionality, legitimate expectations, duty to give reasons, transparency, etc. which have had an important impact on the structure and practices of national administrations. It should be emphasised, however, that these general legal principles are very abstract and vague and that their concrete application may vary from country to country. Take as an example one of the more recent legal principles, the principle of transparency. Within the EU we can find countries with a strong entrenched culture of openness and transparency in public administration, but also countries with an equally old tradition of secrecy in public administration. Germany, for example, does not have a statute regulating access to public information.³⁶

The jurisprudence of the ECJ also includes the interpretation of Article 39(4) EC Treaty dealing with the exception to the general principle of freedom of mobility of the labour force within the EU. This provision provides an exception to the free movement of workers whereby the freedom does not extend to employment in the public service. In several cases, the ECJ had to define the precise meaning of this article. The main question before the Court was to define what constitutes employment in the public sector. As Ziller argues, the ECJ's decision in *Commission v. Belgium*,³⁷ has been the starting point for a series of reforms in the civil service laws of the EU members.³⁸ Here the Court defined two types of posts that fall within the category of 'employment in the public sector'. The first group consists of those posts that involve direct or indirect participation in the exercise of powers conferred by public law. The second group includes those posts where duties are designed to safeguard the general interest of the state

³⁵ E. Page, 'Europeanisation and the Persistence of Administrative Systems', in J. Hayward and A. Menon (eds.), *Governing Europe* (Oxford: Oxford University Press, 2003), pp. 169–70.

³⁶ B. Bugarič, 'Openness and Transparency in Public Administration: Challenges for Public Law', *Wisconsin International Law Journal* (2004) 22/3.

³⁷ Case 149/79 *Commission v. Belgium* [1980] ECR 3881.

³⁸ J. Ziller, 'EU Integration and Civil Service Reform', in SIGMA, *Preparing Public Administrations for the European Administrative Space*, Sigma Paper No. 23 (Paris: OECD, 1998), p. 140.

of other public authorities. In a series of cases, the Court decided which posts are therefore open for non-nationals. The list of exceptions is extensive and includes workers in postal services, nurses in state hospitals, foreign language assistants in universities, researchers in civil research, etc.³⁹ The reforms which followed the case law of the Court changed civil service laws in several countries so as to open to non-nationals the posts not covered by the formula of 'exercising public law powers or safeguarding public interest'. According to Ziller, 60–90% of public service jobs in the Member States are open to non-nationals. The Court's ruling therefore opened up the door for the further Europeanisation of civil services in the Member States. When we look at the figures we see that the number of civil servants moving throughout the Union is very low. With the exception of teachers and researchers, other civil servants mostly stay at home.⁴⁰ The actual impact of the ECJ case law on Article 39(4) EC is therefore quite limited.

Another example has to do with the ECJ's interpretation of the Article 86 EC Treaty regulating public services in the EU. The Court has changed the way national governments regulate public services. The governments were forced to introduce new, less interventionist styles of regulation of public services. The Court was careful enough to stress that its jurisprudence does not preclude the creation of public enterprises. However, both public and private enterprises providing public services have to comply with the EU competition rules. The case law of the ECJ prevented the Member States from treating their domestic public services as national monopolies. Special or exclusive rights are, according to the Court's jurisprudence, justified only if the interests of Member States are consistent with those of the EU. As Nizzo argues, "the Court's case law has made a decisive contribution to scaling back the State's interventionist role, and to harmonising administrative practices, so that the European market could become genuinely unified".⁴¹ But he acknowledges that there are still major differences among the public-service regimes of the Member States. As mentioned above, differences among various regulatory regimes dealing with public utilities still persist in Europe.⁴²

³⁹ C. Demmke and U. Linke, 'Who's a National and Who's a European? Exercising Public Power and the Legitimacy of Art. 39(4) EC in the 21st Century', *Eipascope* 2003/2: 3.

⁴⁰ *Ibid.*, p. 5.

⁴¹ C. Nizzo, *National Public Administrations and European Integration* (2000: 4).

⁴² A. Heritier, 'Public-interest service revisited', *Journal of European Public Policy* (2002) 9/6: 995–1019.

Another form of influence is derived from the principle of effectiveness and the Court's jurisprudence based on this principle enshrined in Article 10 of the EC Treaty. Article 10 requires Member States to take all necessary steps to ensure full implementation of the Treaty provisions. The Member States are being held responsible before their own courts for not implementing directives. While such decisions of the Court do not have a direct effect on the structure of national administration, they have a profound effect on the substance of work of national administrations.⁴³

Europeanisation sometimes takes a very different, more indirect, form. The examples of the last category are regular meetings of Ministers responsible for public administration, where Ministers adopt various resolutions containing recommendations to the Member States as to which 'best practices' to follow. Although the resolutions are not legally binding, a recent follow up report, prepared for the 10th meeting of Ministers for Public Administration in Rhodes, Greece, shows that countries tend to follow such recommendations. Quite a separate question is how such recommendations actually contribute to so-called 'European Administrative Space'.

Another interesting example of the indirect form of Europeanisation is the regular meetings and collaboration among national civil servants in the preparation of EU rules, decisions and policies. Some authors argue that such regular contacts have a profound impact on the culture of national public administrations. But as Page argues, what countries imitate are general ideas and principles, not the actual implementation of those ideas.⁴⁴ As another author argues, "it is easier for ideas to travel than policies". One should thus be cautious not to exaggerate the importance of shared ideas and principles. While there seems to be a strong convergence on the level of ideas and principles, there is much more divergence if we move to the world of real policies and their practical implementation.⁴⁵ Page distinguishes between two concepts of Europeanisation: Europeanisation as an impact, and Europeanisation as homogeneity. His research shows that there are many mechanisms which produce the first type of Europeanisation. Nevertheless, Europeanisation as homogenisation is 'far less formidable than is commonly supposed'. It is limited by factors such as different administrative traditions, basic administrative philosophies, different conceptions

⁴³ C. Nizzo, *National Public Administrations and European Integration* (2000: 5).

⁴⁴ E. Page, 'Europeanisation and the Persistence of Administrative Systems', in J. Hayward and A. Menon (eds.), *Governing Europe* (2003: 173).

⁴⁵ C. Pollitt, 'Convergence: The Useful Myth?', *Public Administration* (2001) 79/4: 943–45.

of the role of the public sector in society, different political culture, etc.⁴⁶ In other words, national administrations remain distinct national political categories.

IV. The Europeanisation of national administrations in CEE: defining administrative capacity requirement

Reforms of national administration in CEE countries were not a key policy priority during the initial stage of the transition. Given the anti-statist bias prevalent among the reformers of that time, this is not surprising.⁴⁷ It is only during the accession negotiations with the EU that administrative reforms became an important item on the policy agenda of the CEE governments. More precisely, with very few exceptions,⁴⁸ most of the governments started with various reforms of public administration only in the second half of the 1990s.

There is no EU *acquis* or formal rules on public administration. Few exceptions were described in the earlier section. Despite the absence of the *acquis* regulating public administration, the EU created criteria which were used to measure the adequacy of administrative reforms in the CEE countries. The first crucial step in this direction was the Copenhagen Summit in June 1993 leading to the so-called Copenhagen criteria. They include the,

[s]tability of institutions guaranteeing democracy, the rule of law, human rights and respect for, and protection of, minorities; the existence of a functioning market economy as well as the capacity to cope with competitive pressures and market forces within the Union; and the ability

⁴⁶ E. Page, 'Europeanisation and the Persistence of Administrative Systems', in J. Hayward and A. Menon (eds.), *Governing Europe* (2003: 176).

⁴⁷ A. J. G. Verheijen, 'Public Administration in Post-Communist States', in B. G. Peters and J. Pierre (eds.), *Handbook of Public Administration* (London: Sage, 2003), p. 490.

⁴⁸ Hungary was the only CEE country which started administrative reforms before the onset of accession negotiations, adopting a new civil service law in 1992. Dimitrova wrongly lists Slovenia as a second example of 'early reformers'. While it may be true that Slovenia's 1990 civil service law contained elements of 'modern' civil service legislation, one should bear in mind that the law was only slightly amended version of previous, Yugoslav communist legislation. While this shows that Yugoslavia was probably the only country in the region where the notion of professional civil service existed, at least formally, it cannot be taken as a 'proof' that Slovenia started with administrative reforms as early as in 1990s. Indeed, Slovenia was one of the last countries to adopt its new civil service law only in 2002. See A. L. Dimitrova, 'Europeanisation and Civil Service Reform in Central and Eastern Europe', in F. Schimmelfenning and U. Sedelmeier (eds.), *The Europeanisation of Central and Eastern Europe* (Ithaca/London: Cornell University Press, 2005), p. 84.

to take on the obligations of membership, including its aims of political, economic and monetary union.⁴⁹

Administrative conditionality emerged in 1995 during the Madrid European Council which, for the first time, explicitly mentioned the need to adjust administrative structures in CEE countries. As Verheijen reports, the administrative capacity criteria was used in its own right for the first time in the Commission Opinions in 1997 and Commission Regular Reports on Progress.⁵⁰ Sometimes explicitly, sometimes implicitly, the Opinions and Progress Reports referred to various issues related to the general quality of public administration. These issues include the development of an impartial and professional administration, the development of a training system, adequate policy developments and policy-coordination capacities, etc.⁵¹

The assessment of administrative capacity was not an issue during previous enlargements.⁵² Its application to the CEE countries was therefore a novelty in the EU enlargement process. But it was not surprising that the EU decided to assess the administrative capacity of potential Member States. Their national administrations were perceived as “weak, under-resourced, inefficient, and prone to corruption, and above all, politicised: civil servants display arrogant attitudes toward the ordinary citizens and undue deference towards party politicians”.⁵³ Since a vast part of the EU administration depends on the indirect administration carried out by Member States, it is not surprising that the Commission decided to scrutinise the administrative capacity of the CEECs national administrations to apply the *acquis*. As Verheijen observes, “too wide a divergence in administrative capacities between Member States to transpose and efficiently implement EU legislation could lead to serious distortions in the functioning of the Internal Market”.⁵⁴ The accession negotiations were not only about formally transposing

⁴⁹ *Presidency Conclusions*, European Council in Copenhagen, 21–22 June 1993. DN: DOC/93/3, June 1993.

⁵⁰ A. J. G. Verheijen, ‘Administrative Capacity Development: A Race Against Time?’, *WRR Working Documents* (2000) W 107, The Hague, p. 16.

⁵¹ *Ibid.*, p. 16.

⁵² J. Ziller, ‘EU Integration and Civil Service Reform’, in SIGMA, *Preparing Public Administrations for the European Administrative Space*, Sigma Paper No. 23 (Paris: OECD, 1998), p. 138.

⁵³ W. Sadurski, ‘Accession’s Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the new Member States of Central and Eastern Europe’, *European Law Journal* (2004) 10/4: 373.

⁵⁴ A. J. G. Verheijen, ‘Administrative Capacity Development: A Race Against Time?’, *WRR Working Documents* (2000: 15).

the entire *acquis*. The Commission required that the candidate countries prove their “administrative capacity to apply the *acquis*”. This phrase constituted the title of the most important parts of the Commission Progress Reports.

Measuring the administrative capacity of the candidate countries turned out to be quite a formidable task for the Commission. The Copenhagen (and Madrid) criteria were general and vague. They did not contain any specific elements, definitions, or models, that could be used to assess the administrative capacity of the CEE countries. The Commission was aware of this problem and asked the SIGMA⁵⁵ unit of the OECD to develop a new assessment system. The 1999 Reports used the new assessment system developed by the SIGMA.⁵⁶ Two papers produced by the SIGMA contained a rich description of certain common principles of public administration in Europe, but were short of a more detailed analysis of how such abstract principles function in different countries. In other words, the SIGMA ‘model’ was abstract, vague and lacked a more detailed analysis of general and abstract principles found across Europe. One should not be surprised to see that “despite the development of the SIGMA baseline assessment tool, administrative capacity remained an elusive concept”.⁵⁷ It is very telling what one Commission source mentioned in this regard: “We never found a way to judge administrative capacity among the existing Member States. It was only in the case of the Central and Eastern European candidates knocking on our door that we erected the barrier of administrative capacity”.⁵⁸ Since there was no clear EU model of public administration, the Commission had a pretty much open-ended discretion to ascertain and tell the candidate countries what the administrative capacity requirement really means. To further complicate the issue, the Copenhagen criteria had no legal basis in the EU treaties. This was

⁵⁵ SIGMA, Support for the Improvement of Governance and Management in Central and Eastern Europe. SIGMA is funded mainly by EU PHARE and implemented by the OECD. See A. J. G. Verheijen, ‘Administrative Capacity Development: A Race Against Time?’, *WRR Working Documents* (2000:12)

⁵⁶ SIGMA, *European Principles of Public Administration*, Sigma Paper No. 27 (Paris: OECD, 1998); SIGMA, *Preparing Public Administrations for the European Administrative Space*, Sigma Paper No. 23 (Paris: OECD, 1998).

⁵⁷ A. Dimitrova, ‘Enlargement, Institution-Building and the EU’s Administrative Capacity Requirement’, *West European Politics* (2002) 25/4: 178.

⁵⁸ *Ibid.*, p. 178. In an interview, the Secretary of State responsible for the reform of public administration in Slovenia in the mid-1990s stated that when the Slovenian government asked the Commission for the explanation of the administrative capacity requirement, it received a confusing and unclear answer. Interview with Gorazd Trpin, former Slovenian Secretary of State, April 2005.

slightly changed with the new Article 6(1) of the Treaty of Amsterdam (ToA), which established certain principles such as liberty, democracy, respect for human rights, and rule of law as common principles to the Member States.⁵⁹ But again, all these principles are so abstract that many different interpretations could fit into their very general meaning.

V. The logic of conditionality: from causality to complexity

Notwithstanding the indeterminacy of the administrative capacity requirement, various studies report that the Commission was able to use conditionality to influence the course of administrative reforms in CEE countries. Grabbe argues that “the scope of the accession agenda goes well beyond the influence of the EU in the governance of current Member States, where the EU has no say over issues such as the quality or organisation of their political institutions or civil services”.⁶⁰ In her study of civil service reforms in CEE, Dimitrova, also reports that “conditionality and especially the pressure for reform linked to the start of negotiations for membership did make a difference”.⁶¹ But, both Grabbe and Dimitrova also show that Europeanisation worked in a complex way, with varied and diffused influence over CEE countries.

Despite the absence of the clear model and despite the vague Copenhagen standards, the Commission strongly insisted on the adoption of civil service legislation as a start for administrative reforms.⁶² In other words, the adoption of civil service legislation, coupled with some additional measures,⁶³ became virtually synonymous with administrative reform itself. It is very interesting that

⁵⁹ M. A. Vachudova, *Europe Undivided: Democracy, Leverage, & Integration After Communism* (Oxford: Oxford University Press, 2005), p. 121.

⁶⁰ H. Grabbe, ‘How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity’, *Journal of European Public Policy* (2001) 8/4: 1014.

⁶¹ A. L. Dimitrova, ‘Europeanisation and Civil Service Reform in Central and Eastern Europe’, in F. Schimmelfenning and U. Sedelmeier (eds.), *The Europeanisation of Central and Eastern Europe* (2005: 85). My critique of Dimitrova is that she focuses too much on legislative reforms. In her assessment of Europeanisation, passing new civil service laws together with secondary legislation counts as ‘administrative’ reform. My argument is that passing civil service laws is only one step toward reforms, but not really a reform itself.

⁶² *Ibid.*, p. 81.

⁶³ Verheijen list the most important elements that were developed by the SIGMA model. They include, for example, the development of a training system, adequate policy development and policy-coordination capacities, effective accountability system, etc. See A.J.G. Verheijen, ‘Administrative Capacity Development: A Race Against Time?’, *WRR Working Documents* (2000: 16).

the SIGMA and the Commission promoted requirements for the adoption of the classical Weberian model of public administration, with the emphasis on professionalism and independence from too strong political interference.⁶⁴ There was not much discussion of the New Public Management (NPM) model, probably the most influential model for civil service reforms in Western Europe today, or of any other models.⁶⁵ Since the strong communist legacy of overt politicisation of public administration was still alive in most of the CEE countries, one can understand why the Commission and SIGMA sincerely believed that depoliticisation and establishment of professional and neutral public administration should become a priority in administrative reforms in CEE. However, it is a little more difficult to understand why such a reform should preclude any borrowing from the NPM or any other alternative model.

As a consequence of the Commission's insistence, most CEE countries speeded up their adoption of civil service laws. Before 1997 only Hungary, Poland, Latvia, Estonia, and Lithuania passed civil service legislation, but in the relatively short period 1997–2002, all other CEE countries had done so.⁶⁶ Dimitrova argues that this pattern shows that conditionality did work in the CEE context. Furthermore, she argues that the additional 'proof' of the effectiveness of conditionality was the similarity of adopted civil service laws. There were differences as to the timing of adoption of legislation, but much less difference as to their content.⁶⁷ Admitting that some details in the legislation differ, Dimitrova emphasises that the new legislation in most cases "has defined the civil service and the position of civil servant, established some form of career civil service system, provided for the protection of civil servants from political interference by favouring competition and limiting political appointments".⁶⁸

⁶⁴ A. L. Dimitrova, 'Europeanisation and Civil Service Reform in Central and Eastern Europe', in F. Schimmelfenning and U. Sedelmeier (eds.), (2005: 81).

⁶⁵ While some authors agree that the EU promoted the Weberian model, others argue that some subsequent advice brings it closer to the so-called mixed model. See A. L. Dimitrova, 'Europeanisation and Civil Service Reform in Central and Eastern Europe', (2005: 81). In an oral presentation at the 2nd Quality Conference in Copenhagen, 2002, Bob Bonwitt, the head of SIGMA, strongly argued against the use of NPM in CEE countries.

⁶⁶ A. L. Dimitrova, 'Europeanisation and Civil Service Reform in Central and Eastern Europe', in F. Schimmelfenning and U. Sedelmeier (eds.), (2005: 84–85).

⁶⁷ *Ibid.*, p. 86.

⁶⁸ *Ibid.*, p. 86. As she mentions, the elements of performance-oriented personnel policy were limited. She admits that there were some changes later, when many countries amended their legislation.

While the advice of the Commission was important, it did not completely pre-determine the course of administrative reforms. The variation in administrative reforms among CEEs shows that conditionality did not work in a simple “clear-cut causal relationship”,⁶⁹ as some authors argued. But elaborating on this point, I would like to dwell on my earlier claim that both the Commission and SIGMA favoured a certain concept of administrative reforms at the expense of other possible alternatives. As mentioned above, they preferred the adoption of the classical Weberian career civil service model, while ignoring the possible advantages of a more flexible position model of civil service, or a combination of both models.⁷⁰ As I would argue in the conclusion, this choice had profound implications for the course and shape of administrative reforms in the region.

Administrative reforms are one of the key policy issues in Europe today. While Western European democracies have continuously sought solutions aiming at the modernisation of their well-functioning public administrations, CEE new democracies basically have had to start from scratch: they needed to re-establish a modern, professional public administration. Thus, Western European democracies have one clear advantage: a long tradition of professional, neutral and apolitical

⁶⁹ J. Hughes, G. Sasse and C. Gordon, ‘Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government’, *Journal of Common Market Studies* (2004) 42/3: 523. Although their study examines the logic of conditionality in one particular policy area, i.e., regional policy, the authors make a broader theoretical claim when criticising too coercive understanding of conditionality.

⁷⁰ In Europe, there are two basic models of civil service: the career system, and the position system. The key elements of the career system includes recruitment of civil servant at the bottom of a specific career ladder in which he is then promoted and remuneration increases according to statutory regulations. The career systems are highly hierarchical but also very protective of civil servants. They enjoy permanent tenure after they spend a probationary period in the administration. The position system differs from the career system in two important aspects: its is more flexible and offers less legal security of job protection to civil servants. Civil servants do not follow a specific career. They are employed for a particular post and it should be easier for them to change their posts in the administration. One of key distinguishing features of the position system is that permanent tenure is not granted and the civil servant is not promoted within a statutory career development system. Working conditions, payment and pension are mainly based on collective agreements. In other words, employment in the position system is more or less comparable to that in the private sector. There is a tendency within the ‘old’ Member States to combine the elements of both systems. Accordingly, some authors call such models mixed systems. The career system exists in Belgium, Germany, Greece, Spain, France, Ireland, Luxembourg, Austria and Portugal. The position system can be found in Denmark, Italy, Netherlands, Finland, Sweden and the United Kingdom. See, A. Auer, C. Demmke and R. Polet, *Civil Services in the Europe of Fifteen: Current Situation and Prospects* (Maastricht: EIPA, 1996), pp. 31–32.

civil service which makes the process of modernisation less difficult to manage. On the other hand, all CEECs recently underwent a sweeping change of their political regimes and replaced the communist authoritarian regimes with newly elected democratic governments. Before the emergence of communist rule, some CEECs were 'normal' democracies with democratic institutions and procedures in place.⁷¹ However, this legacy was short-lived and subsequently almost completely destroyed by communist rule. Not surprisingly, today only very old people remember pre-communist times. Therefore, CEECs had to create a new, professional civil service virtually from scratch. While reforming their civil service, CEE countries looked at various existing models of civil service that existed around the world. The influence of various European models was particularly attractive. Many countries have had quite strong ties with the German and French legal tradition. It was not surprising that they wanted to copy the German and sometimes also the French model. But, the transfer of institutions is one of the most difficult political tasks. Even when we know which model to follow, it is not easy to make it work in a different context. We know that models are always strongly embedded in particular legal-political contexts. It is no surprise then that it is very difficult to ascertain their logic prior to their transplantation to new soil. Understanding their context, particularly the specific historic and political circumstances that produced them, should be a key part not only of comparative political and legal studies but also of any well-designed policy-making strategy.⁷²

The strong insistence of the Commission and the SIGMA on the classical, career civil service model, basically limited the range of policy options available to CEE countries. One of the 'false' dilemmas they were faced with was a choice between the classical Weberian model of bureaucracy and the more flexible, position model of civil service, favoured by the New Public Management (NPM) writers.⁷³ The head of OECD-SIGMA argued that CEEs should first establish a

⁷¹ But, as a prominent historian argues, they never fully modernised their political institutions. They remained a periphery of the advanced western world. I. T. Berend, 'The "Crisis Zone" Revisited: Central and Eastern Europe in the 1990s', *East European Politics and Societies* (2001) 15/2: 250.

⁷² G. Ekiert and S. E. Hanson, 'Time, Space, and Institutional Change in Central and Eastern Europe', in G. Ekiert and S. E. Hanson (eds.), *Capitalism and Democracy in Central and Eastern Europe* (Cambridge: Cambridge University Press, 2003), pp. 15–41.

⁷³ C. Hood, 'A Public Management for All Seasons?' *Public Administration* (1991) 69/1: 4–5; M. Barzelay, *The New Public Management: Improving Research and Policy Dialogue* (Berkeley: University of California Press, 2001), pp. 156–17; O. E. Hughes, *Public Management & Administration: An Introduction*, 2nd edn. (London: MacMillan, 1998), pp. 52–80.

classic Weberian model of public administration. He strongly urged the CEE not to experiment with NPM solutions.⁷⁴ The early Hungarian civil service law from 1992 is more or less in line with the suggested model. That SIGMA advice was not unimportant is clear from the early Czech experience, when the heavy criticism of SIGMA representatives of the draft of Czech civil service law basically killed the proposal.⁷⁵ Unlike their Western counterparts, who experimented and mixed elements of both models, reformers in the CEE were told to opt for one model. As a closer look at the civil service systems in Western Europe shows, that there are few clear models. In fact, only Sweden has a clear position system. In most other countries we find a mixture of career and position models, i.e. mixed civil service systems.

Such a preference for the classical, Weberian model of public administration, coupled with an over-reliance on law and legislation, produced a distinctive 'legalistic' approach to administrative reforms, where passing civil service laws became almost identical to administrative reform itself. As Verheijen critically argues, "the adoption of laws was considered the panacea for addressing problems such a politicisation, fragmentation and instability".⁷⁶ But all this does not suggest that adopting the opposite model, proposed by NPM, would necessarily mean a better reform strategy. It only means that the reform policy process was seriously impoverished. The set of available policy choices was limited and the debate about other possible solutions absent.⁷⁷ This illustrates a broader point about conditionality in the CEE context: much of the existing research focuses on a supposed causal relationship between conditionality and outcomes. It is usually argued that the policy x produced the outcome y . I argue that it is equally important to focus on the negative aspect of conditionality: which issues, debates, policy choices were not discussed because of the conditionality. A flat rejection of alternative approaches to administrative reforms is a clear example of such 'negative' conditionality. One does not have to be a proponent of NPM to see that framing the debate in such an exclusive way was not conducive to good reform strategies. Many reforms in Europe have been inspired by the new public management ideology. A major critique of the career system is that it is too rigid,

⁷⁴ I refer here to the remarks made by Bob Bonwit, cited at n. 66.

⁷⁵ A. Grzymala-Busse, 'The New Dysfunctionalism? Paradoxes of EU Enlargement and the Postcommunist Candidate Countries' (2004: 8).

⁷⁶ A. J. G. Verheijen, 'Public Administration in Post-Communist States', in B. G. Peters and J. Pierre (eds.), *Handbook of Public Administration* (2003: 491).

⁷⁷ This aspect is emphasised by Grzymala-Busse, 'The New Dysfunctionalism? Paradoxes of EU Enlargement and the Postcommunist Candidate Countries' (2004: 9–10).

too generous in protecting the tenure of civil servants, and not efficient enough. A move to private law or a combination of public and private law is recommended. Such a managerial approach includes contracts for top officials, temporary or contractual employment, less security, less generous pension schemes, more openness of civil service systems, flattening of the hierarchy, etc. Are solutions offered by the NPM an advantage or a threat to the professionalism, objectivity, impartiality and neutrality of the civil service? Lawyers usually add that predictability and legal certainty might be jeopardised by some of the NPM solutions. But, on the other hand, there are many possible advantages to the NPM solutions: they offer more flexibility in a too rigid career system, more efficiency in pay-systems, differential remuneration systems and dismissals when necessary. As examples from some developed democracies show, the solutions can combine elements of the old system with new solutions advocated by NPM. The end result might be a novel mixture, which is neither a purely career system, nor entirely position system. Which mix of which elements is the best solution for a particular context clearly depends on many local factors. Namely, civil service systems always have and will continue to reflect the political, economic and cultural characteristics of a given country or society.

Such a debate was more or less absent in the CEE context. Again, this is not to suggest that CEE had to follow one clear model proposed by the Commission and SIGMA. Conditionality worked in much more complex way. Here I agree with authors who argue for a more nuanced approach to conditionality, emphasising the logic of differentiation in different policy fields: “the logic of EU conditionality is that it is not a uniformly hard rule-based instrument, but rather is highly differentiated, its nature shifting and transforming depending on the content of the *acquis*, the policy area, the country concerned, and the political context in which it is applied”.⁷⁸ Arguing that policymakers in the CEE were constrained in making their policy options does not entail that there was no freedom of choice at all. The fact that CEE countries ended up adopting different civil service systems, at least partially,⁷⁹ shows that conditionality did not work uniformly. While Estonia adopted the position model, Slovenia, Bulgaria, Romania and Slovakia

⁷⁸ J. Hughes, G. Sasse and C. Gordon, ‘Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government’, *Journal of Common Market Studies* (2004) 42/3: 526.

⁷⁹ I stress the word ‘partially’ because of the strong legalistic bias embraced by the CEE reformers. In other words, the structures look differently ‘on the books’, but whether the CEE countries would really end up with different administrative models is too early to judge at this moment.

followed the career model, Hungary, Poland, Lithuania, Czech Republic, and Latvia embraced the mixed model.⁸⁰ The Czech Republic strongly resisted the package of civil service legislation arguing that administrative reforms can be achieved through other means.⁸¹ Slovenia was also a laggard when it comes to the adoption of new civil service legislation. As in the Czech case, the new law was only passed in 2002. Although Slovenia received extensive and continuous advice on civil service legislation from the SIGMA, it defended its claim that its existing civil service system more or less meets the requirement of the administrative capacity requirement. Only after continued criticism from the Commission, Slovenia adopted a new civil service law in 2002. When Hungary in 2001 amended its civil service law, the EU informally criticised the amendments. Nevertheless, Hungary adopted the proposed amendments which created a new category of 350 'political' civil servants to be appointed by the prime minister.

The examples clearly show that EU conditionality did not always work in a coercive way, that is, unilaterally. Although the EU used several different tools to enforce conditionality,⁸² it seldom worked in isolation from domestic needs and interests. As Sadurski argues, "the influence of conditionality was rarely in the form of suggesting very specific institutional solutions and devices-perhaps for the simple reason that there is no single model of democracy and rights-protection in the EU itself, much less in the 'West'".⁸³

As shown above, in the case of civil service reforms, EU conditionality influenced the decisions of the CEE governments as to how to reform their national administrations. But there were other equally important factors which also shaped the administrative reforms in the region. The anti-statist bias of the CEE governments left the administrative reforms more or less dormant until the

⁸⁰ T. Verheijen (ed.), *Civil Service Systems in Central and Eastern Europe* (Cheltenham: Edward Elgar, 1999); D. Bossaert and C. Demmke, *Civil Services in the Accession States: New Trends and the Impact of the Integration Process* (Maastricht: EIPA, 2003).

⁸¹ A. L. Dimitrova, 'Europeanisation and Civil Service Reforms in Central and Eastern Europe', in F. Schimmelfenning and U. Sedelmeier (eds.), (2005: 87).

⁸² H. Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* (2001) 8/4: 1013–31. Grabbe mentions five mechanisms used by the EU to effect change through conditionality: gate-keeping which includes, access to negotiations and further stages in the accession process, benchmarking and monitoring, provision of institutional models, financial aid and technical assistance, and advice and twinning.

⁸³ W. Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the new Member States of Central and Eastern Europe', *European Law Journal* (2004) 10/4: 376.

late 1990s. The reformers thus had a very short time to prepare administrative reforms. There was no real political consensus among various political parties in those countries how to proceed with the reform. On the contrary, as Meyer-Sahling shows, the political parties in the region were locked in the spiralling process of the continuous politicisation of civil service, where each newly elected government suspended or radically modified the administrative reforms of its predecessor.⁸⁴ In such a climate of heightened political distrust among the key political actors, it is nearly impossible to agree and even more difficult to implement any serious administrative reform. Administrative reforms in developed democracies are usually piecemeal and take several years to develop. They require the strong support of all major political forces. Why should one then expect that the CEE could design or even implement administrative reforms in few years? EU conditionality thus found the reformers quite unprepared for administrative reforms and with very little time for institutional experimentation, so crucial for any successful institutional reform. These two factors, coupled with the EU conditionality emerging in the late 1990s, contributed to the situation which made the CEE national élites very open to EU influence.⁸⁵ Nonetheless, EU conditionality was met by different responses from different countries. As Dimitrova argues, the more successful reforms had more leverage to deal with EU conditionality. In their case, the credibility of the EU threat to sanction their behaviour was lower than in the case of less successful reformers.⁸⁶ Thus, Poland, Hungary, and the Czech Republic were faced with the lowest credibility of administrative conditionality. Bulgaria, Romania and Slovakia, on the other hand, experienced the stronger force of conditionality. The threat was real in their cases.

The logic of conditionality described so far thus confirms the arguments of the critics of the simple, clear-cut causal model of conditionality, based primarily on its coerciveness, which was imposed by the EU. As the example of administrative reforms shows, the reality was more complex and complicated.⁸⁷ Even though the

⁸⁴ J. H. Meyer-Sahling, 'Civil Service Reform in Post-Communist Europe: The Bumpy Road to Depoliticisation', *West European Politics* (2004) 27/1: 98.

⁸⁵ More about the last point, see H. Grabbe, 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity', *Journal of European Public Policy* (2001) 8/4: 1014.

⁸⁶ A. L. Dimitrova, 'Europeanisation and Civil Service Reform in Central and Eastern Europe', in F. Schimmelfenning and U. Sedelmeier (eds.), (2005: 72–73).

⁸⁷ Wallace criticises a 'linear' view of the enlargement and stresses its dynamic nature and the importance of domestic responses. See H. Wallace, 'EU Enlargement: A Neglected Subject', in M. Green Cowles and M. Smith, *The State of the European Union: Risks, Reform, Resistance, and Revival* (Oxford: Oxford University Press, 2000), p. 163.

acquis in this area was quite ‘thin’, the conditionality and explicit leverage of the Commission was quite important. This goes against the prediction that only when the *acquis* is ‘thick’, can we expect it to provide a strong leverage for the Commission.⁸⁸ Another interesting pattern shows that despite the power asymmetry, EU conditionality did not affect all CEE in a uniform manner. The responses from CEE were different and they also produced different results, i.e. different civil service models. Conditionality turned out to be a rather complex phenomenon, producing different results in different policy areas and different countries.⁸⁹ Examining another very important area of EU influence, creation of regions in the CEE, Sadurski and Hughes, Sasse and Gordon argue that the affect of Europeanisation was indirect, diffuse and not very strong. The results were mixed and varied from country to country.⁹⁰ As the example of administrative reforms show, EU conditionality included both formal and informal elements. While the first included the Copenhagen criteria and the *acquis*, the second included “the operational pressures and recommendations applied by actors within the Commission to achieve particular outcomes during interactions with their CEEC counterparts in the course of enlargement”.⁹¹

Understanding how Europeanisation worked in the CEE context is very important. It offers us a historical and contextual understanding of the genealogy of institutions thus created. But it is not less important to analyse whether Europeanisation helped to create robust and well-working institutions, much needed for the CEE’s nascent democracies, or, whether instead it led to ‘Potemkin harmonisation’ resulting in formal structures designed to please the EU but with little impact on actual domestic outcomes.⁹² Some authors are sceptical when it

⁸⁸ J. Hughes, G. Sasse and C. Gordon, ‘Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government’, *Journal of Common Market Studies* (2004) 42/3: 525.

⁸⁹ *Ibid.*, p. 526.

⁹⁰ W. Sadurski, ‘Accession’s Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the new Member States of Central and Eastern Europe’, *European Law Journal* (2004) 10/4: 397; J. Hughes, G. Sasse and C. Gordon, ‘Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government’, *Journal of Common Market Studies* (2004) 42/3: 547.

⁹¹ J. Hughes, G. Sasse and C. Gordon, ‘Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform of Sub-national Government’, *Journal of Common Market Studies* (2004) 42/3: 526.

⁹² F. Schimmelfenning and U. Sedelmeier, ‘Introduction: Conceptualizing the Europeanisation of Central and Eastern Europe’, in F. Schimmelfenning, U. Sedelmeier (eds.), *The Europeanisation of Central and Eastern Europe* (Ithaca/London: Cornell University Press,

comes to the quality and sustainability of civil service structures established during the accession period.

VI. Public administration in the post-enlargement CEE: formal structures without substance?

The pre-accession civil service systems in CEE suffered from some common problems and dysfunctions. These systems were plagued by a strong politicisation of civil service, an absence of a culture of political neutrality, a lack of mobility in civil service personnel policy, decentralisation and fragmentation of personnel and pay policy, a lack of central agency responsible for the recruitment and dismissal of civil servants, poorly paid staff, and last but not least, a poor image of the civil service.⁹³

As we saw in the previous sections, administrative reforms were slow, erratic and with a strong legalistic bias. No less important was also their timing. Administrative reforms started relatively late in comparison with economic reforms. This was due to the dominance of a neo-liberal, anti-statist ideology.⁹⁴ As we know, many neo-liberals tend to underestimate the importance of the state in a market economy. They simply did not think that the reform of public administration should be a priority. They rather focused on privatisation, liberalisation, and deregulation. They argued that ‘the invisible hand of the market’ would do the reforms.

Verheijen argues that adoption of civil service laws “has not resolved the problems of instability and politicisation and has rarely led to the development of a well-working system of long-term career development”.⁹⁵ Meyer-Sahling finds that even the two ‘early reformers’, Hungary and Poland, have not successfully solved the problem of the depoliticisation of the civil service. On the contrary, in the late 1990s they amended their civil service laws from 1992 (Hungary) and 1995 (Poland) so as to even increase the level of politicisation of the civil service.

2005), p. 17. The term ‘Potemkin harmonisation’ was first used by W. Jacoby, in ‘Priest and Penitent: The European Union as a Force in the Domestic Politics of Eastern Europe’, *East European Constitutional Review* (1999) 8/1–2: 62–67; A. Grzymala-Busse, ‘The New Dysfunctionism? Paradoxes of EU Enlargement and the Postcommunist Candidate Countries’ (2004: 10).

⁹³ D. Bossaert and C. Demmke, *Civil Services in the Accession States: New Trends and the Impact of the Integration Process* (Maastricht: EIPA, 2003).

⁹⁴ A. J. G. Verheijen, ‘Public Administration in Post-Communist States’, in B. G. Peters and J. Pierre (eds.), *Handbook of Public Administration* (2003: 490).

⁹⁵ *Ibid.*, p. 491.

Poland passed a new law in 1998 to introduce some elements of the spoils system. In 2001 Hungary amended the previous law and introduced a new category of 350 political civil servants.⁹⁶ The most recent amendment (2005) to the 2002 civil service law in Slovenia drastically re-politicised the law so as to allow the government to remove all directors general without cause. It is worth mentioning that the 2002 law created a new category of directors general nominated to the post by a special non-partisan commission for a period of five years. This solution was presented as a first but very important step to the depoliticisation of the civil service. In July 2005, the Slovenian Constitutional Court ruled that the amendment violated the principle of legitimate expectations of civil servants.⁹⁷

As Verheijen argues, the CEE countries followed the wrong strategy of administrative reforms. With an over-reliance on legislation, buttressed by a strong legalistic tradition already present there, CEEs sought to adopt new civil service laws first, and reform people later. As he argued, they should have first designed appropriate strategic approaches, invested more in training and education, and devoted more time to tackle structural problems.⁹⁸ For example, to tackle the problem of overt politicisation with almost exclusive focus on legislative aspect of reforms is not a good strategy: “designing and adopting civil service legislation without attacking the root causes of the problems in the administration in the first has proved to be a highly inadequate reform strategy”.⁹⁹ Depoliticisation of the civil service is an immensely difficult task. Most developed democracies in the West spent decades building a political culture of neutral and apolitical public administration. Without changing training and education systems first, it is very naive to believe that passing a new law by itself would solve the problem. Yet, in all CEE we can discern almost a fetishist focus on the production of new legislation.

Despite the extensive financial help from the EU, CEEs failed to create adequate training and education systems for civil servants. The politicians in the region were not prepared to accept the training as a reform tool. They preferred

⁹⁶ A. L. Dimitrova, ‘Europeanisation and Civil Service Reform in Central and Eastern Europe’, (2005: 86–87).

⁹⁷ Immediately after the amendment was passed, the government removed two important Directors General who were appointed on the basis of the 2002 law, which, in their case, did not allow removal without a cause. One Director General was a chief of police. The decision was adopted on 7 July 2005, Court’s Decision U-I/90/05–13.

⁹⁸ A. J. G. Verheijen, ‘Public Administration in Post-Communist States’, in B. G. Peters and J. Pierre (eds.), *Handbook of Public Administration* (2003: 493–94).

⁹⁹ *Ibid.*, p. 496.

the legalistic approach with a major focus on producing new legislation. Given the low quality of domestic training capacities, a lot of training was imported from the EU. The major problem of imported training was that it was not sufficiently attentive to the context of the reforms: there are too many stories about foreign consultants promoting their own national models and neglecting the differences in administrative traditions.¹⁰⁰

In short, new institutions were too often designed with insufficient attention to local needs and local administrative culture. When newly passed laws did not work, they were immediately replaced by new laws. But there are many reports that new laws have not been implemented at all. Instead of focusing on reform strategies aimed at tackling the real problems which prevented the implementation of laws, new laws replacing the old ones were quickly introduced.

While EU conditionality did not completely preclude variations and choice of administrative strategies, it contributed to a 'dysfunctional process' dampening democratic competition and real debate about possible policy choices and options.¹⁰¹ This in itself prevented a successful administrative reform leading to well-working institutions in the region.

While the administrative structures in CEE look, on their surface, similar to their Western counterparts, they operate very differently. They too frequently resemble 'formal structures without substance', typical for the previous modernisation attempts in the region.¹⁰² Whether the membership in the EU 'proves' that CEE has finally modernised their democratic and political institutions is therefore yet to be seen.

VII. Conclusion

The ten new Member States of the EU were exposed to a greater degree of Europeanisation than any previous accession country. There are several reasons for that. The power-asymmetry, time pressure to adopt more than 80,000 pages of the common EU *acquis*, the conditionality of the administrative capacity requirement, and openness of CEE élites to EU influence. As I attempted to demonstrate, the EU imposed quite a strong form of administrative capacity conditionality in the case of civil service reforms. Nonetheless, we should not

¹⁰⁰ A. J. G. Verheijen, 'Administrative Capacity Development: A Race Against Time?', *WRR Working Documents* (2000: 32).

¹⁰¹ A. Grzymala-Busse, 'The New Dysfunctionalism? Paradoxes of EU Enlargement and the Postcommunist Candidate Countries' (2004: 19).

¹⁰² I. T. Berend, *Decades of Crisis: Central and Eastern Europe Before World War II* (1998: 10).

underestimate the importance and role of domestic CEE élites in the process of Europeanisation. Although constrained by EU conditionality, they were still able to make their own, autonomous decisions.

But there is another important aspect of conditionality, which has not received enough attention in the literature on Europeanisation. As I argue in this chapter, conditionality has limited the range of options for policy debate and policy experimentation. It is this 'negative' conditionality that has importantly contributed to bad policy reforms leading to partial or unsuccessful administrative reforms in CEE. Well-designed institutions do not emerge over night. Western European democracies often spent long and protracted periods of time, before they created well-working institutions. CEE countries were expected to do the same in one decade or so. Now that they are full members of the EU, the new Member States should have more time for their own domestically-driven reforms. Many administrative structures created during the enlargement need additional reforms. It is time now for real democratic deliberation and experimentation that can bring much needed administrative reforms in the region. Governments and reformers should learn from the motto of Piaget's work in developmental psychology: his reoccurring theme in his most prominent work is that learning is not possible without inventing.¹⁰³ That this should hold true in the political arena as well is today well recognised in law and political science. It is time now for politicians to turn the motto into a political practice. New administrative institutions in CEE may in the end resemble their Western models. But what is more important is that they actually work well for CEE countries. Even if, in the end, they look different to their Western counterparts.

Although Europeanisation has a strong effect on national administrations, national civil services remain distinct national creatures. Within the EU, national governments have to follow common rules and procedures, but often they choose their own paths to the common end. Because of that, 'national styles' of regulation remain quite different. It would be wrong to talk about the European model of regulation. Within the EU, there are many different styles of regulation. As the theory of historical institutionalism argues, national structures are strongly embedded in a national legal, political and cultural environment. National governments are able to adapt to new pressures without giving up their distinct national, legal and political culture. Europeanisation does not mean convergence or harmonisation. It is true that Europeanisation affects more and more fields of

¹⁰³ J. Piaget, *Play, Dreams, and Imitation in Childhood* (London: Routledge & Kegan Paul, 1999), p. 5.

regulation, but it is also true that it does not prevent national governments pursuing their own, distinct national styles of regulation. Europeanisation can bring more competition, diversity and pluralism. Only in certain areas, does Europeanisation mean the creation of common European standards which are implemented in a similar fashion in all Member States. With the enlargement, more pressure on the Member States is expected. It is unlikely that national governments will cease to be distinct national categories. As Zielonka and Mair argue, diversity within the EU should be welcomed. Instead of seeing it as a possible threat to the European integration, it should become its asset.¹⁰⁴

¹⁰⁴ J. Zielonka, and P. Mair, 'Introduction: Diversity and Adaptation in the Enlarged European Union', *West European Politics* (2002) 25/2: 16.

Chapter 12

The Coordination of Polish Integration Policy:

Selected Features of Post-enlargement Effects*

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I. Introduction

The 2004 enlargement of the European Union was preceded with an unprecedented amount of commentaries, books, scientific events and academic discourse.¹ The European Union (EU) ‘big bang’, hailed long before it actually took place, understandably attracted the attention of both politicians and academics. As a lot has already been said about the very nature of the political and legal character of this phenomenon, this chapter will focus attention on a somewhat sidelined topic, namely the consequences of enlargement for the governmental structures, existing procedures and coordination of the so-called

* The views expressed here are those of the author and do not necessarily reflect the official position of the Polish government. The author would like to thank Director Joanna Skoczek, Mrs. Anna Stępniewska, Mr. Sebastian Barkowski from the Office of the Committee for European Integration and Mrs. Dagmara Jasińska from the Polish Ministry for Foreign Affairs for their valuable remarks and comments on an early draft of this chapter.

¹ See, in particular, A. Ott and K. Inglis (eds.), *Handbook on European Enlargement: a commentary on the enlargement process* (The Hague: T.M.C. Asser Instituut, 2002); M. Cremona (ed.), *The Enlargement of the European Union* (Oxford/New York: Oxford University Press, 2003); and C. Hillion (ed.), *EU Enlargement: a legal approach* (Oxford: Hart, 2004). See also, European Commission, *Enlargement One Year On: state of play/ éléments d'analyse*, MEMO/05/145, Brussels, 29 April 2005.

‘integration policy’, a term used since the early 1990s when Poland signed an Association Treaty (Europe Agreement of 1991) with the European Community and its Member States.

This chapter focuses on developments during the first year of Poland’s membership in the European Union seen from the perspective of government and relating to the practical experiences gathered also during the pre-accession ‘active observer period’.² The chapter is divided into sections dealing with selected features of the coordination of post-enlargement integration policy in the Polish government. The author’s intention is not to create an overall picture of the integration policy (particularly with respect to the evolution of the existing coordination structures)³ as such, nor to give a fully-fledged academic assessment of the coordination process, but rather to present some of the—in the author’s opinion most important—aspects of the work that has been done in this area of interest in the last few months.

Furthermore, it should be noted that the institutional architecture may be taken as a tangible example of a broader process of changes within the governmental administration resulting from integration.

II. Integration policy

The term ‘integration policy’ has lived up to its expectations during the more than a decade-long period up to Poland’s much-desired accession to the EU as a fully-fledged Member State. Still, the very public interest in the work carried out successfully since 1989 has gained momentum particularly with the onset of the accession negotiations in March 1998 and during the rocky road to Athens, where in April 2003 the Accession Treaty was finally signed.⁴ It is important, therefore,

² On the views of the ‘old’ Member States, see, R. Sinnott, ‘Assessing the Implication of EU Enlargement for the Existing Member States: The Public Opinion Perspective’, *European University Institute Working Papers* (2004) (11) RSCAS, Florence.

³ See, *inter alia*, F. Jasiński, ‘Prioritization of work—preparing Poland’s accession to the European Union’, *Politikfeldanalyse* (2004) 1/4; F. Jasiński, ‘Poland *vis-à-vis* the debate on the European Union’s future’, in P. Cullen and P. Zervakis (eds.), *Post-Nice Process. Towards European Constitution* (Baden-Baden: Nomos, 2002); M. Andeas and J. A. Usher (eds.), *The Treaty of Nice and Beyond: enlargement and constitutional reform* (Oxford: Hart, 2003); H. Berger and T. Moutos (eds.), *Managing European Union Enlargement* (Cambridge: MIT Press, 2004); A. Verdun and O. Croci (eds.), *Institutional and Policy-making Challenges to the European Union in the Wake of Eastern Enlargement* (Manchester: Manchester University Press, 2004).

⁴ For an interesting analysis of this issue, see K. Inglis, ‘The Union’s Fifth Accession Treaty: New Means to Make Enlargement Possible’, *Common Market Law Review* (2004) 41/4: 937;

to remember that a job as demanding as that undertaken during negotiations was performed prior to the actual start of the media-focused negotiations.

Government integration policy covered all the steps undertaken by the ministries and central offices that led towards accession to the EU, including approximation of laws, creation of cooperation schemes between parties involved in the process, intensive training of experts, development of specialised human resources, presentation of 'European' information to the public, translation of the *acquis* and, last but not least, convincing the European Commission and the EU Member States of Poland's developing preparation to join the 'club'. The term 'coordination' gained particular attention in the early 1990s, and became the main goal of the government, irrespective of which political force had a majority in the parliament.

The government's Plenipotentiary for European Integration and Foreign Assistance, established in 1991, soon created its own Office that subsequently evolved into brand new administrative structures. With the Committee for European Integration (CEI) in place since 1996, and its Preparatory Team consisting of deputy ministers (Undersecretaries of State) responsible for European affairs, work had gained new speed. The Committee "became the true catalyst spurring the discussion of adaptation priorities, as well as a forum for debate on the most vital problems related to Poland's preparation for EU accession".⁵ Practically each important issue dealing with European integration could be discussed in this ministerial forum and the Committee (together with its assisting Office) is in existence today, serving the governmental bodies as an open forum for daily post-accession work, jointly with the newly-created (2004) European Committee of the Council of Ministers (ECCM, which virtually replaced the CEI's Preparatory Team).⁶ The overall present coordination model of the governmental integration policy was approved by the Council of Ministers on 4 March 2003 (subsequently revised on 9 March 2004).

The new Committee was established with a view to setting up a forum for the discussion and adoption of the official positions of the Polish government on

see also, A. Adinolfi, 'Free Movement and Access to Work of Citizens of the New Member States: the Transitional Measures', *Common Market Law Review* (2005) 42/2: 469.

⁵ F. Jasiński and M. Tabor, 'The Coordination of Integration Policy in Poland in the pre-Accession Period', *The Polish Foreign Affairs Digest* (2004) 4/1: 75.

⁶ By an Ordinance of the President of the Council of Ministers on 23 March 2004 ECCM is one of two standing (permanent) preparatory committees of the Council of Ministers. The second one is the Committee of the Councils of Ministers, dealing with the matters not linked with the European legislative and decision-making path.

European issues, and to discuss other issues relevant to European integration. It also has the task of reconciling any differences of opinion and resolving any inter-ministerial disputes that may arise during the preparation of the Polish government's positions for the meetings of the Committee of Permanent Representatives (COREPER) and/or the Council. If the Ministers fail to agree on a common position, the Committee forwards the draft document to the Council of Ministers, which takes the final decision. The Committee also refers to the Council of Ministers matters falling under the exclusive competence of the latter. The operating mode of the Committee is based on the functioning of a Council of Ministers Committee. The difference is that the European Committee meets twice a week, on Tuesdays and Fridays. This timetable is dictated by the working schedule of the European Union institutions. The scope of competences enjoyed by the Committee also differs from that of a Committee of the Council of Ministers. In order to ensure proper coordination of its works and an effective discharge of its responsibilities, the European Committee enjoys decision-making powers in the field of European policy in areas which do not fall under the exclusive competence of the Council of Ministers.

Another key institutional tool is the Act of 11 March 2004 on the cooperation of the Council of Ministers with the *Sejm* and the *Senat* on issues related to the Republic of Poland's membership of the European Union,⁷ enabling a Polish political party to make full use of constitutional mechanisms for the day-to-day cooperation between the government and the parliament. An important part of these inter-institutional relations is an exchange of information. It must be underlined that during the accession negotiations, the Polish parliament, from the point of the current work of the government, had incomparably less tools at its disposal in order to intervene in the process,⁸ largely depending on the smooth running of the *Sejm* and the outcome of its work.

Apart from establishing a separate governmental body playing the role of decision-taker and coordinator,⁹ the coordination of integration policy also

⁷ Act on the Cooperation of the Council of Ministers with *Sejm* and *Senat* on the issues relating to the membership of Poland in the European Union, available at: <http://www1.ukie.gov.pl/>.

⁸ See, in this volume, Jiří Příbanc's comments on 'depoliticisation', Darina Malová on the 'disappearance of political responsibility', and Wojciech Sadurski on the 'fragmentation of polity'.

⁹ With due respect to the actions undertaken *inter alia* by the Prime Minister or the Minister for Foreign Affairs. Later on relevant institutional decisions have been taken with respect to the commencement of the negotiations; see, *inter alia*, A. Mayhew, 'Enlargement of the

included the creation of the subsequent policy documents, such as, to name but a few, National Programmes of Preparation for Membership (NPPM)¹⁰ adopted in 1998–2001, the Report on Poland’s Institutional Adjustments to the Requirements of Membership in the EU (2002),¹¹ followed by a detailed Action Plan on Poland’s administrative and Judicial Capacity (2002),¹² and other specific sectoral documents, such as the Schengen Action Plan (since 2001).¹³ Practically every year since 1991, the Polish government has produced an important document—schedules, action plans, strategies, reports or programmes—mirroring the stage of readiness for membership and focusing on outstanding issues still to be addressed. It reflected two main factors: an internal need for the coordination of necessary adjustments; and conditions formulated by the EU, for example, in the Commission’s subsequent Regular Reports (1998–2003).¹⁴

It should be stressed that the process of further development of the Polish ‘integration policy’ is constantly under way, with the new enhancements, highlighted below, to take place in the forthcoming months, corresponding to the needs of the government and referring to the short-period post-accession experiences already gained.

European Union: An Analysis of the Negotiations with the Central and Eastern European Candidate States’ *Sussex European Institute Working Paper*, 2000/39.

¹⁰ *National Programme for Preparation to Membership* was the Polish title for the Commission’s *National Programme for the Adoption of the Acquis*. Poland’s intention was not to limit its outline document solely to the *acquis* as it stood but to possibly encompass also non-legislative parts of the EU policies and meet the criteria deriving from them. This step has been positively greeted by the European Commission.

¹¹ Its introduction reads that “[...] advancement in preparation of administration on both state and self-government levels in many negotiation areas is unsatisfactory and requires concentration of personnel, material and financial efforts in order to improve the present situation [...]”. The gloomy vision of K. H. Goetz’s and H. Wollman’s “politicization at the peak of the administration” has—fortunately—been overcome with the on-going process of the strengthening of the Polish Civil Service Corps, including far-reaching legislative and institutional changes, in ‘Governmentalizing central executives in post-communist Europe: a four-country comparison’, *Journal of European Public Policy* (2001) 8/6: 881.

¹² In this document it was possible to significantly increase a number of ‘European’ staff in the ministries and central governmental offices. It also helped clarify the term ‘administrative capacity’.

¹³ See <http://www1.ukie.gov.pl/>.

¹⁴ See <http://www.europa.eu.int/comm/enlargement/negotiations/index.htm>.

III. Getting acquainted

What may sound surprising is that the actual fact of the accession of 1 May 2004 was not a deep shock for the Polish administration. It did not cause an avalanche of unexpected or undesired changes within governmental structures.¹⁵ The reason is simple: Polish experts had been ‘vaccinated’, ‘tested’ with a year-long formal pre-accession observer status,¹⁶ when Poland made use of the opportunity to train and to become better-acquainted with the new and demanding environment of the EU decision-making process and the ever-growing and all-encompassing Europeanisation of the Polish administration. This means that the real ‘revolutionary’ changes took place earlier, before actual accession.

Indeed this period was a real milestone for the Polish ministries and central offices, its procedures and naturally, for the experts. To a great extent, the largest end-user of this process was the government, as the majority of actions taken under active observer status related to the work of the ministerial experts, formally speaking not only governmental, but also parliamentary. Social representatives could also visit the relevant EU institutions and, if necessary, present their viewpoints concerning draft legal acts and documents under preparation,¹⁷ which also gave them the opportunity to find their way in the corridor talks. They still did not have the right to participate in binding decision-making, however, and also governmental experts from the ten ‘new’ EU Member States were excluded from participation in the Council’s Working Groups

¹⁵ B. Lippert, G. Umbach and W. Wessels even predicted “an overhaul of the domestic co-ordination system for EU affairs” in the “Europeanization of CEE executives: EU membership negotiations as a shaping power”, *Journal of European Public Policy* (2001) 8/6: 1000.

¹⁶ It should be noted that before this time Poland and the remaining acceding countries were included in the so-called ‘transition period’, that is, between the formal ending of the accession negotiations and the Accession Treaty coming into force (that is *de facto* as of 23 January 2003 until 16 April 2004). Similar procedures, taken before the prior enlargement involving Austria, Sweden, and Finland in 1995, were modified in connection with the Treaty of Amsterdam coming into force.

¹⁷ As confirmed in the Final Act of the Accession Treaty, where Point IV referred to the confirmation of the exchange of letters between the EU and the acceding states “on an information and consultation procedure for the adoption of certain decisions and other measures to be taken during the period preceding accession, and which is annexed to this Final Act”. It was decided that ‘new’ Member States would be in the same position as the ‘old’ ones in the area of declarations, resolutions, and other viewpoints adopted by the European Council or the Council regarding the Community or the EU, and adopted with the common consent of the Member States. They should comply with the principles and guidelines resulting from these acts and undertake those measures necessary to implement them.

discussing external relations matters with candidate countries under the association Europe Agreements (Bulgaria and Romania at the time) and the enlargement follow-ups.

Active observer status must be recognised as a highly valuable tool preceding actual accession, without which all the negative effects of the 'big bang' would materialise. As a result of this model almost all the necessary steps¹⁸ had been taken gradually more than a year in advance. And besides making the newcomers better acquainted with the EU itself, this status taught also the EU-15 about the forthcoming challenges of having more Member States around the table. The lessons learnt and experience gained by both the 'old' and the 'new' Member States respectively, paved the way for a smoother and more coherent EU enlargement.¹⁹ The following achievements and features of the integration policy derive therefore from what has happened since January–April 2003 in terms of logistics, organisation and procedure, notwithstanding the previous steps taken before the periods of 'transition' and 'actively observing' (it was the goal of the Polish government to sustain a certain level of continuum, a link to the previous 'mini-membership' model of cooperation).

IV. Being present

The very first achievement, from 'Day One' of 1 May 2004 onwards, was that the Polish authorities gained official confirmation of their status, ridding themselves of their former status of observer and receiving the long-desired EU Member State 'badge'. It may seem trivial, but it gave the Polish MEPs, Ministers and common experts confidence to perform their duties with the utmost precision, conviction and desire to achieve the goals before them.

Poland's full presence in the EU required full administrative readiness. With this in place,²⁰ Poland started to make use of the formal instruments and procedures at hand and commenced its membership from the outset. Enjoying wide-open access to the whole of the EU decision-making process, corridor discussions and surrounding internal procedures, made a tremendous difference

¹⁸ For example, the designation of experts, gathering EU know-how, establishing the relationships with EU institutions and bilateral partners.

¹⁹ Note that A. E. Töller writes about, *inter alia*, 'Europeanization by Learning', 'The Europeanization of Public Policies—Understanding Idiosyncratic Mechanisms and Contingent Results', *European Integration online Papers* (2004) 8/9: 3; available at: <http://eiop.or.at/eiop/>. See Jacques Ziller's comments in this volume on 'learning curves'.

²⁰ In terms of the IT environment, experienced staffing, an adequate level of training schemes performed, organised cooperation with national parliaments and others.

to the character of the work carried out by the government before April 2003 and May 2004. Poles participating in the different EU meetings, even though well-trained and educated for more than a decade, finally had the best possible opportunity to put their theoretical experience into practice and to have a real influence on on-going developments. The pragmatic character of the lessons learned during pre-accession 'active observer' period had a large effect on the smooth joining of the decision-making process.

It is crucial to bear in mind that apart from the governmental experts, other Poles also commenced their activities in 'Brussels'²¹—MEPs, social partners, lobbyists and representatives of Polish regional authorities whose role gained new attention with Poland joining the Union.

Also of note is the decentralisation aspect of the change witnessed in the works of the ministries. Participation in the comitology meetings and Council discussions required a shift in the pre-accession mode of cooperation. A large amount of confidence was placed in lower civil service staff, usually non-diplomats, who on a daily basis take the floor in Brussels and present official positions according to the instructions prepared at home. Before 2003, the Ministry for Foreign Affairs (MFA) was responsible for the majority of external negotiations or at least represented Poland at international *fora*. With quasi-international discussions led in Brussels, particularly in the Working Groups responsible for the intergovernmental third pillar issues, it is no longer the MFA which takes the leading role, but the 'common' ministerial experts, often from the international cooperation departments in these non-MFA ministries and central offices, but also from 'substantive' units.

Since the day of Poland's accession to the EU until the end of 2004 some 700 persons, including individuals of ministerial rank participating in the different Council formations and 'common' governmental experts going to Council Working Groups, travelled from Warsaw to Brussels, using up some two-thirds of the allowance provided by the Secretariat General of the Council for refunding travel costs.²² Comparable data is available with respect to attendance levels during comitology meetings.²³ Polish authorities are presently working on a way to increase this level of attendance. Such statistics are food-for-thought as

²¹ Under this general term the author means all institutions and bodies relating to the process of European, not limited to Brussels, but also encompassing Luxembourg and Strasbourg.

²² In the first quarter of 2005 usage was close to 15%.

²³ See also, J. Trondal and F. Veggelnad, 'Access, voice and loyalty: the representation of domestic civil servants in EU committees', *Journal of Public Policy* (2003) 10/1: 59.

they show that national experts, for a variety of reasons, do not necessarily take part in all the events organised in Brussels, often limiting Polish delegations to the experts coming from the Permanent Representation to the European Union ('the Mission').

Is the perceived downgrading of certain discussion *fora* the correct approach to take? An answer lies in the activities of various old Member States whose representatives are often absent during the meetings where the discussion is of a minor interest for their countries or a particular country may wish to express to the others its position with an 'empty seat' policy or lower level of representation.²⁴ An ability to weigh one's priorities and sketch them in a binding political document is a heavy but necessary task to be performed by any EU Member State, particularly with the flood of daily information coming from Brussels.

Another issue at stake is the language regime. Polish representatives learned long ago that English and French are essential tools of communication in the Brussels' corridors, and no-one would expect the imposition of linguistic equality during off-the-record talks, but this very aspect turns out to be not only of a technical character but also a political one when it comes down to working translations in the Council. It is obvious that each high-level delegation to the permanent committees or the COREPER/Council speaks at least English and French fluently, but the following example clearly proves how impractical it may be to use the 'Presidency + working languages only' rule used in daily work.²⁵

Experience from the work of the Council's European Court of Justice (ECJ) Working Party shows that it is quite difficult for the new Member States to intervene during the preliminary ruling procedure before the Court, as the documentation dealing with particular cases, to which these countries may be interested in joining under Article 234 TEC, is only distributed in the original language of the case, thus breaching the ECJ Rules of Procedure in terms of applicable language regime.²⁶ With only a limited period of time to submit a

²⁴ The 'empty seat' policy occurs more in the comitology sphere than in Council Working Groups.

²⁵ As one might say: linguistic reservation does not necessarily always help. The question of an 'honorary' approach to the language regime is another issue not dwelled upon in this chapter.

²⁶ Under Article 104 (1) of ECJ Rules of Procedure, within the preliminary ruling procedure "decisions of national court shall be communicated to the other Member States in their original version accompanied by a translation into the official language of the state to which they are addressed". The second part of this norm is not being followed with respect to the

statement of the case or written observation to the Court, it is hardly possible to understand the contents of the issue at stake properly, and take a sound and responsible decision. The case must be read carefully and fully understood at home before any Member State decides to join it before the Court. Indeed this issue may sound like an example of the internalisation of the Union's problems—any Member State may at any time claim it has not enough time to think the issue over thoroughly—but the reasonable period of time and limited resources results in such a step eventually.

Another issue is the question of putting the representatives of the new Member States into EU institutions. Some recent tensions revealed that a prerequisite for representation was the fair distribution of high-ranking positions in the Commission and the Council ensures good publicity for the EU in a particular Member State, and keeping the balance with respect to the presence of these officials is an important diplomatic tool to be used by the heads of the EU bodies.

V. Being aware

One of the most important aspects of EU membership is to know and understand what it is really about, what the ultimate goal is during daily negotiations, what the pros and cons of the national position to be presented are, and who is responsible for preparing them. In other words: unaware Member States may not only spoil their own policies, but also unintentionally help the ones they would not like to assist at all. This is evident with respect to comitology meetings, when a certain state—that is, a particular person, a representative—decides not to vote, as he/she does not understand the deal, or is not aware of the specific aspects involved in the discussion. Involuntarily he or she may help other states with such a step, thus at the end of the day diminish the role of his or her own country. For the time being, Poland has effectively tried to avoid such situations but it must be borne in mind that it can happen at any time within the EU legislative maze. Human resources are therefore a decisive and often dangerous factor.

Being aware means also comprehending, for instance, the logic behind draft legal acts discussed at the Council level. New Member States, thrown into the deep end of the EU decision-making process, had to learn how to read between the lines of vague sounding clauses, how to make the best use of available databases and internet tools in order to get acquainted with the history of a

'new' Member States, therefore Poland suggested that translations only be made of the summaries of the national courts' decisions.

particular project, and whom to back up during negotiations, even during the pre-accession period, in order to achieve the results needed.

In the meantime Poles realised how important and useful the European Commission's Technical Assistance and Information Exchange (TAIEX) Office really was. Established in late 1995 (operative since 1996) it has done an enormous job in transferring knowledge about the EU directly to the end-users from the candidate (then acceding) countries.²⁷ For almost a decade, this unit within the Commission's services has trained tens of thousands of national experts from these states, giving them access to the different databases, organising external study visits, running meetings with their counterparts from the EU-15 and assisting translation activities. Due to the TAIEX presence on the pre-enlargement scene, the new Member States did not only rely on the availability of private/commercial training partners, like the European Institute for Public Administration (EIPA) in Maastricht, or the Academy of European Law (ERA) in Trier, but have also had tailor-made TAIEX instruments at their disposal.²⁸ This Office became also responsible for the coordination of the twinning arrangements with the acceding states.²⁹

The awareness feature has been, however, watered-down with the arrival of ready-made products, such as the Accession Treaty with Bulgaria and Romania, in the drafting of which the new Member States had a limited opportunity to participate. From a legal point of view, Poland and its counterparts could not do anything more than accept this approach (with due respect to secrecy procedures during the Council's works during pre-accession period). The same applied also to the Council's Terrorism Working Party, where access was practically forbidden to the new Member States' experts before 1 May 2004.

²⁷ The author was a TAIEX Contact Point for Poland in 1998–2000. See also, the TAIEX webpage at: <http://www.taiox.cec.int.eu>, and the available yearly reports on the Office's activities.

²⁸ Even though TAIEX flexibility in terms of replying to the needs of experts from the acceding states waned approaching the final date of accession. After enlargement TAIEX still plays a role, albeit much less pivotal *vis-à-vis* 'new' Member States, with respect to Bulgaria, Romania, Turkey, Croatia and Western Balkan countries.

²⁹ Nevertheless practical implementation of the twinning arrangements, with respect to their usefulness to the Polish ministries and central administration offices, has not only been assessed positively by the Polish end-users.

VI. Being active

There are different styles of membership: some Member States' representatives might be called 'talkers' on the Council level, some present their opinions only at an early stage, often lobbying the Commission on the matter concerned and later observe the flow of the discussion. From within the 'new ten', it is possible to point out who belongs to which group, with Poland usually being active as much as possible at the Working Group level. It is crucial to clarify what this activeness means for the government's integration policy.

Being active does not only mean the ability to build coalitions during Brussels' corridor talks, or following voting procedures and providing input during an exchange of views. First of all it is crucial to know the national objectives and ultimate goals, as well as the positions of others, and to then translate them into clear technical instructions and political messages, bearing in mind the ability to react flexibly to the changing fronts of talks and new developments of the matter at stake. In principle, such a general approach is used by the Polish delegations in the Commission and the Council, where ministerial representatives take part in the meetings.

An interesting feature of the post-accession reality has emerged, namely the equalisation of Brussels-business. That is the inter-ministerial consultations held between interested ministries and central offices within the governmental structures with national-business.³⁰ This development was widely understood by the decision-makers long ago, but, to the astonishment of some commentators, it occurred very smoothly and generally speaking this business merger has been a great success to date.

Furthermore, national experts got together. This is an excellent example of how the process of Europeanisation helped resolve local problems, namely struggling, often non-existent or weak person-to-person contacts. Due to the activity of most of the governmental experts in the range of EU areas of interest, these experts had to learn how to 'get closer' to each other, establish informal ties, learn 'friendly' working procedures with respect to the instructions and reports prepared jointly. This de-formalisation and indirect impact of enlargement on the Polish civil servants speeded up work not only in the area of activity of EU issues, but also in other areas.

³⁰ This includes the equalisation of importance of the EU *acquis* with national legislation during daily activities of the Polish government.

It would be very difficult to enumerate all the legal acts and political documents adopted by the EU which were directly influenced by the Polish delegation, but any list would include the Hague Programme (successor to the Tampere Agenda), the negotiation of the seat of the European Border Agency (Warsaw), the reform of the ECJ Rules of Procedure, the New Financial Perspective (NFP),³¹ and a number of the Internal Market directives, including the one on cross-border services. Areas where Poland has been less directly influential would include external relations, particularly with respect to the 'Eastern dimension' of the Union,³² where the new Member States still have to fight hard to get their views across. Clearly, Polish experiences would be valuable to the EU with respect to the realisation of the European Neighbourhood Policy (ENP).

One should also remember that the acceding states had full membership rights during the Intergovernmental Conference (IGC) prior to accession to the EU, this being a positive exception under the 'active observer' regime.

So, is Poland already *the* player in the EU? Do other Member States care about Poland's voting power, opinions and thoughts on the direction of the Union? An answer to this question might be political: yes, of course they care, because Poland is the sixth largest EU Member State and intends to have its voice well-heard in Brussels. But a more technical answer would be even more interesting: yes, as statistically, Polish representatives are more often asked to join different corridor coalitions, asked about their point of view and are less often seen as newcomers. This gives Poland more confidence, thus strengthens its negotiating skills, powers, and at the end of the day strengthens the Union itself from within. Common nomenclatural division between old and new Member States persists and it is rather unlikely that it will disappear in the next couple of years. Moreover, some partners may still remember the last period of accession negotiations and Poland's strong position clearly showing the needs of the Polish government.

VII. The importance of technicalities

The Polish government is thus facing a deep-reaching Europeanisation of its daily work on the governmental level (civil service), but not in terms of transplanting

³¹ In this context the author disagrees with Rafał Trzaskowski's comments presented during the Conference on the 'obnoxious behaviour' of the Polish delegates with regard to the negotiations of the New Financial Perspective. See also, A. Mayhew and S. Tokarski, 'The Financial Framework of the European Union, 2007–13: New Policies? New Money?', *Sussex European Institute Working Paper*, 2004/78.

³² With the exception of the successful lobbying for the recognition of the situation in Ukraine and Belarus in late 2004 in the EU General Affairs and External Relations Council (GAERC).

other Member States' schemes into national practice (in fact there is a widespread diversity of modes of governance between EU Member States), but instead is aware of the consequences of accession for particular areas of interest.³³

In practice, all the Polish ministries and central government offices have established separate units dealing with European integration (some existing since the 1994 institutional reform of the Polish government's structure), allowing for the incorporation of a coherent model of coordination, based on consequences in discussion, stable inter-departmental communication and strong monitoring and handling of issues. It should be noted that working on-line was a prerequisite of the effective introduction of the new institutional model of coordination.

The on-going introduction of the recently created *Electronic Exchange of Documents–Poland* system (EWD-P) in Polish ministries, central government offices and other recipients of the documentation flown from the EU is a major step towards getting practically everyone 'on-track', and giving information to the correct and responsible persons. It is similar to the systems already existing in several Member States.³⁴ It is based on the experiences gained in the pre-accession and short-term post-accession periods, when Polish officials were (and still are, alongside with EWD-P) using only U32Mail/Extranet System, terminals of which have been installed in the Brussels and Warsaw Offices of the (Polish) Committee for European Integration.³⁵ An aim of the new system is to facilitate the transfer of information and thus the whole bulk of work of the Polish officials participating in the EU legislating process, by providing mechanisms for managing the documents sent from the EU and ensuring the appropriate support for developing Poland's positions and instructions in response to the documents received from Brussels. This new comprehensive network device will function also as a repository of all documents sent from the Secretariat General of the Council and files prepared by the Polish delegation, as these become fully-fledged EU documents when adopted. The EWD-P system already allows for a much easier monitoring of particular cases and enforces concrete results in the daily work of

³³ G. Rydlewski, 'Problemy europeizacji administracji publicznej', *Śłużba Cywilna* (2004/2005) 9: 12. See J. Hayward and A. Menon (eds.), *Governing Europe* (Oxford, New York: Oxford University Press, 2003). See also, similar comments by Daniela Piana in this volume.

³⁴ It should be noted that some EU Member States asked Poland for advice on how to create similar systems in their own countries.

³⁵ F. Jasiński and M. Tabor, 'The Coordination of Integration Policy in Poland in the Pre-Accession Period', *The Polish Foreign Affairs Digest* (2004) 4/1: 83.

the government. Furthermore the monitoring and benchmarking processes will be strengthened accordingly.³⁶

VIII. Further enhancements and modifications

What still needs to be enhanced is the factual introduction of the EWD-P system in order to strengthen accessibility of data and speed up time-consuming follow-up. Furthermore, reporting activities, which are a cumbersome and painful thorn in the side of most national administrations, need to be enhanced as Poland knows that the rapid-reaction to the on-going developments in Brussels is the key to the success, also on the national scene. Deadlines are *the* most expensive part of EU membership, and often force far-reaching changes in the internal procedures in the ministries and central government offices, making them more EU-oriented in terms of documentation flow and introducing modern *e-government* coordination. Furthermore, a number of departments had to be reorganised, a number of employees redeployed, especially as the 'European issues' were the most demanding item on the daily agenda.

Enhancement is evident in the area of strengthening experts' knowledge, particularly with respect to the very specific aspects of decision-making processes, namely inter-institutional EU cooperation and they have become better acquainted with the jurisprudence of the Court of Justice, including non-legal experts. In other words, it is time to go beyond the basics, also with respect to further decentralisation of power and putting the 'European' tools in the hands of their end-users operating on the regional and local levels.

On the other hand, it is not only the time for Poland to enhance its performance, but also for the EU institutions (i.e. the Council and the Commission) to enhance theirs, particularly in terms of the quality of the *acquis* translations.

What still needs to be modified will, hopefully, be the result of the forthcoming entry into force of the Constitutional Treaty, particularly in terms of cooperation with the national parliament (already by now, under the above-mentioned Act of 11 March 2004, the Polish government systematically hands over to the Parliament the documents received from the Secretariat General of the Council).

³⁶ It may sound a bit technocratic but at the same time it serves the ultimate political goal of functional and efficient membership in the EU. See S. Tokarski and A. Mayhew, 'Impact Assessment and European Integration Policy', *Sussex European Institute Working Paper*, 2000/38.

IX. Conclusion

Until the very hour of enlargement, the acceding states were judged reactively by the Commission with respect to the approximation process (including harmonisation of laws), and this process was a one-sided, usually deeply technical task performed by the parliament, the government and the part of the EU *acquis* end-users. Now Poles are formally 'common EU fellows' of the decision-making process, cooperating with the European Commission on a largely different basis, with more confidence and also with more bureaucratic 'passion'. This makes Polish officials far more pro-active, enabling them to take the necessary initiative and make use of the 'corridor discussions' to advance Polish interests. Poland must also monitor its own proceedings with even more attention, as the consequences of failure in the post-accession stage may be more detrimental than before accession (although it should be noted that the decision to postpone Poland's accession was politically impossible).³⁷ Such consequences could include sanctions imposed by the European Court of Justice.³⁸

When forging its own integration policy Poland has taken into account the coordination models of, *inter alia*, Denmark, France, Germany, Spain and the United Kingdom, but 'Europeanisation'³⁹ *per se* is not always a purely strengthening factor. Some mistaken decisions were linked to a misperception of what the EU wanted us to do, some triggered undesired outcomes, such as a false public perception of the budgetary costs related to the delegations of public officials flying daily to Brussels.

Furthermore Poland succeeded in using the best practices derived from its longer-standing presence in the Council of Europe, NATO, OECD and the UN, particularly in terms of having the very same experts in the delegations going to the EU meetings, in order to sustain coherence in the decision-making process.⁴⁰

³⁷ See Wojciech Sadurski's comments on this issue in this volume.

³⁸ J. Pietras, 'Polska w Unii Europejskiej—doświadczenia członkostwa w 2004 roku', in *Ocena pierwszych miesięcy członkostwa Polski w UE—mity i fakty*, Institute for Strategic Studies, Cracow, 2005, p. 141. See also Articles 38 and 39 of the Accession Treaty.

³⁹ See, J. Hughes, G. Sasse, and C. Gordon (eds.), *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe: the myth of conditionality* (New York: Palgrave Macmillan, 2004); see also, E. Tulmets, 'The Introduction of the Open Method of Coordination in the European Enlargement Policy: Analysing the Impact of the New PHARE/Twinning Instrument', *European Political Economy Review* (2005) 3/1: 54.

⁴⁰ One should note that a great part of EU legislation, especially in the third pillar, is based on the Council of Europe's experiences. Consequently, those in charge of Council of Europe matters are usually experts in the Council Working Groups.

In 2001 Heather Grabbe wrote that, “[...] the CEE countries are still in a state of transition, and their governance structures have not yet reached a stable form [...]”,⁴¹ however it is difficult to share this point of view four years later, particularly as one can easily observe the paradoxes of changing structures and dynamics of governance similarly in the old Member States. In the author’s (practitioner) opinion, and taking an example of Poland in recent years, governance structures already reached quite a satisfactory level of stability, even though it is true we still witness some transition effects, particularly in the economic sector. Clearly, the new EFTA Member States were better acquainted with the ‘corridors’ of the *Justus Lipsius* building in Brussels than the newcomers who joined the Union in 2004, but it is important to remember it was a much different Union to accede to, if one takes into account recent vast developments in the second and third pillars, particularly after the Commission boom in initiating new legislative acts and an avalanche of soft-law provisions adopted in practically all areas of the EU *acquis*.

Polish officials have noted with some satisfaction that those who recently claimed that enlargement would block or freeze the various institutional procedures of the EU, particularly the voting process, have been proved wrong.⁴² It is unclear how long the stability of this particular model of integration policy will last. For the time being, the author claims that the short-term goal of integration policy has been met and that structures are in place and the procedures are binding. What lies ahead of us is the day-to-day participation in European Union works and the taming of any irregularities observed within the coordination system.⁴³

⁴¹ H. Grabbe, ‘How does Europeanization affect CEE Governance? Conditionality, diffusion and diversity’, *Journal of European Public Policy* (2001) 8/6: 1028. The author shares Grabbe’s conclusions relating to ‘broad aspects of governance which the EU accession affects directly’, pp. 1028–29.

⁴² Such a prediction was given, *inter alia*, by H. Bchir, L. Fontagné and P. Zanghieri, ‘The Impact of EU Enlargement on Member States: a CGE Approach’, *Centre d’Etudes Prospectives et d’Informations Internationales Working Paper*, 2003/10: 12. See also, B. Plechanonová, ‘The Treaty of Nice and the distribution of votes in the Council: voting power consequences for the EU after the oncoming enlargement’, *European Integration online Papers* (2003) 7/6: 13; available at: <http://eiop.or.at/eiop/>.

⁴³ Particularly as a number of the above-mentioned arguments equally relate to the rest (‘Nine’) of the ‘new’ EU Member States.

Chapter 13

*Territorial Government in the New Member States**

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I. Transition and structural change

The threefold transition faced by New Member States—democratic transition, economic reform and European integration—has entailed a series of structural reforms to systems of government and administration. A further complication has arisen where the state itself is newly independent, as in the Baltic states, Slovakia, the Czech Republic and Slovenia. While these reforms might be portrayed as a matter of modernisation, or catching-up with Western Europe, they are taking place at a time when the role and configuration of the state in the older Member States is itself undergoing significant changes, while the European Union is also evolving. In this process of state reconfiguration, the regional and local level has emerged as a critical area. Yet, while there is broad agreement on the need for reform of territorial governing arrangements, there is much less agreement on what form it should take. Different pressures and arguments point to different solutions, while domestic and European political influences have been intertwined in such a way as often to make it impossible to distinguish them. There are some trends and patterns, but we can not say that enlargement has had a consistent impact on territorial government or that there is a new European model emerging. Instead, the picture is highly differentiated according to the conditions and politics of each state.

* I would like to express my thanks to Gwendolyn Sasse for comments on an earlier draft of this chapter.

Arguments about the reform of territorial government, here and elsewhere, hinge on considerations of democratic participation and accountability, on the one hand, and efficiency and functional effectiveness, on the other. In the literature, these are often portrayed as in potential conflict with each other, although at the appropriate spatial level they may be mutually reinforcing. Today matters are even more complicated, since there is argument about the meaning of the terms themselves and their operationalisation. Arguments about varieties of democracy are legion, while new thinking in public administration and management has questioned old notions of efficiency. All of these take place within a highly politicised context in which decisions about the allocation of competences and resources have a real impact on the balance of power among political parties, social groups and territories.

Political parties in Central and Eastern Europe (CEE), as elsewhere, have tended to take an opportunistic attitude to territorial reform. Opposition parties will favour it but change their mind in government, those with established territorial bases will seek to preserve them, and boundaries of new units will be scrutinised to see where partisan advantage lies. Politicians and parties will seek to retain their social support base and client networks and extend them where possible. Reform is often synonymous with the removal of old Communist-era élites and the institutions associated with them, and this is used both as a mobilising argument and as a weapon for partisan gains. Administrative reform is also pervaded by considerations of advantage. Central ministries will resist transferring power to regions and localities, and old bureaucratic élites will seek to sustain their advantages during institutional restructuring. Sectoral ministries will resist strong local and regional government and seek to retain their chains of command down to local level. Thus the process of reform is marked by an inextricable combination of arguments about good government and partisan motivation. There is a first mover advantage, in that groups that are able to define the institutional architecture on their own terms at an early stage may entrench their positions, using the resources, patronage and networks of the new institutions to accumulate more power. Further reforms at a late stage are thus rendered difficult.

The legacy of the past is important in a deeper sense, creating path-dependencies and historical memories, which in turn may serve as positive or negative models. These past legacies include the Communist era, the inter-war period and the earlier imperial experiences, each interpreted and re-interpreted with reference to the present. Generally speaking a statist and nationalist teleology has dominated interpretations of the past, with the states being presented as the

product of natural evolution and progress. There is a suspicion of regionalism as something used by imperial élites to reinforce state control.¹ Here and there, however, are challenges to the nation-state model as the dominant discourse. There are correspondingly multiple interpretations of the Europe which the New Member States are joining—a Europe of independent nation-states now being extended eastwards; a Europe whose legacy of transnational order may chime with traditions in the central and eastern part of the continent; or a Europe which is evolving from the nation-state to a higher and post-national political order.

A word on terminology is in order here. Three levels of territorial government are usually recognised. The municipal or local level is the base unit and exists everywhere in Europe, although varying in size and status from the small rural communes found in France to large cities. The provincial or county level is often used as a division by the central state, and is sometimes also a unit of elected government. The regional level in some cases takes the form of the federated unit of a federal state; in others it refers to a relatively new institution in Europe, the ‘meso’ level intermediate between the central and local level. The distinction between the provincial and regional level is not always clear, especially in small countries, but does become clear in those cases where states have established regions as a third level above it.

II. Democratic considerations

There are two diametrically opposed traditions about the relationship of territorial government to democracy. The ‘Jacobin’² vision locates the democratic will in the national community and sees local power centres as the basis for privilege, inequality and resistance to change. This thinking has a legacy in the CEE from the interwar period, and is reinforced at times when state élites feel insecure. The other conception, associated with English-speaking and Nordic countries, is that more decentralised systems are inherently more democratic, and that variation in policies (or at least in their application) is to be welcomed. Traditions of civic and regional self-government are underdeveloped over much of the New Member States, although there is rhetorical support for

¹ Z. Balogh, ‘The New Regionalism in the Central and Eastern European Countries: lessons for dealing with peripherality in the new European Union Regions’, *The Newsletter of the Regional Studies Association*, 2005/256: 10–15.

² ‘Jacobin’ is a term used in France, Spain and other countries to denote republican centralisation, although the historical Jacobins of the French revolutionary era were a more complex group. Jacobinism in the modern sense is in fact the product of the French Third Republic and contemporary developments in other European countries, including Italy.

decentralisation. In recent decades, the civic engagement argument for decentralisation has rather given way to the 'public choice' school, which argues that local government should be fragmented both territorially and functionally in order to secure units of administration whose outputs can be tailored closely to the preferences of their citizens (or consumers as they are often seen). This argument is occasionally heard in the New Member States, where it chimes with enthusiasm for the market and the dismantling of large-scale planning structures inherited from the old regimes, but it has not been predominant. Indeed, this intellectual approach has been in decline in Western Europe in recent years, with a renewed emphasis on citizenship and general-purpose governments.

Regional devolution has also been advocated in the Western Europe on democratic grounds, and this too has entered into debate in the New Member States. Devolution entails regions taking over functions from the central state itself, rather than merely administering central policies, thus providing new forms of democratic choice. This has proved particularly sensitive in the New Member States, since such regions may seem to challenge the nation-state itself as the essential forum for democratic will formation and for setting of general policy lines.

Federal conceptions of democracy are a powerful influence in some parts of the world, where they are associated with decentralisation, citizen engagement and, above all, the division and sharing of power. These traditions are weak across most of the CEE countries, where they were largely rejected during the inter-war years and further discredited by the Soviet, Yugoslav and (post-1968) Czechoslovak experiences.

The most important European body in diffusing ideas of local democracy is the Council of Europe. It has a Charter of Local Self-Government, laying down principles that Member States should follow and it has been active in central and eastern Europe in encouraging democratic practice. This has helped anchor the assumption that democratic government is decentralised and has encouraged the formation of networks to spread good practice. It has also worked on a Charter of Regional Self-Government, but this has proved more difficult, given the reticence of some states and the difficulties in defining the regional tier. The European Union has taken some account of this in assessing the democratic credentials of candidate countries, but it has not been an element or hard conditionality. Indeed the EU has repeatedly stated that internal territorial organisation is a matter for Member States themselves, especially in its politically more sensitive aspects.

III. Minority questions

Decentralisation is particularly sensitive when it affects national or cultural minorities. In Europe, these are of two types: stateless nations nested within host states, but retaining their own identity, desire for autonomy, and even potential for secession; and national minorities, who see themselves³ as kin to the titular nationality of a neighbouring state. Both types exist in Western Europe: the former in groups like the Scots, Catalans and Basques,⁴ the latter between Italy and Austria, Germany and Denmark, and Sweden and Finland. In the CEE, the settlements after the two world wars and in the 1990s fragmented multinational states and empires, largely eliminating the first category, but leaving many examples of the latter. There are a few groups aspiring to recognition as 'nations', or at least historical-cultural entities in their own right, such as in Silesia or Moravia, but most minorities are related to kin states. The efforts to resolve the problem through state fragmentation and population transfers has not worked and never can, since national and ethnic identity is subjective, adaptable and reactive. So although, following the Second World War, the supposedly German population was expelled from Polish Silesia, including the part newly acquired from Germany, this did not stop some of those who remained adopting a German identity in later decades when it suited them, or from rediscovering a distinct Silesian identity within Europe.⁵ In the Baltic states, large numbers of native Russians entered during the post-war years, creating a highly diverse population. The truncation of Hungary after the Treaty of Trianon left large numbers of Hungarians outside their nominal state. The split of the Czech Republic and Slovakia in 1993 did not yield homogeneous states. Although the Moravian and Silesian movements in the Czech Republic did not prove very significant, that of Hungarians in Slovakia did.

In recent years Western practice has been to grant territorial autonomy to stateless nations and national minorities and to encourage various forms of cross-border co-operation. This has not been an easy adaptation and followed a phase in which concessions to national or cultural minorities were seen as a violation of national sovereignty and as dangerous (an attitude which persists in France). At the same time, nations and minorities have territorialised themselves, building on

³ There is, of course, a strong subjective element in this.

⁴ The Basques and Catalans illustrate both types, lacking their own state but spreading across state borders.

⁵ W. Dressler Holohan and M. Ciechocinska, 'The Recomposition of Identity and Political Space in Europe: The Case of Upper Silesia', in L. O'Dowd and T. M. Wilson (eds.), *Borders, Nations and States* (Aldershot: Avebury, 1996).

the themes of the 'new regionalism'⁶ to build systems of action short of statehood, seeking whatever degree of autonomy is available within the state and the emerging European order, through culture and economics as well as politics. In this way, formal territorial autonomy can be made real if matched by a strong functional capacity. Pan-European networks of minority parties, such as the European Free Alliance, have been open only to democratic and inclusive movements, and the basis of the European project itself is rooted in tolerance and democracy. This has favoured moderation and inclusion, while playing down separatism and irredentism in favour of a complex, multilevel Europe. Extreme groups like the Vlaams Blok and the Lega Nord, have been excluded.

In the CEE countries there has also been a certain Europeanisation of minority movements, looking for opportunities short of secession or irredentism to satisfy autonomist demands.⁷ Yet the matter is even more sensitive and there is a strong resistance to territorial autonomy as a solution, since this appears as a threat to the unity of the nation-state. The Czech Republic was deeply opposed to conceding autonomy to Moravia, while Poland has not conceded to Silesia the special autonomy it enjoyed between the wars (before the expulsion of the 'German' population). Slovakia has sought to stop the emergence of a Hungarian-majority region, resorting under the Mečiar regime to some extraordinary gerrymandering. Hungarian governments have been very keen on minority protection, since they can use this on behalf of the large Hungarian minorities in neighbouring countries. There is a system of minority self-government but this has a weak territorial articulation, given the dispersal and location of the minorities. The question has also arisen at the municipal level, notably in the Baltic states, where some localities have Russian majorities demanding language rights in local citizenship, administration and education. There is evidence, as in parts of Western Europe, of minority groups being Europeanised, and seeing Europe as a new space in which autonomy claims can be negotiated, and this has moderated secessionist and irredentist claims. Yet they are not as territorialised as they have become in the west, and there are fewer vehicles for region-building through economy, cultural and devolution as an alternative to secession. States

⁶ M. Keating, *The New Regionalism in Western Europe. Territorial Restructuring and Political Change* (Aldershot: Edward Elgar, 1998).

⁷ J. Batt, 'Reinventing Banat', *Regional and Federal Studies* (2002) 12/2: 178–202. J. Batt, 'Fuzzy Statehood versus Hard Borders: The Impact of EU Enlargement on Romania and Yugoslavia', in M. Keating and J. Hughes (eds.), *The Regional Challenge in Central and Eastern Europe. Territorial Restructuring and European Integration* (Brussels: Presses interuniversitaires européennes/Peter Lang, 2003).

remain suspicious. On the other hand, there is evidence of distinct civic cultures, often dependent on historic events, as research on Poland has shown.⁸ These do seem to affect institutional performance.

IV. Efficiency considerations

The literature on local and regional government is not agreed on what constitutes efficient government and how it might be secured. Classical management theory has had a lingering influence, emphasising clarity, clear lines of command, limited spans of control and co-ordination. For much of the twentieth century, this was combined with a depoliticised approach to local government, focusing on the delivery of services and expansion of the national welfare state, rather than on policy choices that might be made locally. Repeated reforms in the states of Western Europe sought to create larger units, in the interests of economies of scale, to limit the role of party politics, and to undermine distributive and clientelistic systems of government in favour of strategic management. Local governments were merged and consolidated and, where this was not possible, inter-municipal arrangements were put in place in the cities, and regional governments established above them. Professionalism in service delivery was encouraged, while politicians were to be confined to strategic policy questions. This was at best a partial success. Depoliticisation in local government is by definition impossible, and there was always a conflict between the aim of creating strong local governments able to make strategic choices, and that of reducing politics to technocratic managerialism. However desirable it might appear to confine politicians to a strategic role, they can never be excluded from administrative decisions which are of prime interest to their constituents. Local government consolidation was achieved in many countries but proved impossible in others, notably France. It was never convincingly demonstrated that there are economies of scale in local government, at least beyond the consolidation of tiny municipalities.⁹

From the late 1970s there was a swing in the opposite direction. Public choice theorists argued that efficacy was best achieved through functionally and territorially fragmented units, which could tailor their services more precisely to

⁸ H. Baldersheim and P. Swianiewicz, 'The Institutional Performance of Polish Regions in an Enlarged EU. How Much Potential? How Path Dependent?', in M. Keating and J. Hughes (eds.), *The Regional Challenge in Central and Eastern Europe* (2003).

⁹ M. Keating, 'Size, Efficiency and Democracy: Consolidation, Fragmentation and Public Choice', in D. Judge, G. Stoker and H. Wolman (eds.), *Theories of Urban Politics* (London: Sage, 1995), pp. 117–34.

client needs. Efficiency could be enhanced by competition among service providers rather than by monopolists. New Public Management drew on these ideas while also highlighting the changed nature of government and public administration itself. Rapidly changing social and economic problems were to seen to require greater flexibility and lighter management structures. Policies could not be made and delivered by government alone, but needed partnership with the private sector and other actors. A distinction was made between providing public policies (the task of government), and producing them (which could be contracted out).¹⁰ Institutions are replaced by networks, spanning the public and private sector as well as levels of government. This whole complex arrangement has been summed up as ‘multilevel governance’ a notoriously vague concept but seems to refer to the replacement of a former Weberian model of the bureaucratic state with networks.

The question for the New Member States is then to which model of public administration they are aspiring, the old Western model or the new. There has been some confusion here as to what can or should be done. Is it possible to leap from a Communist system of public administration to a post-Weberian or New Public Management one without passing through a period of bureaucratic consolidation in the Weberian mode? Is a period of centralised state management necessary before decentralisation can be attempted? Is a strong bureaucracy needed in transitions, in the absence of a consolidated civil society and well-structured private sector? Transition countries have grappled with these questions, as has the European Commission in its advice to them, moving now in one direction and now in another. The Commission, like governments in the west over the years, has been worried that partisanship and clientelism, spilling over into corruption, are endemic in local government and get in the way of reform and good policy design. This might point to a strong Weberian bureaucracy and centralisation in policy. On the other hand, they are encouraged to engage in partnerships with the private sector and showered with the language of ‘governance’, ‘stakeholders’ and decentralisation.

¹⁰ A favourite analogy of the advocates of New Public Management is between the tasks of steering and rowing a boat. See D. Osborne and T. Gaebler, *Reinventing Government: how the entrepreneurial spirit is transforming the public sector* (Reading, MA: Addison-Wesley, 1992). They seem unaware that most of the steering in a rowing boat is done by the oarsmen.

V. Regions, policies and institutions

One of the important tasks assumed by Western European countries in the post-war era was that of ensuring balanced regional development. This was pursued initially with centralised policies, diverting economic activity (mainly industry) from booming regions to underdeveloped or declining ones, with a mixture of incentives and regulations. Gradually, this was accompanied by more elaborate systems of regional planning, in which industrial plants provided the stimulus to growth, while government developed the necessary physical and social infrastructure. A weaker, bottom-up element was provided in the form of consultative machinery and planning councils, representing local government and the social partners. In Germany, where the federal system prohibited this model, a similar end was achieved in through the joint-tasks framework. Diversionary policy was sold as a positive-sum game, in which poor regions would gain through new development, and the wealthy regions would see a reduction in congestion and inflationary pressures, and the national economy as a whole would gain through using otherwise idle resources. Moneys transferred to poorer regions would stimulate demand for goods produced in the rest of the country, giving rise to the expression 'spatial Keynesianism'. There was also a social dimension, with regional policy projected as an expression of national solidarity, the territorial dimension of the welfare state.

Since the 1970s, however, this model has been in trouble. National diversionary policies do not work when capital has a worldwide choice of locations. Regions now compete for investment in European and global markets and wealthy ones are increasingly reluctant to subsidise their weaker brethren. The regional development literature now argues that traditional factor endowments and location are no longer the key determinants of regional success, and that attention needs to be paid to softer factors, including human capital and (even softer) 'social capital'.¹¹ Some go so far as to argue that the traditional theory of comparative advantage, in which each region could find its place in the national division of labour, has given way to competitive or absolute advantage, in which regions must seek to outdo each other. This implies (although the experts sometimes shy away from this conclusion) that there will be winners and losers. The notion of competitive regionalism has certainly entered into political

¹¹ P. Cooke and K. Morgan, *The Associational Economy. Firms, Regions, and Innovation* (Oxford: Oxford University Press, 1998); A. Scott, *Regions and the World Economy. The Coming Shape of Global Production, Competition, and Political Order* (Oxford: Oxford University Press, 1998); M. Storper, *The Regional World. Territorial Development in a Global Economy* (New York/London: Guildford, 1997).

discourse, including that of the European Commission. Top down regional policies have given way to decentralised policy. Corporatist regional planning arrangements have given way in many cases to elected regional governments, whose main concern is economic development. At the same time, the argument for planning and concentration has come back after the neo-liberal rhetoric of the 1980s and early 1990s. Regional policy has also been Europeanised, with large increases in spending since the late 1980s and is a constant object of contestation among the Commission, national governments and the regions themselves.

Regional disparities in the New Member States are very large in comparison with the historic disparities in Western Europe. Investment has a strong tendency to cluster in capital cities, with other concentrations along western borders. Rural areas, old industrial regions and areas adjacent to eastern borders have suffered most.¹² Disparities are likely to trigger political demands, and with the prospect of the emergence of new centre-periphery cleavages, perhaps aimed against both the state and the EU.¹³ On a more positive note, they may also help generate new regional development coalitions around issues of growth and change, although it is too soon to see evidence of this. The prerequisite of such coalitions is strong political leadership or the presence of a locally-based business class. The latter does not generally exist and has not often been fostered by inward investment. Instead, regions are integrated into global supply chains and capital is poorly 'embedded' locally.¹⁴

A fundamental question facing New Member States is whether to have an anti-disparity policy at all. There are those who argue that investment should be welcomed wherever it wants to locate and that national governments cannot afford to prejudice their own competitive advantage by favouring weaker regions. Pressures for regional policy, however, do come from parties with territorialised support bases, and from the European Commission, which is to provide much of the resources. Then there is the question of whether centralised regional policy, as in Europe of the 1950s and 1960s, is preferable to the new, bottom-up approaches

¹² A. Lange, *Uneven Regional Development: The European Union and its New Member States* (Münster: LIT, 2004).

¹³ C. Mudde, *EU Accession and a New Populist Center-Periphery Cleavage in Central and Eastern Europe*, Centre for European Studies Central and Eastern Europe Working Paper, 2004/62, Cambridge, MASS, Harvard University.

¹⁴ D. Sadler, 'Production Systems and Uneven Development in East Central Europe: The Limits to Regional Economic Development', in M. Keating and J. Hughes (eds.), *The Regional Challenge in Central and Eastern Europe* (2003); A. Scott, *Regions and the World Economy. The Coming Shape of Global Production, Competition, and Political Order* (1998).

based on endogenous development and social capital. There is disagreement on the institutional implications of various models. Decentralised regional policy does not imply political decentralisation as it could be delivered by agencies or partnerships, depoliticised and taken out of the hands of local political élites. Then there is the scope of regional policy. It might be confined to economic development in its narrow sense, in partnership with investor interests, or it might be cast more broadly to include social and environmental concerns. The philosopher's stone of regional development is a strategy that would combine these elements in a positive-sum way and provide a virtuous path to development; and there are some rather wishful suggestions in the literature that this can be attained if only we find the right spatial scale. More realistically, however, these are priorities to be balanced and decided by institutions. Another persistent idea, which has also entered the debate in the CEE, is that regions of a critical size are needed. This is an echo of the old economies of scale argument, that big is better and is often buttressed by references to western Europe, especially (at least until recently) the German *Länder*.¹⁵ This confused and confusing set of arguments reverberated through the accession process, conditioning both the advice given by the Commission and its reception in the candidate countries.

VI. Regions, conditionality and accession

The effects of European integration on territorial politics and government are multiple. Some of the most important effects arise from the single market and the importation of the idea of competitive regionalism, in which regions and cities have to compete for investment and market advantage. This has institutional implications, sparking a search for the right framework and organisation to promote development. Others effects are more direct, concerning the intervention of European institutions in government restructuring. The European Union has overwhelmingly been concerned with functional, economic and efficiency considerations rather than political institutions. It has, in the process of accession, emphasised the need for democratic consolidation, but has been reticent in giving advice on what this implies and on the role of local and regional institutions, regarded as a matter for national governments. It has been even more reluctant to engage in nationalities questions or issues of minority rights, especially where these involve altering the distribution of power. The Council of Europe has had a more direct role here, but it too has been conscious of the delicacy of the question and the need to avoid direct intervention. Nonetheless, the policies that European

¹⁵ This despite the fact that the German *Länder* differ greatly in size.

institutions have pursued do have implications for territorial government and politics and, as in the national context, are not easy to depoliticise or reduce to technical and managerial questions.

In the early days of the accession process, there was a widely-held view among the candidates that a condition for joining the EU was establishing a regional level of government.¹⁶ It is not entirely clear where this came from, but at a Commission Carrefour held in Budapest in 2000 it turned out that the idea was rather deeply entrenched. There was, it is true, some confusion about what this meant, and about the distinction among regional policy (which could be centralised or decentralised), regional administration (which could be a branch of the central state), and elected regional government. One widely-held idea was that, in order to qualify for the Structural Funds, New Member States would need to have regional governments, although this is not the case in much of Western Europe. This was even reflected in some of the academic literature.¹⁷ The Commission documents are more circumspect, talking about regions not under the chapters on political reform, but under preparation for Structural Funds, and focusing on administration rather than government, but the impression is certainly created that the EU was pressing the idea of decentralised policy and partnerships in line with recent practice in the West. It seems likely that consultants engaged by the Commission and candidate governments were less cautious. There is also evidence that pro-regionalist domestic actors used the European argument to tactical effect, eliding the distinctions between regional policy, administrative decentralisation and political devolution.

This all changed dramatically after 2000, especially with the decision to admit all ten candidates in 2004 and a shift of responsibility from DG Enlargement to DG REGIO. The Commission now insisted that Structural Fund programmes would have to be managed centrally and preferably concentrated in one or two national programmes rather than divided into regional or sectoral ones. There should be one paying authority, normally the Ministry of Finance. Policies should be focused on hard infrastructure rather than soft human capital and enterprise

¹⁶ J. Hughes, G. Sasse and C. Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe* (London: Palgrave, 2004); M. Keating, 'Regionalization in Central and Eastern Europe. The Diffusion of a Western Model?', in M. Keating and J. Hughes (eds.), *The Regional Challenge in Central and Eastern Europe* (2003).

¹⁷ M. Baun, 'EU Regional Policy and the Candidate States: Poland and the Czech Republic', *Journal of European Integration* (2002) 24/3: 261–80; E. Kirchner and T. Christiansen, 'The Importance of Local and Regional Reform', in E. Kirchner (ed.), *Decentralization and Transition in the Visegrad Countries* (Basingstoke: Macmillan, 1999).

measures. This marked a dramatic break, not only from what the EU had appeared to be saying hitherto, but also with developing western experience since the late 1970s, and requires some explanation. One reason is purely practical. The accession date of 2004 meant that the New Member States would have only two years to absorb the funds in the current spending round (which ends in 2006), and this is more easily done by central ministries and with capital spending on infrastructure. There was overt concern about the lack of administrative capacity at the regional level and a less loudly-voiced worry about corruption, clientelism and partisan spoils systems. So the Commission turned down Hungarian and Polish proposals for regionalised programmes and the Czech Republic's proposals for sectoral ones. It even criticised Latvia's law on decentralisation, adopted in view of the Structural Funds, on the grounds that decentralisation would weaken administrative capacity.¹⁸ The only requirement concerning regions was now that candidate countries should designate NUTS2 regions for the statistical purpose of determining eligible regions, and that there should be some administrative mechanism at this level (not an elected authority). Poland, the only county in the course of establishing elected regional governments corresponding to its NUTS2 level, could not use these as the managing authorities, since the programmes, as mentioned, had to be centralised. Slovenia and Malta, which wanted to divide their territories so as to retain some Objective 1 eligibility, were told to classify the whole state as a NUTS2.

Officials in Brussels were rather reluctant to discuss this apparent policy U-turn, although one did claim that the experience of Portugal and Ireland in the 1980s proved that centralised management of the Structural Funds was best (ignoring the fact that at the time the Commission had been encouraging those countries to decentralise). There is an argument that centralised policies may be appropriate for countries at an early stage of development, but the Commission's motives appear to have more to do with concern about political intervention, clientelism and the weakness of both administration and civil society at the regional level. The problem, however, is that if central institutions are given control of these EU resources from the beginning, this will reinforce them and weaken regional and local forces, creating a new path-dependency that will be difficult to break in future. The conclusion must be that, while European integration in general puts a premium on endogenous development in order to create regional competitiveness, the accession process has tended in the opposite direction.

¹⁸ A. Evans, 'Regionalism in the EU: Legal Organization of a Challenging Social Phenomenon', *Journal of European Integration* (2002) 24/3: 219–43.

Other external influences have further complicated the process. Twinning programmes with old Member States and bilateral assistance programmes have been a mechanism for the importation of national models of local and regional government, be they French, German or British. Sometimes these have reinforced historic links, as between France and Poland, where we can see strong similarities in territorial government and philosophies of the state. Consultants often have promoted whatever ideas are in fashion, more or less clearly understood and articulated. International organisations, including the World Bank, the International Monetary Fund and private foundations, have tended to prefer their own *ad hoc* delivery machinery rather than entrust their programmes to existing territorial governments. This has made for a certain institutional proliferation and lack of coherence in spatial policy and planning.

The EU has promoted cross-border co-operation throughout Europe through its INTERREG programme, although the practice is often very difficult. It is the same in the New Member States, where the Phare programme provided for regions bordering the old EU. States sought to limit the emergence of cross-border regions by extending co-operation schemes to the entire border rather than cohesive areas along and across it. From 2000, INTERREG 111B sought to continue co-operation with candidate countries, with a more focused approach at NUTS3 level, which appeared more promising. Yet the disparities in status among territorial governments on either side of borders have made direct co-operation difficult.

Regarding minority rights, European bodies, including the Council of Europe, the Organisation for Security and Co-operation in Europe and the European Union, have been drawn in more reluctantly. Protection of minorities was incorporated into the Copenhagen criteria but, unlike the other criteria, was not transposed into the *acquis communautaire*. Nor has the minority rights issue been territorialised, with states and European bodies preferring to emphasise the individual rights of members of minorities as opposed to collective rights, and to focus on access to services rather than autonomy. Kymlicka¹⁹ and others argue that the western norm of territorial autonomy for nations and minorities could be exported to the CEE. The problem is that there is no pan-European norm, but only a set of concurrent state practices, in some states and not in others. European intervention would imply that the norm be generally applicable across the EU-15, something that they would not accept. In any case, it is not clear that this evolving

¹⁹ W. Kymlicka, 'Reply and Conclusion', in W. Kymlicka and M. Opalski (eds.), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford: Oxford University Press, 2001).

western norm would be directly transferable to the New Member States, given the different configuration of the minorities question and the lack of a strong functional underpinning for regional systems of action.²⁰

VII. Types of territorial government

It is not easy to distinguish the effect of external and internal influences on the reform of territorial government in each of the New Member States. European conditionality is not easy to decipher in itself and has been reinterpreted by domestic actors to their own advantage. Political and institutional self-interest have played out differently in different contexts. Technical arguments have been instrumentalised politically, and political interests themselves have changed depending on whether a given party is in or out of government. Out of this has emerged a variety of types of territorial government, not always well connected with each other. There is a municipal level everywhere, providing the basic unit of local administration and representation. After the transition in several countries there was a tendency to fragmentation, as the old Communist structures were rejected and politicians scrambled for advantage. The number of local governments in the Czech Republic increased from 4,000 to 6,000, and in Hungary from 1,600 to 3,100.²¹ Estonia and Latvia also have a very fragmented municipal system. This tendency was presented as a reinforcement of democracy, allowing localities not only to run their own affairs, but to determine their own units. Yet it has subsequently caused problems of efficiency and resource allocation, which is one factor in the move to over-arching regional structures. It has also allowed central governments, including their field services, to gain increased power in policy-making and resource allocation.²²

There has been a tendency to elect mayors, as is the case in Western Europe, with the larger local governments thus becoming both more partisan and more personal in leadership. There has not been much consolidation of city governments or metropolitan regions, apart from the case of Warsaw, where the various municipalities, while retaining their separate existence, form a compulsory association. County level governments follow a variety of models,

²⁰ M. Keating, 'European Integration and the Nationalities Question', *Politics and Society* (2004) 32/3: 367–88.

²¹ J. Hughes, G. Sasse and C. Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe* (2004).

²² A. Ágh, *Institutional Design and Regional Capacity-Building in the Post-Accession Period* (Budapest: Hungarian Centre for Democracy Studies, 2005).

sometimes elected and at other times not. In some cases, they are the highest level of territorial government, taking over the planning functions that elsewhere belong to regions.

Table 13.1: Average population by municipality

Poland	15,500
Hungary	3,200
Czech Republic	1,600
Slovakia	1,900
Slovenia	10,300
Estonia	5,500
Latvia	4,300
Lithuania	60,500

Source: M. Falzon et. al., Local Finance in the Twenty-five Countries of the European Union (Paris: Dexia, 2004)

There is an uneven pattern of regionalisation and, even where governments have been convinced of its functional benefits, it has taken a limited form. There is strong resistance to federal principles or dividing authority. States have tended to resist giving territorial self-government to historic regions or areas dominated by national minorities. Debates in all the cases were informed by European considerations but the issue was eventually settled by domestic political considerations.

Regional governments have been established first in Poland, followed by the Czech Republic and Slovakia. There was a long struggle in all cases. In Poland the partisans of forty-nine regions faced those preferring twelve big ones, with a final compromise on sixteen. Regionalisation in the Czech Republic was designed to avoid recognising historic or cultural regions in Bohemia and Moravia, but was still highly contested by the parties, with Václav Klaus's neo-liberal government being strongly opposed, before agreement was reached on fourteen. These are too small to be NUTS2, so they need to be grouped for that purpose, with some co-ordinating machinery to make up eight units. Hungary was divided into seven regions but only for regional policy and planning purposes, the regions being managed by indirectly-elected councils. Proposals for direct election have been repeatedly postponed. Lithuania also proposes indirectly elected regions under a law of 2003. This kind of arrangement, with indirect election or corporatist

management, has proved unstable in the West, since it suppresses key political conflicts and has tended to make way either for elected regional government or (in the United Kingdom) re-centralisation.

Regions, where they have been established, have been weakened by a number of factors. As in the West, there is a reluctance to give them real powers at the expense of state and local levels, where politicians are entrenched, so that they tend to be confined to planning and programming tasks but without the powers to make these plans stick. Nor do they relate to a strong pattern of interest group activity and civil society, since these tend to operate at other levels, like the municipality or the established Hungarian county.²³ By the time of their establishment much of the administrative and political space had already been occupied by the central state, local government, or *ad hoc* agencies. Their marginalisation in the Structural Funds programming and management only exacerbates this problem. It is all rather reminiscent of France and Italy, where the regions are always described as the level of the future but never quite realise their potential; as opposed to Spain, where regions have established a strong place in the institutional architecture of the state and the political power structure. Sectoral ministries ensure that sectoral/vertical priorities still prevail over horizontal policy making at the regional level; and many issues are negotiated through party networks spanning the both levels.

In some countries, territorial governments co-exist with strong de-concentrated arms of central government, another parallel with France. The Polish *voivodship* is an elected regional government, but the *voivod*, confusingly, is a central official with their own administration. The head of the elected administration is the marshall, who chairs a Regional Steering Committee, while the *voivod* negotiates contracts with the state as the basis for financial transfers.²⁴ In Hungary, Commissioners of the Republic existed at regional level alongside the non-elected councils, but have since been replaced by Public Administrative Offices at the county level. Estonia has county governors appointed by the centre alongside indirectly elected councils. Romania has elected county councils, but

²³ I. Pálné Kovács, C. Paraskevopoulos and G. Horváth, 'Institutional "Legacies" and the Shaping of Regional Governance in Hungary', *Regional and Federal Studies* (2004) 14/3: 430–60.

²⁴ M. Czernielewska, C. Paraskevopoulos and J. Szlachta, 'The Regionalization Process in Poland: An Example of 'Shallow' Europeanization?', *Regional and Federal Studies* (2004) 14/3: 461–95.

they too are flanked by an appointed prefect.²⁵ Table 13.2 shows the variety of arrangements and their correspondence (or lack of correspondence) with the EU's NUTS schema.

Table 13.2: Directly or indirectly elected territorial government in New CEE Member States

	Municipal	Country	Region	Prefectoral	NUTS2
Poland	2,489	373	16	16	16
Hungary	3,158	19	7*	19	7
Czech Republic	6,258	77*	14	77	8
Slovakia	2,920	79	8	22	4
Slovenia	193			58	1
Estonia	247	15*		15	1
Latvia	547	26			1
Lithuania	61			10	1

Source: M. Falzon *et. al.*, *Local Finance in the Twenty-five Countries of the European Union* (Paris: Dexia, 2004); J. Hughes, G. Sasse and C. Gordon (2004)

Note : * indirect

VIII. Conclusion

In the New Member States as in the old, there are strong functional pressures to modernise territorial government, to increase professional management, to consolidate fragmented structures, and to regionalise. Yet political pressures push reforms in the direction, on the one hand of fragmentation, and on the other of centralisation. European influences are present but have been inconsistent and so variously interpreted as to prevent us stipulating any common logic of Europeanisation. In practice, after a phase in which regional decentralisation was in vogue, both state and EU pressures have been towards centralisation,²⁶ especially of regional economic policy. Territorial mobilisation has so far been relatively weak, except where there are active national minorities. The central states appear, for the moment, the victors in the struggle for dominance. Rather than encouraging convergence around a common model of regional or 'meso-

²⁵ J. Hughes, G. Sasse and C. Gordon, *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe* (2004).

²⁶ A. Ágh, *Institutional Design and Regional Capacity-Building in the Post-Accession Period* (2005).

level' government, enlargement appears to have entrenched some important national differences.

On the other hand, we can expect the regional issue to remain salient. Economic disparities, the intrusion of external actors and the struggle for control of development policies are likely in the future to stimulate a new territorial politics. Depoliticised and technocratic development policies, as earlier in the West, are likely to be challenged. States may also face pressures to regionalisation and decentralisation in social policy, as has happened more recently in the West. National minorities will continue to press for territorial autonomy. So, as in the West, we will not see a once-and-for-all institutional restructuring to resolve simultaneously issues of functional efficiency, democratisation and minority rights. Rather these issues will remain part of the politics of the New Member States, with each gradually working out its own settlement.

Part 4

Policy Developments in the New Member States

Chapter 14

The European Union: An Opportunity for Poland?

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I. Introduction

The political decisions on the enlargement of the European Union were made a relatively long time ago. However, not everybody—either in Poland or in the EU—accepted this extremely important decision with proper understanding and satisfaction. Accordingly, further debate goes on in this area, and the aim of this debate is to point out fundamental advantages and threats resulting from Poland's accession. Yet, immersed in the overall stream of everyday problems, such discussion is mostly of just a superficial nature or, quite often, it becomes heated with emotional arguments taking precedence over rational ones. It would appear that, even if for those reasons alone, worthwhile to recall repeatedly the basic motives for Poland to access the European Union and to make people aware of consequences of that fact.

Generally speaking, there have been three fundamental reasons for advocating Poland's accession to the EU and Polish presence in the EU, namely, economic considerations, political reasons, and social reasons. It is for the same three reasons that the EU should adopt and accept Poland as a Member State enjoying equal status and rights.¹

¹ The subsequent analysis draws upon the following publications: P. De Grauwe, *Economics of Monetary Union* (Oxford: Oxford University Press, 2002); E. Kawecka-Wyrzykowska and E. Synowiec (eds.), *Unia Europejska. Przygotowania Polski do członkostwa* (European Union. Poland's Preparation to Membership) (Warsaw: IKiCHZ, 2001); D. Milczarek and A. Z. Nowak (eds.), *Integracja europejska. Wybrane problemy* (European Integration. Selected

II. Economic considerations

The main economic argument for Poland to accede to the EU was the opportunity to benefit from its economic potential to a much higher degree than it was previously possible. In 2000 the EU's Gross Domestic Product (GDP) was estimated at around 21% of global GDP, while GDP *per capita* was, at the same time, at the level of € 21,100. Its share in international trade was at the level of around 19%. For a comparison, in the same period the GDP of the United States was estimated at about 22% of global GDP, amounting *per capita* to € 31,800, while Japan's GDP was around 10% and the *per capita* GDP was € 32,200. As can be seen, therefore, the EU, the US and Japan generate as much as 61% of the total GDP of the modern world. This means that roughly one-sixth of the global population generates around three-fifths of GDP, while the remaining five-sixths of people in the world account for as little as two-fifths of the world's GDP. Just to have a reference point: the GDP of the so-called former socialist countries (and there are more than forty of them) is estimated to account for around 4.5–5% (including that of Poland: about 0.55%) of total GDP globally.²

Taking these figures into consideration, should Poland, economically speaking, integrate with the EU or not? The answer to the question was reached quite easily, if we first answered the question whether Poland desired to belong to the 'creators' of the modern world or whether it was satisfied with no more than an observer's role. If Poland wished to be one of the creators, that is, to be actively involved in shaping the world's economic, political, social and other policies, if only to a limited degree, but in any case to a much greater extent than it did upon its domestic scale—or on local one at best—then the question whether Poland should accede to the EU was unambiguous: 'Yes, it should'. If it remained on its

Problems), (Warsaw: Warsaw University Centre for Europe, 2003); A. Z. Nowak, *Integracja europejska. Szansa dla Polski? (European Integration. An Opportunity for Poland?)*, (Warsaw: PWE, 2002); A. Z. Nowak and J. W. Steagall, *Globalization, European Integration and...?* (Warsaw/Jacksonville: Warsaw University Centre for Europe, Coggin College of Business University of North Florida, 2002); and documents: *Korzyści i koszty członkostwa Polski w Unii Europejskiej, Raport z badań (Costs and Benefits of Poland's Membership in the European Union. Research Report)*, Natolin College of Europe, Warsaw, 2003; *Polska w Unii Europejskiej. Doświadczenia pierwszego roku członkostwa* (Warsaw: Urząd Komitetu Integracji Europejskiej, 2005).

² It is sometimes argued that, although GDP is not a perfect measure to define the level of a country's economic development, it is nevertheless the best among those known to date. And it should be recalled that the basic weaknesses of GDP as an indicator mainly stem from the fact that it fails to reflect directly the level of scholarisation, longevity, general satisfaction, etc.

own, outside that group of countries whose share in the global economy accounts to more or less 21% of global GDP, then, with its GDP share of 0.55%, it would practically be incapable of playing any significant economic role in the contemporary world.

In theory, one could even agree with those who maintain that, to be among the 'creators', it would have sufficed to join either NAFTA or the ASEAN group. In practice, however, such opinions could hardly have been regarded as serious, taking into account sheer geographic distance, as well as—in relation to the ASEAN group—huge cultural differences.

The question was, however, whether everybody would benefit from Poland's accession to the European Union? The answer was not simple. Certainly, entities and persons who would prove competitive in relation to entities and persons from the EU would undeniably benefit. Accession provides an opportunity for young people, and in particular young people with high levels of education. On the other hand, it is not that simple to obtain a high level of education, either in the past, or today. In the contemporary world, which is also very competitive in this area; solid and comprehensive education is generally associated with fluency in several foreign languages, personal computer skills, entrepreneurship, innovativeness, awareness of cultural differences and capabilities of prompt adaptation to any sort of change.

Taking a look, for example, at a modern worker, instead of a person who digs ditches with a pick-axe we are more likely to see an expert engineer, competent in using complex, semi-automatic or computerised machines and equipment. In order, therefore, to be successful and reap as much benefit from accession as practicable, Poland must first and foremost endeavour to raise the level of education of its population, to stimulate its innovativeness and entrepreneurial abilities. Otherwise, the country might not be capable of taking full advantage of the opportunities open to it, and part of its potential will go unused. Worse still, a certain group in society may find, in the short run, that it has benefited much less than its potential than expected, or that it has become a 'loser'.

Has Poland reached a peak in terms of what is possible in this respect? Most certainly not. But, importantly, the European Union should act as a spur to mobilise and work hard to face the twenty-first century challenges rather than being a reason to be afraid of the Community.

Can Poland stand up to such challenges on its own? It seems that in a long-term perspective it could. But why wait for such a long time if, for many millions

of us, the EU presents a readily available opportunity to attain international standards much sooner.

Undoubtedly, and for a variety of reasons, a part of Polish society is neither able nor willing to attain these standards. Was European integration to be opposed on that basis? It seems that the right answer is 'no'. Instead, one should not only be aware of the problems faced by people unable to adapt to international requirements and challenges, and not to forget about that, but also to be of help in solving their problems. But who should do that? The Polish taxpayer, represented by a Polish government, or an EU taxpayer, represented by the Brussels administration? The experience of countries that have joined the EU in the past suggests that it may be both. However, it seems that one should look to the Polish government in the first place, as the aid resources from the EU seem insufficient to solve serious problems in Poland in the areas of education, unemployment, environment protection, vocational conversion and re-qualification of large groups, etc.

On the other hand, the scarcity of EU funds cannot be used as an argument against the process of integration. The opposite applies: it was a firm argument to advocate integration, since those funds, as in fact intended, are only meant to act as an impulse to stimulate changes.

Furthermore, accession to the EU was also expected to trigger a new wave of foreign capital inflow. An important causal factor in that regard was a growth of confidence in the Polish economy, a natural consequence of its new place within the common market, coupled with increasingly high profitability of capital assets in Poland compared to those in the EU (as a result, among other things, of lower prices of labour, land, raw materials, and so on). In particular, growth in the level of foreign direct investment (FDI) should entail an accompanying growth in employment, contributing to a lower unemployment rate.

It should be noted, on the other hand, that a significant flow of FDI may also result in a further appreciation of the Polish currency, a fact that may, in consequence, diminish potential benefits accruing from integration. One has to reckon with phenomena such as a rise in the level of manufacturing costs, and, as a result, a decrease of competitiveness of goods and services generated in Poland, followed by an increasing deficit in the current trade account and a deterioration of general economic conditions. This will in turn have a negative impact on unemployment. If this situation persists over a long period, it may even lead to the emigration of skilled labour or 'brain drain'. This would be an extremely negative effect for Poland's development, in a number of ways.

First, this would mean that most dynamic, business-minded and innovative people would be the first to emigrate. Another disadvantageous effect of Poland's accession to the EU may consist in a decline of several sectors of the economy that are unable to meet the demands of being competitive. While seen from a long-term perspective this is a positive process, as it raises an overall economic effectiveness on a national scale, it nevertheless may lead, on a short-term basis, to serious economic and social turbulence. Such negative effects should be prevented and counteracted by an efficient financial policy, consisting in, among other things, sound co-operation between the central bank and the minister of finance. This regards such factors as reasonable monetary and fiscal policy, aiming at economic stabilisation on the one hand, and on supporting stable economic growth on the other hand. It is, admittedly, the basic objective of economic leaders, including monetary authorities, to aim—also following the example of other countries—at stable prices, but at the same time to promote sustainable economic development.

Summing up these considerations, there is a high probability that, as in other countries that acceded to the EU in the past (such as Spain, Portugal, Greece and Ireland), the accession of Poland will result in:

- a growth in the scale of savings import, caused by transfers from the EU budget and by a greater inflow of private capital in general; in the past the latter helped strengthen national currencies, a significant growth of import and an increase in the scale of domestic demand;
- a considerable growth in terms of investment, allowing both the financing of a new infrastructure and the acceleration of modernisation and development of productive assets processes; such an increase was also accompanied by a growth in consumption; and
- a growth in GDP dynamics, typically driven, in an early phase, by demand (a greater domestic demand facing, at the same time, a significant loosening of external development restrictions, i.e. of a need to keep the dynamics of the trade deficit under strict control), and then mainly caused, in a later phase of the development of internal co-operation within the Community, usually occurring at least 10–15 years following accession, by the supply effects of modernisation of production facilities and capabilities (i.e. from a growth of production competitiveness).

The above analysis, albeit concise, suffices to illustrate that the costs of Poland's integration with the EU will be—seen both from macro-economic and micro-economic perspective—greatly and undeniably overbalanced by advantages and positive effects. However, there is still a question concerning the degree to which

such advantages will be achieved and to what extent they will outweigh the costs: it will mainly depend on the awareness of those problems on the part of political leaders and on the soundness of their economic policy.

III. Political reasons

The political reasons for Poland to accede to the EU, which were discussed and considered, can be divided into two groups.

In the first, more general group, reasons regarding the creation and development of democratic institutions, related with the transition to a newly-established market economy. This concerns private ownership of the means of production, protection of property rights, a role for parliament, for regional and local governments, and for public opinion, etc. Such institutions, necessary for the growth of a market economy, are highly developed and specialised in almost all the EU's Member States. Poland's accession to the EU will reinforce and consolidate their national importance.

The second group includes political reasons, which are in a sense, the same as the original political reasons on the basis of which the EU was formed and then developed. Clearly, the fundamental political premise to establish that organisation was an urge to ensure the peaceful development of the continent. It is recognised and accepted, with almost no exceptions, that Europe has been able to develop peacefully thanks to establishment of the EU, which meant the same as providing an efficient instrument to peacefully solve, within that forum, any political, ethnic, religious and economic conflicts that have appeared on the continent. In addition, and as illustrated by the example of the USA, a strong integration of societies eliminates, at least to a certain degree, a number of tensions and resentments occurring among them.

Usually three basic motives have been mentioned as underlying the very concept of integration in Europe.

The first was an awareness of the European allies, following the Second World War, of an increased production of coal and steel by post-war Germany, and hence the proposal to create the European Coal and Steel Community (ECSC). During an initial stage of its operation, the ECSC was meant to 'restrict' production of goods which were certainly regarded as strategic and which at any time could have been used to produce tanks and military aircraft.

The second factor concerned the fear of expansion of communism evident during the early post-war period. There was an anxiety little short of certitude

among a number of Western nations that, on their own, there were unable to withstand the westerly 'march' of the Bolshevik revolution. Accordingly, the only solution, it seemed, was to create a counterbalance powerful in economic and political terms in order to control that expansion.

The third and final factor was related with the need to raise the competitiveness of Western Europe in relation to the USA. Following the Second World War, both the economic and political role of the US grew in spectacular strides. Europe found it hard to come to terms with such an evident American domination worldwide. It was believed, as a result, that the unification of the Western part of the continent should play a vital role in increasing both the power and competitiveness of the old continent.

At first glance it might seem that Europe, and indeed the whole world, is currently facing an entirely different political situation. One could say that Europe is much more stable now than in the period when the communist system declined and fell apart. In most European countries there are consistent and well-rooted democratic systems, while in others the process of democratisation is underway. However, in spite of such positive changes there have been a number of expert observers of political reality in Europe that believe that there is still a danger of emergence of new conflicts on the continent. That is why, in the Maastricht Treaty, for example, the hitherto existing areas of co-operation between Member States were supplemented by a new one, the so-called 'second pillar', the Common Foreign and Security Policy, and in 1999, a military dimension was also added, in the form of the European Security and Defence Policy.

The main objectives of the EU foreign, security and defence policies were specified in the Treaty of Amsterdam. They concern, most of all:

- protection of common values, interests, sovereignty and entirety of the EU;
- consolidation of EU security;
- maintenance of peace and reinforcement of the means of international security;
- promotion of international co-operation; and
- development and strengthening of democracy, the rule of law, respect for human rights and a set of fundamental freedoms.

It should be emphasised that the objectives of Polish foreign policy, generally based on two main priorities—that is, the preservation of strong transatlantic EU–US links, and support for independence and pro-Western political trends in

Poland's Eastern neighbours—have directly matched the EU foreign policy objectives listed above.

These arguments prove that the paths and prospects of Poland and the EU have converged, also from political point of view.

The aptness of this conclusion found additional confirmation in the events of 9/11, which was a striking illustration of how nothing can be taken for granted. This lesson applies in particular in relation to defence systems and the maintenance or further progress of democracy. This is further confirmed by the numerous national, ethnic, social and religious clashes found in Europe. These facts together prove very clearly that there is a need to stand together with the whole family of democratic states, and that it is necessary to be actively involved in shaping and influencing foreign and defensive policy of the state and group to which one belongs. Moreover, the foregoing facts suggest that there is a need to integrate and co-ordinate the tasks of the police, immigration, customs, military and intelligence services. One should not expect such an undertaking to be smooth and free of clashes, since in this area a certain sum of national interests of Member States must always be dealt with, sometimes shaped as a result of their disagreements or rivalry. Nevertheless, no reasonable way towards an effective maintenance of security and peaceful development can be found other than the path leading to full integration.

Throughout most of Poland's history, the ideas of democracy, citizens' freedoms and security, both national and that of the neighbouring countries, as well as peaceful development, were familiar and dear to Poland. Thus, for Poland it is quite obvious and natural to be interested in the peaceful development of both the modern world and the European continent, and to be involved in shaping those processes through active participation in EU structures.

IV. Social reasons

Generally speaking, one can say that, with social reasons taken into account, Poland was interested in EU accession with a view to raising the living standards of its population as compared to the level that has carried over from the past.

Although Poland is a fully democratic state, in relation to a number of social issues it retains negative experiences from the past. In particular, problems of individual freedom, principles and terms of employment, equal status of both sexes, workplace safety and hygiene, consumer protection, the rights of handicapped persons, environmental protection, and so on. Although such weaknesses are mostly just a burden inherited from the past, non-democratic

system, it would nevertheless prove quite difficult to overcome such a troublesome inheritance individually, especially in the face of numerous, equally important or urgent, issues. On the other hand, there is no doubt that problems occurring in those fields could also be solved without any direct reception of patterns established in the EU. However, this would last considerably longer, the threat to make serious mistakes would arise too frequently; and it would potentially be too costly to undertake such risk.

Therefore, the question arose whether it was worthwhile to go it alone or whether it was more advisable to take advantage of the EU's experience in this area. The answer to such a question seemed, again, quite obvious: any good patterns that have been well proven should be made use of, with such adaptation to Polish conditions as appropriate. Such an attitude can further be supported by the argument that Poland has obtained, at least partially, considerable aid funds from the EU for implementation of those solutions that proved effective in other Member States.

A part of the EU's achievements in the above-mentioned areas was already implemented in Poland during the so-called pre-accession period, either completely, or at a more superficial level. For example, Community-derived law regarding the equal treatment of men and women in employment was partially implemented in Poland. However, in spite of those changes, women still account for a larger percentage of the unemployed than men. Clearly, there is still much to be done.

Further principal changes in Polish labour law following Poland's accession to the EU have concerned the working time vs. holiday time ratio, i.e. shortening working time and extending holidays. It is disputable whether in this will be beneficial for the underdeveloped Polish economy in the long run, but from the point of view of the improvement of living standards it will certainly mark a positive change, enhancing the general quality of life.

Moreover, the implementation of EU standards in the area of workplace safety and hygiene, whilst it will certainly contribute considerably to the improvement of health and safety levels in the work environment, may also lead to increasing production costs.

Finally, reaching a broader base for social dialogue between employer organisations, trade unions and the government may raise the social status and human dimension of work. Changes to follow in this field may lead to some unrest in the labour market on a short-term basis. However, from a long-term perspective, this is likely to give human labour more nobility and respectability,

resulting in more satisfaction from work and a corresponding growth in efficiency.

An improvement in the living standards of the Polish population may also be achieved by putting the state bureaucracy in proper order as a result of adoption of some standards of procedure, as well as providing citizens with proper instruments of appeal against erroneous administrative decisions, both to domestic and international bodies. The introduction of such tools should help to implant more discipline into the—currently far from perfect—Polish administration. Contrary to what could be heard in a number of populist opinions of opponents of integration, the point should also be made that accession to the EU can bring a growth of rights and status of individuals in Poland in other terms. For example, at present, no university or academy is allowed to undertake any serious enterprise, such as the construction of a new building or the preparation of study programmes, unless the issue of unobstructed access for handicapped persons is properly taken into account. In the past the handicapped in Poland were generally treated with pity or even contempt, but several years ago the handicapped suddenly became socially visible in Poland and today no-one is surprised to see a blind student in a university or a disabled person travelling down the street in a wheelchair. This also reflects a very significant influence of the EU, which has been much more sensitive and demanding in these respects and which, in a sense, fortunately managed to impose such solutions on Poland and other applicant countries. One could easily mention many more similar examples of positive changes taking place in Polish society in recent years.

V. What can Poland bring to the European Union?

In a long-term perspective taken by the EU Member States when they decided to enlarge, Poland brings an enormous consumer market. This is already a significant contribution. Furthermore, if Poland manages to meet certain conditions, it will be in a position to build a strong and sound economy, develop education, and create jobs. If the country is successful in avoiding the sort of depopulation so evident in most EU Member States, then, in perhaps a dozen or in twenty years, it will become a very strong economic partner. This will be an evident profit for the Union. As we can see, Poland has significant potential that it can offer to the EU. Yet, good use ought to be made of the given opportunities.³

³ There is an interesting example that might be apt in this context. Early in the 1960s, each of two countries—Ghana and South Korea—had a similar GDP, oscillating around US \$350 *per*

Even in the social area, Poland can provide the EU with some good solutions. This concerns, for instance, the Polish model of family life. It is a misconception that in the EU people want to live in total freedom and independence. Some groups oppose the present situation in relation to abortion, euthanasia and other socially sensitive issues. Polish solutions in those fields may constitute an advisable pattern to follow. The model of family life and parent-child relations in Poland is also an important socio-cultural resource. These are Poland's assets. Moreover, the country can bring a good deal of enthusiasm, a will to work and a spirit of entrepreneurship.

In relation to purely political matters, on the other hand, taking the size of the Polish population, the size of the country and its geographic situation into account, Poland's accession to the EU consolidates stabilisation in the region, contributing, at the same time, to further peaceful development of the continent.

VI. Poland in the EU: selected aspects of the first year of membership

Before making any indications concerning the first year of Poland's membership in the EU, it is worthwhile to recall the pros and cons of joining the Union. The Euro-optimists pointed out the possible advantages for Poland on joining the EU, mostly as a result of competition resulting of free movement of goods, services, capital and labour, access to better and relatively cheaper education, European management, innovations, new technology, etc. The Euro-pessimists mainly pointed out the disadvantages of joining the EU. In particular, fears linked to the buying up of land, the loss of national sovereignty, a rise in the unemployment rate, resulting from huge import levels of goods and services from the EU, the bankruptcy of many businesses, secularisation of the country, a rising inflation rate, etc.

As one can see, the advantages and disadvantages claimed by both sides were of different weight and calibre. So what in fact has happened in the last year? What is the reality after one year of Polish presence in the EU? To answer these questions we should look at the balance of one year of membership from various perspectives. One could propose at least four points of reference. In particular,

capita. During the past four decades, GDP in Ghana has increased to about US \$450 *per capita*, while that in South Korea has risen to more than US \$12,000. Why such a huge difference? The answer is: South Korea invested in education, a strong economy was built, and the country opened itself to the world, including to regional co-operation, while Ghana was devastated by home conflicts, corruption and the wasting of international aid it received.

there are economic and financial viewpoints, as well as political and social perspectives. At this stage it is difficult to assess which one is the most valuable.

According to a poll concerning on the first year 'balance sheet', presented in Poland in May 2005, approximately 73% responded that they had not experienced any advantages from joining the EU, while at the same time around 60% confirmed that they had not experienced any disadvantages. These numbers indicate that the feeling in Polish society concerning one year of Polish attendance in the EU is generally positive. The initial results of the summary of the first year balance of Poland in the EU confirm the common feelings. Let us look briefly at these results.

Economic perspective

The first positive sign to note, from the economic point of view, is that between May 2004 and May 2005, GDP in Poland rose by 5.3%. Of course, this relatively high rate of GDP growth is not only a result of joining EU, but it is estimated that, thanks to enlargement, the GDP increased approximately 0.9 to 1.2 percentage points. The other positive sign was a rise in Polish exports which, increased by 60% from May 2004 to May 2005, and exports to Russia which grew by approximately 90%. Before EU enlargement, nobody expected such progress in rising exports. So what happened? The rise in exports to the EU was a result of increased demand for Polish agricultural products. In Poland organic production put healthy and good quality goods on the market, and as a result of lower costs of production, these were much cheaper than similar products from elsewhere in Europe, making them very desirable and competitive. On the other hand, Russians also imported agricultural products and durables from Poland. What is interesting here is that the level of foreign trade between Russia and Poland increased despite the imposition on visa requirements on Russian citizens, according to the Schengen agreement. Exports to Russia also increased due, among other reasons, to a rise in the level of quality of technical products produced in Poland.

Moreover, from economic point of view, at least two other observations can be made. As a result of integration, interest rates in Poland diminished and price convergence was observed. The reduction in interest rates was the result of free movement of capital, while the second resulted from the free movement of goods and services.

In addition to the positive achievements of integration, some negative observations in the one-year assessment were also made, the most visible being an increase in the rate of inflation. From April 2004 to April 2005, inflation increased

by 2.7 percentage points and was estimated at the end of April 2005 to be 4.4% in comparison with 1.7% in April 2004. Between April 2004 and April 2005, a slight rise in the rate of unemployment estimated at about 1.2 percentage points was also observed. Clearly, any rise in the rate of unemployment should be assessed negatively, but it is worth adding that it had been expected that the rise in unemployment in Poland after joining the EU would be much higher. This slight rise can therefore be assessed rather positively. Finally, the relevant period witnessed a tremendous rise in imports of used cars, which rose from approximately 230,000 in 2004 to 800,000 in 2005. This fact adversely affected the production and purchase of new cars produced in Poland, which of course had a strong influence on the labour market.

Financial perspective

At least two positive signs can be observed in this perspective. The first is a rise in the flow of foreign direct investment. In April 2005, FDI amounted to € 7.5 billion, or about twice as much as in the previous year. This growth in FDI was mainly due to a considerable increase in confidence in the Polish economy after its integration into the EU and its good economic perspectives. The second positive sign is a net inflow of structural funds at the level of € 1.5 billion. Before joining the EU, many specialists in Poland and in the EU expected that Poland would be a net payer to the EU, mostly because they did not believe that either the Polish administration or the beneficiaries of the funds would be prepared enough to fulfil all the eligibility requirements to obtain the money. However, this pessimism proved to be unjustified, as the requirements were properly fulfilled and the aid was in fact granted.

Among the negative signs, one should first point out pressure on the appreciation of the Polish zloty. An increased flow in of FDI in real terms implies an increased demand for internal currency, in this case the Polish zloty. Increased demand for zloty at the same level of supply of money *ceteris paribus* means a rise in the exchange rate. A higher exchange rate among others means more expensive goods and services, which in thus become less competitive on internal and external markets. That runs directly or indirectly to lower production, and consequently, to a higher rate of unemployment. The second negative sign worth mentioning here is pressure on the budget deficit. Structural funds can finance accepted programmes by definition up to 75% of their value. So, at least 25% of the value of the project is always accounted for by self-financing. In reality, self-financing means financial sources obtained from the local or central government, with the exception of those financed by private institutions. Where there is a huge

budget deficit—ironically—a positive inflow of structural funds creates pressure to increase it. On the other hand, this can be also helpful in that it can accelerate public finance reforms.

Political and social perspective

From a political perspective, by joining the EU Poland became an active player on the European scene. It has taken part in the debate on the Constitutional Treaty, the EU budget, and foreign and security policy, etc. From a social point of view, it should be stressed that, as a result of EU membership, there has been an increase of social awareness concerning the advantages and disadvantages of being a member of the EU. People are no longer apprehensive, but instead think and act in order to adjust quickly to the new situation and to take advantage of it. In the meantime, there has been a significant change in the perception of the EU in terms of human rights, social achievements, education, environmental protection, and so forth. These apply mostly to the young generation, but not only. This latter fact has also diminished the role of the politicians who had earlier opposed Polish participation in the EU.

In short, one should stress that the experiences of Poland's first year in the EU are relatively positive. The pessimistic scenarios concerning an almost total collapse of the Polish economy (rise of inflation, unemployment, net payment to the EU, huge emigration from Poland, the buy-out of Polish land, etc.) have not materialised. Instead, we see a rise of entrepreneurship among the young generation, an increase in self-confidence among young and educated people, an increased belief in education and a rise of the hope that many future achievements depend on them.

Chapter 15

European Entanglements:

Minority Issues in Post-accession Hungary and the EU

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I. Introduction

In the period since accession one could sum up the entirety of minority-related developments in the enlarged European Union with the words ‘all’s quiet’. There have been no significant legal developments in Brussels or in the new Member States, while politically, even the question of minorities has been overshadowed on the European stage by momentous events (such as the signing, and later, the undoing of the Constitutional Treaty), and no less momentous near-misses (like the uneasy birth of the Barroso Commission), as well as by ongoing economic and security issues. At given moments, minority matters have flickered briefly at the European level, but have had no staying power. To the extent that minority protection had been a criterion of accession for the states of the former Soviet bloc, monitored regularly in some manner,¹ this retreat from the spotlight may be surprising. In the context of the legally limited role of the Union in such matters, however,² the withdrawal could be understood as a return to the (new-old) *status quo*.

¹ See G. Pentassuglia, ‘The EU and the Protection of Minorities: The Case of Eastern Europe’, *European Law Journal* (2001) 12/3: 3 for an early evaluation; for a sceptical view of conditionality, see G. Sasse, ‘EU Conditionality and Minority Rights in Central and Eastern Europe’, paper presented at the Nations, Minorities and European Integration Conference, held at the European University Institute, Florence, 7–8 May 2004.

² See the discussion in B. de Witte, ‘The Constitutional Resources for an EU Minority Protection Policy’, in G. N. Toggenburg (ed.), *Minority Protection and the Enlarged European*

Under the European radar, at Member-State level, minority matters have been conspicuous and increasingly embedded in a discourse of 'Europeanness'. Thus, the Latvian Social Integration Affairs Minister, Muiznieks, has reported increased rates of naturalisation by permanent residents (mainly members of the Russian-speaking minority) in the wake of EU accession (and even the referendum on accession), in addition to more financial resources for integration programmes.³ A few months later, in a conscious attempt to grant continent-wide visibility to an ongoing social crisis, eight Central and Southern-European states together announced, with the support of a number of European and international organisations, the launch of a series of programmes under the heading 'Decade of Roma Inclusion'; there has been significant coordination at supranational level,⁴ but it remains to be seen whether results will be forthcoming. The increasing embedded nature of minority matters in European ones—in all Member States—in turn brings the former to the European level with Union-wide responses. The attempt of the Spanish government to forge a new consensus with national minorities is, for example, reflected in a proposal to the European Council to grant the Catalan, Basque and Galician languages official status within the Union (and to include these languages in the Lingua programme).⁵ The murder of Dutch film-maker Theo Van Gogh in November 2004, not only made headlines,⁶ but was also a topic for the meeting of Ministers for Justice and Home Affairs where common principles on the integration of immigrant minorities were finally

Union: The Way Forward (Budapest: LGI, 2004), p. 107; and G. N. Toggenburg, 'Minority Protection in a Supranational Context: Limits and Opportunities', in G. N. Toggenburg (ed.), (2004: 1), for a discussion of existing competence, as well as possibilities for development.

³ Address by Nils Muiznieks, Minister for Special Assignments for Society Integration Affairs, at the meeting of the Committee of Ministers of the Council of Europe, Strasbourg, 17 Nov. 2004. See also, 'From Segregation to Integration', *European Voice*, 22 July 2004. Whether the jump in naturalisation is a sign of increased integration or a means to leave the country is unclear, however.

⁴ For more information, see <http://www.romadecade.org>.

⁵ Memorandum by the Spanish Government—Request for Official Recognition in the European Union of All Languages with Official Status in Spain, 13 Dec. 2004, <http://www.es-ue.org/>. In essence, an amendment of Regulation 1/1958 determining the languages to be used by the European Economic Community, [1958] OJ P 17, is sought. Also worth noting is the fact that Spain proposes to underwrite the cost for the implementation of the changes.

⁶ See 'EU's ethnic integration thrown into sharp relief by violence', *European Voice*, 25 Nov. 2004; BBC News Online, 'Germans argue over integration', 30 Nov. 2004, for European and domestic effects. All BBC News Online articles referred to in this essay are available at: <http://www.bbc.co.uk>.

adopted.⁷ Finally, in a nod to new Member States' (primarily Poland, Slovenia and Hungary's) concerns about the effects of the Schengen regime on local border crossing systems considered crucial for reasons of economy and kin-minority relations—the Commission has presented a (new) proposal for the introduction of special local visas at the borders of the Union.⁸

To what extent, however, have specific minority-related developments been generated by the completion of enlargement? The response is, not at all. Indeed it would be unusual if they were, given that minority matters are, by definition, a process interpreted and re-interpreted in light of changing circumstances. Unlike in the case of more tangible questions, such as whether paprika is to be examined for toxicity on arrival in the Union,⁹ accession thus did not—and could not—have immediate effects in new Member States (or, for that matter, in the European Union).¹⁰ However, the change of context has already led to the re-framing of old questions. These questions, in turn, are being posed in new arenas. Under these circumstances specific political and legal developments on both levels are only a question of time.

Perhaps unsurprisingly, many developments have occurred in Hungary,¹¹ a Member State with a sizable minority population within its borders, as well as

⁷ European Council Press Office, 2618th Council Meeting, *Justice and Home Affairs*, Press Release 14615/04 (Presse 321), 19 Nov. 2004, p. 15ff. See also *Brussels European Council Conclusions*, 4–5 Nov. 2004, 14292/1/04 REV 1, Annex I, p. 19ff.

⁸ European Commission, Proposal for a Regulation of the European Parliament and of the Council laying down rules on local border traffic at the external land borders of the Member States and amending the Schengen Convention and the Common Consular Instructions, COM (2005) 56 final, 23 Feb. 2005, especially recital 2. See also, COM (2003) 502 final for two earlier proposals.

⁹ This scandal, centred on the presence of toxic substances in paprika imported to Hungary from Spain and Brazil, and mixed with home-grown varieties, with apparently inadequate quality checks in the Netherlands, led to a demand by Hungary that all spices be included in the list of substances requiring thorough checks by batch. See *Népszabadság*, 'Az unió is vizsgálatot indít', 3 Nov. 2004; *Népszabadság*, 'ÁNTSZ: lezárult a paprikaügy', 16 Dec. 2004. See also, BBC News Online, 'Poison paprika sparks Hungary ban', 28 Oct. 2004.

¹⁰ The new Latvian government's declared intention to ratify the Framework Convention is perhaps a good example of the lack of a cause-effect relationship. See Eurolang, *Language Intergroup Debates Status of Russian-speaking Minorities in Latvia*, 24 Feb. 2005, available at: <<http://www.eurolang.net/default.asp>>.

¹¹ This is not to say that developments in other new Member States may not also be relevant; the situation in Hungary is that with which the author is most familiar.

large kin-minorities¹² in surrounding states. Before turning to events in this particular country, however, a quick look at a response in Strasbourg—namely, the passage of a European Parliament Resolution on the harassment of minorities in Vojvodina¹³—is worthwhile, since it is a direct result of Hungary’s accession, and a sign of more to come.¹⁴ A series of motions for such a Resolution came after a spate of attacks in the Serbian province against members of (Hungarian¹⁵ and other) minorities had caused uproar in the Hungarian-language media,¹⁶ and prompted an official complaint from the Hungarian government (April 2004), as well as a visit by President Mádl (September 2004). In other words, the Resolution was but one,¹⁷ but arguably the most effective, means used to call attention to the treatment of a kin-minority, in addition to then-Foreign Minister Kovács’s reference to the matter at a meeting with his colleagues.¹⁸ (That the matter was a minor one in the context of Union politics matters little as the very fact of having

¹² While there is no settled terminology for the actors in such international situations, the terms used by the Venice Commission in its *Report on the Preferential Treatment of National Minorities by their Kin-state*, 2001 have been adopted here.

¹³ See European Parliament, *Joint Motion for a Resolution on the harassment of minorities in Vojvodina*, RC-B6–0045/2004 and *Minutes of Plenary Session for 16 September 2004*, P6 TA-PROV(2004)0016.

¹⁴ The first sign, in the form of a Hungarian proposal (strongly opposed by Latvia and Slovakia) to include a reference to the rights of national minorities in the Constitutional Treaty, came during the Intergovernmental Conference, i.e. before actual accession. See text proposed by the Italian Presidency, 23 Nov. 2003, CIG 52/03. The Treaty was finally signed in June 2004 and includes a reference, in Art. I-2 to “respect for human rights, including the rights of persons belonging to national minorities”.

¹⁵ To avoid confusion, the terms ‘Hungarian national’ or ‘Hungarian minority individual’ will be used when referring to the legal status of individuals; the term “Hungarian” will be reserved to denote membership in the nation. Accordingly, the term ‘nationality’ is used *only* in reference to the legal link between an individual and a state under international law; and has no bearing on collective identities. A presentation of concepts of ‘nation’ is outside the scope of this chapter. It suffices for our purposes to note that there is no consensus either in or outside Hungary; civic, ethnic and cultural strands co-exist, as the legislation discussed here shows.

¹⁶ The incidents were also picked up by international media. See ‘Attacks Against the Hungarian Minority in Serbia Are Increasing’, *The New York Times*, 16 Sept. 2004; BBC News Online, *Ethnic Tensions Top Serbia Talks*, 14 Sept. 2004.

¹⁷ See also Council of Europe, *Parliament Resolution on the Functioning of democratic institutions in Serbia and Montenegro* (2004) No. 1397, 5 Oct. 2004, par. 12–13 and 22.

¹⁸ See European Council Press Office, 2604th Council Meeting, *External Relations*, Press Release 12068/04 (Presse 251), 13 Sept., 2004, p. 16.

had the opportunity to raise it was enough.)¹⁹ In fact, the ‘internationalisation’ of the issue was not looked upon favourably by Belgrade.²⁰ The delegation called for in the Resolution reported to the European Parliament’s Foreign Relations Committee in early February 2005 and prepared a summary of its findings in March;²¹ it appears that the monitoring of the situation will continue for the foreseeable future.

In order to illustrate the manner in which accession has impacted on minority matters this chapter examines two developments in Hungary since 1 May 2004: the recently adopted modification of the Act on the Rights of National and Ethnic Minorities, before Parliament since March 2004; and the so-called ‘referendum on dual-nationality’²² in December 2004. While neither of these developments are directly attributable to accession since they pre-date it, both were deeply affected by it, as the approaching E-day changed perceptions, plans and actions. Although the resulting developments, including the questions they raise and the discourse in which they are embedded, are particular to Hungary and have only begun unfolding in the course of this past year, they highlight issues of a general nature that are likely to impact on the Union.

II. Re-considering the boundaries of ‘the people’

Hungary’s Act on the Rights of National and Ethnic Minorities (MA)²³ has been the focus of attempts to revise it almost since the moment of its inception. A few weeks before its entry into force, the President of Parliament’s Human and

¹⁹ In this context, see also the comments of George Schöpflin, now a member of the European Parliament: “Any backsliding, or implicit anti-Hungarian discrimination must be publicized, mediated on every occasion, in every forum, for that, after all, is the European norm”, ‘Citizenship and Ethnicity: The Hungarian Status Law’, in Z. Kántor *et al.* (eds.), *The Hungarian Status Law: Nation-Building and/or Minority Protection* (Sapporo: Slavic Research Centre, 2004), p. 104.

²⁰ *Southeast European Times*, ‘Hungary Seeks EU Resolution on Ethnic Violence in Vojvodina’, 9 Sept. 2004.

²¹ See *Rapport de la Mission d’Enquête Réalisée par la Délégation ad hoc du Parlement Européen en Voïvodine et à Belgrade* (29–31 Janvier 2005), 2 March 2005, PE 350.475.

²² This designation relied on the assumption that a minority individual would maintain the nationality of her home-state; legally, this would have been possible in the case of all countries except Ukraine.

²³ 1993. évi LXXVII. törvény a nemzeti és etnikai kisebbségek jogairól. The law was passed in July 1993 with 96.5% of deputies in favour. See J. Bodáné Pálok, ‘A magyar kisebbségi törvény megszületésének körülményei’ (1993) 12–13 *Acta Humana*, p. 26 for a discussion of the genesis of the Act.

Minority Rights Committee already foresaw changes in light of lessons learned through practical application.²⁴ These lessons have been bitter, though few would argue that the law has provided a strong underpinning for increased minority identification and created a basis on which to construct a minority protection framework in Hungary.²⁵ In a nutshell, the Act guarantees individual and collective rights in the areas of culture, education and language use (including their financial correlatives) through local and national self-government to thirteen minority groups (Bulgarian, Roma, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthene, Serb, Slovak, Slovene and Ukrainian) (see MA Art. 61(1)),²⁶ whose members are Hungarian nationals (MA Art. 1(2)). Foreign nationals, including refugees and migrants, as well as the stateless are not covered under the law; the distinction, which was a point of agreement among the parties involved in drafting, is generally explained with reference to Art. 68 of the Hungarian Constitution, which states, in Section 1, that “national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State.” In other words, minority and majority nationals (and only they) make up the ‘people’ of Hungary, in which sovereign power resides.²⁷

²⁴ *Magyar Narancs*, ‘Okkal és Joggal: Interjú Fodor Gáborral’, 30 Sept. 1993.

²⁵ For an overview of both positive effects and problems, see speeches by János Fuzik (President of the Slovak National Self-Government), Csaba Tabajdi (Member of Parliament, Council of Europe Rapporteur for Roma Affairs), Toso Doncsev (President of the Office for National and Ethnic Minorities 1999–2000) and József Hevesi (Advisor on Nationalities, Békés county) at the tenth anniversary of the Minorities Act, in *Tízéves a kisebbségi törvény* (Budapest: Office for National and Ethnic Minorities, 2003).

²⁶ As per MA Art. 61(2), other groups may be added to the list, provided they are (as per Art. 1(2)): settled in Hungary for the last one hundred years, a numerical minority and “distinct from the rest of the population due to [their] own language, culture and traditions and display [...] a consciousness of belonging aimed at the preservation of all these, and at the development and protection of the interests of their respective historically developed communities” (“*a lakosság többi részétől saját nyelve és kultúrája, hagyományai különböztetik meg, egyben olyan összetartozás-tudatról tesz bizonyosságot, amely mindezek megőrzésére, történelmileg kialakult közösségeik érdekeinek kifejezésére és védelmére irányul*”). All translations are by the author, unless otherwise noted. The petition of a group of individuals claiming Hun identity is presently before Parliament, in accordance with MA Art. 61(2). Though the ‘Huns’ claim they waited to petition until EU accession for fear of retribution, the likelihood of recognition is still rather low. See *Népszabadság*, ‘Létezik Magyarországon hun kisebbség?’, 5 Jan. 2005.

²⁷ See Art. 2(2) of the Hungarian Constitution.

After years of false starts, in March 2003 a Parliamentary Resolution²⁸ kick-started the latest attempt at amendment, which finally resulted in parliamentary approval of a Draft Act on the Election of Minority Self-Government Representatives and on the Amendment of Certain Laws Relating to National and Ethnic Minorities on 13 June 2005 (DA 2005).²⁹ However, by 2003 changes to the existing Act were not only a parliamentary requirement, but also a constitutional necessity, in light of the Constitutional Amendments introduced in 2002 in preparation for EU accession.³⁰ These amendments included the addition of a much-criticised ‘Europe clause’ (now Art. 2/A),³¹ and an overhaul of Articles 70–71 on voting rules. The latter change notably replaced the provision of Art. 70(1)—whereby all adult nationals were entitled to passive and active voting rights in all (including minority self-government) elections—with a differentiated system, allowing for differing voting rights for nationals, EU citizens, refugees and migrants in various kinds of elections. It is worth noting that, despite the constitutional provision mandating who constitutes ‘the people’, there has been no controversy about the extension of certain voting rights to alien residents, arguably because it was the representatives of ‘the people’ who decided to extend the right.³²

According to Art. 71(4), minority self-government elections are now treated as a separate category and one in which not all nationals may participate; the right is, as per Art. 68, now limited to members of the national and ethnic minorities. Given that the Constitutional Amendments entered into force on the day of accession, the Minister of the Prime Minister’s Office rightly stated on the occasion of the Draft Act’s first round of Parliamentary discussion that,

[t]he fulfilment of the constitutional mandate stating that the creation of minority self-governments is the right of minorities, and not others, must

²⁸ *Resolution on the need to review the laws concerning minorities* (30/2003. (III. 27.) OGY határozat a kisebbségeket érintő jogszabályok felülvizsgálatának szükségességéről).

²⁹ T 9126/101. törvényjavaslat a kisebbségi önkormányzati képviselők választásáról, valamint a nemzeti és etnikai kisebbségekre vonatkozó egyes törvények módosításáról (presented to Parliament on 13 June 2005), as modified by T 9126/102. zárószavazás előtti módosító javaslat.

³⁰ See 2002. évi LXI. törvény a Magyar Köztársaság Alkotmányáról szóló 1949. évi XX. törvény módosításáról.

³¹ See, *inter alia*, J. Czuczai, ‘Utószó’, in J. Czuczai (ed.), *Jogalkotás, jogalkalmazás hazánk EU-csatlakozása küszöbén* (Budapest: KJK Kerszöv Kiadó, 2003), p. 131.

³² In this context, compare a (pre-Maastricht) decision of the German Constitutional Court on the right of foreigners to participate in the municipal and district elections of a *Bundesland*. *Ausländerwahlrecht I*, [1990] 83 BverfGE 37, at par. 52ff.

be ensured. Insofar as this does not occur, an unconstitutional situation may result after May 1st 2004, in point of the operative regulations on minority voting rights.³³

The Draft Act in fact introduces substantial changes to the existing system; most, however, must remain outside the scope of our study. For our purposes it is sufficient to note that the scope of application has been altered, in that only members of minorities who have officially registered their minority membership may participate in minority self-government elections (see DA Articles. 2(1)(d) and 31).³⁴ In addition, the original Draft Act (2004)³⁵ simultaneously extended the pool of individuals who could belong to a national or ethnic minority, removing the requirement of Hungarian nationality. Accordingly, pursuant to DA Art. 28 (2004), legally resident European citizens, refugees and immigrants who consider themselves a member of one of the minorities were to be allowed to participate. Here, we encounter a clear contradiction. If the Constitution provides that only members of the national or ethnic minority may take part in self-government and if the law determines that such minorities must, by definition, have been settled in Hungary for one hundred years, then how is a German European citizen, for example, to be a member of the national minority? Merely speaking German does not necessarily make one a member of the German national minority, because the individual shares none of the other characteristics of the minority, linked to the group's history in Hungary. Or does it? On the one hand, a number of deputies made reference to residents' social connection to the place in which they live as justification for the extension of this right; together with kinship, it was assumed

³³ Remarks made in Parliament by Péter Kiss, "[B]iztosítani kell azon alkotmányos rendelkezés teljesülését, mely szerint a kisebbségek és nem mások joga a kisebbségi önkormányzatok létrehozása. Amennyiben ez nem történik meg, 2004. május 1-jét követően a hatályos kisebbségi választójogi rendelkezések tekintetében alkotmányellenes helyzet jöhet létre", 31 March 2004, taken from the Minutes of Parliament (*Országgyűlési Napló*), available at: <http://www.parlament.hu>.

³⁴ Problems appeared directly after the first minority self-government elections, in light of claims that non-minority individuals had voted. In fact, the combined effect of the tension between Constitution Articles 68(4) and 70(1), along with the principle of free determination of identity that formed a cornerstone of the Minority Act (see MA Art. 7(1)), has been that no objectively established criteria of minority belonging exists, *inter alia*, for the purposes of determining voting eligibility. The Constitutional Court has, in fact, refused a belated appeal for clarification on this point for petitioner's lack of standing. See 181/E/1998 (II. 16) AB order.

³⁵ T/9126. törvényjavaslat a kisebbségi önkormányzati képviselők választásáról, valamint a nemzeti és etnikai kisebbségekre vonatkozó egyes törvények módosításáról (presented to Parliament on 5 March 2004).

that such a connection required the right to participate in minority elections.³⁶ On the other hand, members of some home-minorities have clashed with immigrants ostensibly of the same national group, accusing the latter of wishing to represent not the 'national-minority' culture, but the 'national' one.

In a linked consideration, identical treatment of autochthonous and immigrant members of a minority (even if both are Slovak) would necessitate a changed justification for the special treatment granted under Hungarian law; the reasons enumerated in the Constitution and the (original or amended) Minority Act would no longer hold water, as they are based on a logic of democratic sovereignty. Given the constitutional provision stipulating who constitutes the sovereign 'people' of Hungary, the modification necessarily means that our symbolic 'Hans' or 'Marian' would, in effect, be considered a member of this 'people' for the purpose of minority elections, but not for national ones.³⁷ An unusual outcome, in any case. Moreover, the discrepancy whereby additional rights would, by default, be granted to some immigrant groups (e.g. Romanians) with a national-minority in Hungary, but not others (e.g. Chinese) would need to be accounted for in some way.

So why this particular suggested amendment? As a number of speakers noted repeatedly during discussion of the Draft Act in Parliament, the reason is accession.³⁸ Firstly, considering the intertwining of municipal and minority self-government elections in the MA, voting rights in one or the other are not easily separated. More importantly, the limitation of passive and active voting rights to nationals was feared to be in violation of EU citizens' right to stand for

³⁶ See remarks made in Parliament by János Hargitai, 1 March 2005.

³⁷ The result is not the same with regard to the existence of voting rights for non-nationals in municipal elections to the extent that the basis for this right is not linked constitutionally to a logic of *demos*. If, as discussed in the *Commission's (Fourth) Report on Citizenship of the Union (2004)*, however, national voting rights are extended to European citizens, all Member States will need to reconsider the *demos*-constitutive function of nationality over that of residence. See COM (2004) 695 final, pp. 8–9, 11.

³⁸ See remarks made in Parliament by Attila Mesterházy, 8 June 2005 and Gábor Simon, János Hargitai and Gábor Fodor, 31 March 2004. However, only one party, the Hungarian Democratic Forum (*Magyar Demokrata Fórum*, MDF), openly disagreed with the extension of personal scope in Parliament during the first round of discussion. (Interestingly, no speaker referred to the other groups to which personal scope had been extended: they seem to have been tacked on.) See also, remarks by János Hargitai in the second round of discussion, 1 March, 2005.

and vote in the former (see Art. 19(1) TEC);³⁹ in particular, it was feared that the minority self-government units would fall under the definition of “basic local government unit” as per Art. 2(1)(a) of Directive 94/80.⁴⁰ On this consideration, however, the differentiation among European citizens—a French-speaking Belgian national would not have the same right as a German-speaking one, for example—would have resulted in a strange, though not unlawful, situation.

Secondly, in light of the nationality non-discrimination principle (Art. 12 TEC), it was feared that the differentiation in question would be unacceptable. In theory, for example, provision could be made for a clause excluding non-nationals from participation in minority self-government, while retaining their right to vote in municipal elections. Reference could even be made to the ‘analogous situation’ principle first espoused by the European Court of Human Rights in the *Belgian Linguistics Case*,⁴¹ and few would doubt that nationals and non-nationals (still) constitute differing groups with regard to certain voting rights. It is precisely this reliance on legal status which may create problems, however, since (with some exceptions) it is no longer recognised as a basis for unequal treatment in the case of European citizens—if minority self-government units do fall under the local government unit of the above Directive—then there can be no differentiation on the basis of nationality, or identity concerns. Moreover, if the individuals in question ostensibly share the ‘same’ identity, this is especially true, since the only factor rendering ‘their’ situation different is the very nationality that may no longer be taken into account. The distinction between ‘minority’ and ‘national minority’ would thus disappear.

³⁹ See, *inter alia*, remarks made in Parliament by Miklós Csapody on 1 March 2005; speech by Imre Papp (Deputy Secretary at the Ministry of Justice) on the occasion of the tenth anniversary of the Minorities Act, in *Tízéves a kisebbségi törvény*, p. 91.

⁴⁰ Council Directive 94/80/EC of 19 Dec. 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1994] OJ L 368, as amended by Council Directive 96/30/EC of 13 May 1996 amending Directive 94/80/EC laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, [1996] OJ L 122. See remarks by János Hargitai, 1 March 2005.

⁴¹ Case ‘*Relating to certain aspects of the laws on the use of languages in education in Belgium*’ (*Merits*) [1968] ECtHR 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64.

Another reference point for the extension of the legislation's personal scope was probably *Bickel and Franz*,⁴² despite the fact that the case in question centred on language-use only and did not encompass the "tangible and spiritual culture, historical traditions, as well as other characteristics related to their minority being that form part of their individual and collective identity"⁴³ also covered by the Hungarian Minorities Act. Such matters of minority protection are, at present, well beyond the competence of the Union, despite the view of one scholar that "the Union's national treatment principle requires that we understand all national groups (and ethnic groups) falling under the territorial sovereignty (residing in the territory [*sic*]) of the Republic of Hungary as minorities".⁴⁴ On this basis, if the reasoning of the case (specifically par. 25) were applied directly, the rights of the Minority Act would need to be extended to all European citizens present in Hungary, not just those in residence and this would be an absurd outcome, quite inexplicable under the proportionality requirement. The crux really comes in par. 29 of the judgment, however, where the Court determines that, while "the protection of [an ethno-cultural] minority may constitute a legitimate aim, it is no 'valid justification' for the practice at issue in the case, since extension of the specific right would not undermine the protective aim". Perhaps this determination was not so difficult to make in the limited context of language use for criminal procedure purposes in one province of a Member State. Query, however, whether the ECJ would allow itself to be dragged into a discussion of the extent to which a singular system of minority self-government may or may not be undermined by the participation of European citizens.⁴⁵

The Hungarian Parliament itself seems to have been uneasy about this and other, even more difficult questions such as the need for minority registers, since an eerie silence descended on public discussion of the law after March 2004.

⁴² Case C-274/96 *Criminal Proceedings against Bickel and Franz* [1998] ECR I-7637. See also Case 137/84 *Ministère Public v. Robert Heinrich Maria Mutsch* [1985] ECR 2681. Both cases concerned language rights in areas of Member States with some form of territorial autonomy.

⁴³ "tárgyi és szellemi kultúrája, történelmi hagyományai, valamint a kisebbségi létükkel összefüggő más sajátosságai egyéni és közösségi önazonosságuk része", Preamble, MA.

⁴⁴ "[A] nemzeti elbánás uniós alapelve megkívánja, hogy kisebbségen valamennyi, a Magyar Köztársaság területi szuverenitása alá tartozó (Magyarország területén lakó) nemzetiséget (és etnikumot) értsük", A. L. Pap, 'Kisebbségek, diaszpóra, Európai Unió–Magyarország lépéskényszerben', in I. Halász, B. Majtényi, and L. Szarka (eds.), *Ami összeköt? Státustörvények közel s távol* (Budapest: Gondolat Kiadó, 2004), pp. 88–89.

⁴⁵ It is likely that very few resident European citizens would take the trouble to register and vote, in any case; small numbers would not, however, change the reasoning any decision would use, nor the approach to minority rights it would signify.

Accession came and went, and with it, the factual (albeit dormant) unconstitutionality of the existing Act, and yet Parliament took no action. Apparently, a lack of consensus among parties and between minorities as regards legal provisions and even the role of the law hindered action. From 1 March 2005, however, parliamentary discussion continued, and amid references to stalled drafting attempts, with fundamental disagreements between (and within) parties as to particular elements of the law. Some Young Democrats (*FIDESZ-Magyar Polgári Szövetség*, FIDESZ-MPSz), for example, stated that the personal scope of the law should be limited to Hungarian nationals, mainly due to differential treatment of immigrant and autochthonous minorities, but also because EU citizens were believed to have different interests from the members of national minorities; others considered an expanded scope to be a legal necessity, as well as a key precedent (for both kin-minorities and the EU).⁴⁶

On 8 June 2005, on the occasion of the final round of discussion, a substantially re-worked Draft Act (DA) was presented to Parliament. Among the major changes was the sudden reappearance of the nationality requirement (DA Art. 28). This comeback seems to have been the result of a compromise between the two largest parties and elicited a certain amount of criticism from representatives.⁴⁷ More importantly, in order to accommodate this new-old provision and in the light of the EU concerns already discussed, minority and municipal elections have been separated (as shown by the removal of, *inter alia*, MA Art. 22, as per DA Art. 39), resulting in a fundamental transformation of the structure of the minority protection system. The most obvious (and detrimental) result of this change is the disappearance of any chance for minority territorial autonomy, which had been linked to the compound nature of municipal and minority elections. In recompense, provision has been made for the presence of a minority representative in municipal government (see DA Art. 68(3)).

The combined result of concern for the special protection of autochthonous minorities and for EU citizens' rights has thus been a key (and perhaps problematic) change to the very structure of the MA. In fact, the Draft Act (2005), finally accepted by Parliament, is now before the Constitutional Court, on petition from President Mádl, due to the possible unconstitutionality of the new provision on minority representatives in municipal government. Even assuming that the DA is found constitutional, further modification seems imminent after

⁴⁶ Compare the remarks made in Parliament by Attila Gruber and Zsolt Németh with those of János Hargitai on 1 March 2005.

⁴⁷ See remarks made in Parliament by Ferenc Schmidt, Imre Bán and János Hargitai on 8 June 2005.

the next minority elections in 2006; new discussion is, in turn, likely to revive the question of personal scope.

While accession did not prompt a reform of the Minorities Act, it has shaped the timetable of amendment, the content of the draft legislation, and the wider role the law is hoped to play. In fact, re-drafting has occurred with the self-conscious knowledge of Hungary as an EU Member State:⁴⁸ while some speakers, even during the first round, spoke of adapting Hungarian legislation to the existing rules of the game,⁴⁹ others saw the re-drafting as a foothold for the extension of minority rights in Union jurisprudence. Specifically, accession “doesn’t just mean that we are forced to apply what someone in Brussels decides, but also that we form the law of the European Community from here; we also help integration in this manner”.⁵⁰ Re-drafting has, however, opened a Pandora’s box of issues, the answers to which are likely to raise new questions. The clock ticks on.

III. A referendum on the nation or how *not* to handle kin-minority questions

On 5 December 2004, Hungarian voters were asked to answer two questions in a national referendum, one of which read as follows:

Do you want the National Assembly to make a law offering—with preferential naturalization—Hungarian nationality, upon request, to non-Hungarian nationals who reside outside Hungary, declare themselves to be Hungarian and attest to their Hungarianness with a ‘Hungarian Certificate’ as per Art. 19 of Act 62/2001 or by other means, as stipulated in the law to be prepared?⁵¹

⁴⁸ This is true not only with regard to personal scope, but also other areas of the law, such as the creation of regional minority self-government.

⁴⁹ Remarks made in Parliament by Gábor Fodor, 31 March 2004. See also remarks made by János Hargitai during the second round, 1 March 2005.

⁵⁰ “[...] *nemcsak azt jelenti, hogy amit Brüsszelben valakik eldöntenek, azt mi kénytelenek vagyunk alkalmazni, hanem innen mi is alakítjuk az Európai Közösség jogát, mi is segítjük ilyen szempontból az integrációt*”. Remarks made in Parliament by János Hargitai, 31 March 2004). See also, remarks by Ákos Mesterházy during the second round, 1 March 2005.

⁵¹ “*Akarja-e, hogy az Országgyűlés törvényt alkosson arról, hogy kedvezményes honosítással - kérelmére - magyar állampolgárságot kapjon az a magát magyar nemzetiségűnek valló, nem Magyarországon lakó, nem magyar állampolgár, aki magyar nemzetiségét a 2001. évi LXII. törvény 19. §-a szerinti ‘Magyar igazolvánnyal’ vagy a megalkotandó törvényben meghatározott egyéb módon igazolja?*” The other question concerned agreement with the

In response, 51.57% of the voters answered 'Yes'; however, since only 37.49% of those eligible to vote showed up, the referendum was declared to be without effect (after a tortuous round of court decisions).⁵² As one daily commented, the outcome can best be explained by 'distraught perplexity'.⁵³ No wonder, perhaps, considering the emotional and ugly campaign in the weeks leading up to the vote: opposition parties (and some kin-minority politicians) divided Hungarian nationals into groups of 'good' and 'evil', in an attempt at prompting a guilt-ridden 'Yes' vote.⁵⁴ In its pursuit of a 'No' vote the government resorted to social demagoguery bordering on xenophobia (e.g. the spectre of hordes of new nationals sapping the welfare system), while both sides attempted to turn the referendum into a party political contest; leading intellectuals quarrelled about whether or not to boycott the referendum;⁵⁵ and kin-minority groups plastered the country with emotively worded posters.⁵⁶ Meanwhile, neighbouring states

privatisation of health care and was answered with no, though the outcome was, again, without effect.

⁵² The National Election Office (*Országos Választási Bizottság*, OVB) declared the referendum (i.e. the answers to both questions) ineffectual on the basis of inadequate participation. See 196/2004 (XII.11) OVB decision. Appeals for a re-count on behalf of the World Federation of Hungarians (*Magyarok Világszövetsége*, MVSz), as well as a private individual were, however, granted by the Supreme Court on 14 Dec. 2004, Kvk. III. 37. 3 16/2004/2 and Kvk. IV. 37. 315/2004/2. On 4 Jan. 2005, the OVB declared that the re-count had not produced a substantially different result, 2/2005. (I. 4.) OVB decision, a result which was accepted by the Supreme Court on 7 January, Kvk. III. 37. 013/2005/2 and Kvk. III. 37. 011/2005/2. The invalidity of the referendum result thus became final.

⁵³ "kétségbeesett tanácstalanság", *Népszabadság*, 'A népszavazás kudarca', 6 Dec. 2004.

⁵⁴ The most controversial remark was perhaps that of the vice-president of the Hungarian Coalition Party (*Magyar Koalíció Pártja* or MKP) in Slovakia, Miklós Duray, who stated "végre élvált a szar a víztől" ("finally the shit has come out of the water"), in reference to the refusal of the socialists and the liberals to sign the closing statement of the meeting of the Hungarian Standing Conference (*Magyar Állandó Értekezlet* or MÁÉRT), 12 Nov. 2004, supporting a 'Yes' vote in the December referendum. *Magyar Rádió*, 'Határok Nélkül', interview with Miklós Duray, 15 Nov. 2004.

⁵⁵ See *Népszabadság*, 'Tartózkodunk a szavazástól', 13 Nov. 2004; *Népszabadság*, 'Miért megyek el szavazni', 20 Nov. 2004.

⁵⁶ Posters included the following slogans: 'Összefogás a Nemzetért!' (Solidarity for the nation!), 'Újra Együtt!' (Together again!), 'Ne Mondj Le Rólunk!' (Do not give us up!) 'Nyújts Feléje Védő Kart' (Lend him/her a protective hand), quotations from the national anthem, 'Soha Nem Hagynám El a Szülőföldömet... de Magyar Vagyok!' (I would never leave my homeland... but I am Hungarian!) 'Ők Magyarok? Ma Nem Lehetnének Magyar Állampolgárok' (Are they Hungarian? Today, they could not be Hungarian nationals), with pictures of important figures (writers, composers, politicians) from Hungarian history.

intermittently made appearances with varied and novel threats: Romania vowed to strip individuals of their Romanian nationality (despite the fact that dual-nationality is allowed under national law),⁵⁷ while Slovakia declared it would turn to the European Union to hinder the grant of Hungarian nationality to its nationals. The Union, in turn, stated that the matter was an internal one, in line with the present legal stance whereby nationality issues remain within Member State competence.⁵⁸ No wonder the international press had a field day, as the referendum was presented as a further example of how these nationalist Eastern Europeans were causing (or in a rare instance, belatedly avoiding) trouble.⁵⁹

The individual voter was left wondering not only whether to vote (and if so, how), but also how they had ended up having to make such a decision in the first place. In the last instance, no one came away happy from the *débâcle*: voters felt disappointed or ashamed, the government and opposition appeared confused as to who had 'won', and Hungarian minorities declared themselves betrayed.⁶⁰ In the days following the referendum, however, an increasing number of people declared that a new era had begun in Hungarian-Hungarian relations, as discussed below. But how did such a question surface in a referendum in the first place?

The question of kin-minorities⁶¹ had returned to everyday politics in Hungary with a vengeance after 1989. The re-drafted Constitution included, in Art. 6(3), a

⁵⁷ In a bizarre instance of legal show-and-tell, Romania relied on a 1979 bilateral treaty (excluding dual-nationality) in respect of which Hungary, in turn, claimed to have given notice of termination in 1990.

⁵⁸ See Case C-369/90 *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria* [1992] ECR I-4239; and Case C-200/02 *Chen and Others v. Secretary of State for the Home Department* [2004] ECR, not yet reported. See also, Declaration No. 2 on Nationality of a Member State, annexed to the Final Act of the Maastricht Treaty.

⁵⁹ *Inter alia*, *Der Spiegel*, 'Teures Ja', 29 Nov. 2004; BBC News Online, 'Hungary Vote Angers Romania', 4 Dec. 2004; BBC News Online, 'Low Turnout Scuppers Hungary Vote', 6 Dec. 2004; *International Herald Tribune*, 'Uneasy Echo in Hungary', 6 Dec. 2004; *Le Monde*, 'Hongrie: deux référendums invalidés faute de participation', 6 Dec. 2004; *Die Presse*, 'Emotionales Referendum', 6 Dec. 2004; *Frankfurter Allgemeine Zeitung*, "Parteipolitik besiegt Nationalpolitik": Ungarisches Referendum gescheitert', 7 Dec. 2004.

⁶⁰ Accounts and images of crying people, black-ribboned Hungarian flags, refusals to sing the Hungarian anthem and 'No Hungarian nationals' signs in the windows of stores in Hungarian-minority areas were continuously reported on by all media in the days following the referendum.

⁶¹ The Treaty of Trianon (Treaty of Peace Between the Allied and Associated Powers and Hungary, 1920) reduced Hungary's territory to one-third its pre-Treaty size; as a

recognition of 'responsibility' for the kin-minorities.⁶² This language obviously leaves a great deal of room for interpretation,⁶³ however, and each new government has consequently taken a slightly different track from that of its predecessor on such questions; continuous experimentation has, accordingly, been characteristic. Hungary's future accession to the European Union has, on the other hand, had been the ever-present six-ton elephant in the room, trumpeting a future with kin-minority communities separated from Member State Hungary by Schengen borders. The perceived impermeability of these borders, as exemplified by the visa regime, combined with a view that Hungarian-Hungarian relations should be unhindered (see the 'responsibility clause'), and in fact developed in all areas, has led to a variety of reactions: a series of bilateral treaties (the so-called 'basic' treaties, as well treaties on minority protection), the championing of EU accession for neighbouring states,⁶⁴ bilateral treaties on entry and exit (with Ukraine and Serbia-Montenegro), as well as the controversial status law of 2001⁶⁵ (amended in 2003),⁶⁶ with its 'Hungarian certificate' and privileges and benefits granted both in Hungary and the home states. The array of attempts highlighted not only government differences in approach, but also the lack of decision on what the goal of Hungary, as kin-state, should *vis-à-vis* the minorities: kin-

consequence, about 3.3 million Hungarians found themselves in the states bordering Hungary. At the time, nationality was already a controversial question: although Articles 63 and 64 of the Treaty allowed for individuals to choose their nationality among the states that replaced the Austro-Hungarian Monarchy, deciding for one other than that of the state of residence meant expulsion and, in fact if not according to the Treaty, the loss of all land and immovable property. Thus, many individuals in the former Monarchy were faced with a choice between losing their possessions and choosing the nationality of the state they felt they belonged to. Only the residents of one town, Sopron (now Hungary), had the option of voting on which state to be in. The Treaty was the focus of irredentist claims, by all Hungarian governments, until 1945. At the end of the Second World War, through Articles 3 and 4 of the Helsinki Final Act (1975) and in all bilateral treaties with neighbouring countries since 1991, Hungary has declared the inviolability of borders. Focus has instead shifted to union 'above' borders (for the right-wing) or minority-protection (for the left).

⁶² See also the *Resolution on the situation of 'Hungarians beyond the border'* (46/1990. (V. 24.) OGY határozat a szomszédos országokban élő magyar nemzeti kisebbségek helyzetéről).

⁶³ See I. Kukorelli, 'A felelősség klauzula értelmezési lehetőségei', in J. Tóth (ed.), *Schengen (A magyar-magyar kapcsolatok az uniós vízumrendszer árnyékában)* (Budapest: Lucidus Kiadó, 2000), p. 175.

⁶⁴ Recently displayed in the controversy surrounding the postponement of entry talks for Croatia. See BBC News Online, 'EU postpones Croatia entry talks', 16 March 2005.

⁶⁵ 2001. évi LXII. törvény a szomszédos államokban élő magyarokról.

⁶⁶ 2003. évi LVII. törvény a szomszédos államokban élő magyarokról szóló 2001. évi LXII. törvény módosításáról.

minority protection? Solidarity? Cultural unification? Help with integration into their home states? The granting of Hungarian nationality has, in any case, been rejected as a possibility by all governments; and has been coupled with attempts at neutralisation of the demand through measures granting rights falling short of full national citizenship (e.g. the status law).

Kin-minority (and nationalist) organisations, on the other hand, have been demanding Hungarian nationality since the mid-1990s, viewing it not only as a legal precondition (a questionable premise, in any case), but also as a means of placing members of minorities on an equal footing with Hungarians in Hungary, as well as a political 'union or unification of the nation' (*nemzetegyesítés*).⁶⁷ In the resulting discussion, a rainbow of legal statuses such as 'external nationality' (*külhoni állampolgárság*), 'nation citizenship' (*nemzetpolgárság*), etc. were considered. Although many were legal (and probably political) impossibilities, they illustrated the level of desperation reached by everyone dealing with kin-minority matters. In 2003, however, with Hungary's accession now date-linked,⁶⁸ events took on a life of their own. The spark was provided by news that Serbia-Montenegro would have no problems with dual-nationality and was followed by heightened activity in kin-minority communities (e.g. signature-collecting drives in Serbia-Montenegro, studies in Romania), by varied party drafts to amend the Act on Nationality, and by increasingly desperate government attempts to silence discussion by pointing to the European Union's assumed hostility to the extension of nationality, but all to no avail. In the course of the year, twelve organisations submitted petitions formulating possible questions to be asked in a referendum to the OVB.⁶⁹ The petition of one entity (the World Federation of

⁶⁷ From *Délvidéki Levél Gyurcsány Ferenchez* (Letter from Vojvodina to [the Prime Minister]) <http://www.kettosallampolgarsag.hu>. This idea, specifically in its incarnation 'beyond borders' ("*határokon átnyúló nemzetegyesítés*"), is a favourite formulation of the right-wing in Hungary.

⁶⁸ See Art. 2(2) of the Treaty of Accession, signed on 16 April 2003, [2003] OJ L 236.

⁶⁹ As per Constitution Art. 28/C(2), a national referendum must be held on any question falling within the competence of Parliament (see Art. 28(1)), and not excluded under Art. 28/C(5), if 200 000 voters have, within a four-month period (see Art. 28/E) signed a petition requesting said referendum and formulating the question to be asked. The question must be approved by the OVB before any petition drive may begin.

Hungarians),⁷⁰ was finally approved by the OVB in September 2003,⁷¹ after the latter determined that the question did not violate the principles of the Hungarian Act on Nationality,⁷² nor those of the European Convention on Nationality (1997)⁷³ (or any other relevant international instrument to which Hungary is a party). In a much-criticised decision the Constitutional Court rejected all objections to the call for a referendum, ruling in March 2004⁷⁴ a signature drive could begin. The drive ended in July with over 320,000 authorised signatures, allowing the parliament to pass a resolution calling for a referendum in September.⁷⁵ Political actors in Hungary as well as many kin-minority entities were thereby placed in a fixed situation by a dubious NGO and left to manage as best they could, i.e. none too well.

But behind the imposition of the referendum question, amid the party squabbling, and beyond the unceasing accusations and counter-accusations few stated outright that EU accession had changed the rules of the game when it came to kin-minority questions.

Until very recently Hungarian policy had functioned with a unitary conception of kin-minorities; in other words, all members of Hungarian minorities in the Carpathian basin are considered to belong to a unitary Hungarian nation. (The

⁷⁰ This organisation, founded in 1938, is meant to serve as a forum allowing Hungarians from around the world to share their views on social, political and cultural issues; in practice, meetings have often been controversial, with strong (sometimes extreme) and publicly nationalist overtones.

⁷¹ 116/2003. (IX. 18.) OVB decision.

⁷² 1993. évi LV. törvény a magyar állampolgárságról (as amended in 2001 and 2003). The Act ties naturalisation to residence in Hungary—eight years on a general basis, shortened to one year for individuals who consider themselves Hungarian and have an ancestor who held Hungarian nationality (see Arts. 4(1) and 4(3)).

⁷³ The main consideration here was the question of discrimination on the basis of ethnicity, in light of Convention Arts. 2 and 5(1).

⁷⁴ 5/2004. (III. 2.) AB decision. The language of the question and the possible result of a 'Yes' outcome, including any drafted law, have been attacked on a number of bases listed in Art. 28/C(5) of the Constitution, including: ambiguity of language (in contravention of the clarity requirement of the Court, as set out in 1990) and of outcome (i.e. the question leaves a great deal of leeway to Parliament in the drafting of the law in question and results in a substantial change of nationality regulation); a possible breach of the principle of *effectivity* in international law (since no residence in Hungary would have been required), as a result of which Hungary's international obligations would be affected; unwarranted discrimination between e.g. those Hungarians with a Hungarian Certificate and those without (and a retroactive modification of the purpose of the Hungarian Certificate).

⁷⁵ 13 Sept. 2004. President Mádl announced the date of the referendum in late October.

approach is generally espoused with an eye to the fact that these people were once united in a single state in whose nation-building they had participated.) There has been no official consideration of the differing histories of these groups since 1920, or of their varied situations.⁷⁶ Accordingly, many actors (and even some commentators) have looked on the European Union as a kind of Holy Grail: once all neighbouring countries joined, borders would no longer matter and the nation could be reunited, socially and culturally. Reality has not played along, however, as borders have acquired shifting significance since accession: increasingly meaningless in some cases (Austria, Slovakia, Slovenia), temporarily problematic in others (Romania, Croatia), and an assumed brick wall (Serbia-Montenegro, Ukraine) in still others.

The outcome of the referendum, in essence, meant the public implosion of a kin-minority approach rooted in the peaceful re-establishment, in some form or another, of what had once been: a focus on the past is no longer possible. The arrival of the European Union, as a daily reality, rather than as an external factor, has meant that regional differences ignored thus far are now impossible to overlook. A policy aimed at the minority in Serbia-Montenegro can no longer be claimed to fit the situation in Slovakia, for example, not only because the needs of the two groups may differ, or because of diverse home-state policies (these latter have generally been considered insufficient and/ or ignored, in any case), but because one is a fellow Member State while the other is unlikely to become a member in the near future. Nor does it make sense to speak of hindrances to cultural exchange in Slovenia anymore, for example—the positive effects of diminished borders is already apparent—but the question cannot be ignored in the case of Ukraine. This is not to say that events related to one kin-minority may not affect thoughts on another: the possibility of cultural (and perhaps administrative) autonomy in Romania—as part of the decentralisation planned by the new government—led to the temporary re-emergence of the issue in the context of Slovakia, for example, leading to increased tension between Bratislava and Budapest. In fact, the range of options now being discussed in Hungarian-Hungarian *fora*—that is, (still) nationality,⁷⁷ simpler

⁷⁶ This conception has also been imported into domestic minority politics: members of the German minority in Hungary were thus part of the singular German nation (even if the minorities themselves pointed out otherwise). The approach is, as discussed, increasingly under pressure in the home-minority context.

⁷⁷ Most clearly demanded by the newly formed Forum for the Organizations of Hungarians Beyond the Borders (*Határon Túli Magyar Szervezetek Fóruma* or HTMSzF) in a letter to the Hungarian Parliament in January 2005. See *Magyar Szó*, 'A HTMSzF megkerülhetetlen lesz', 13 Jan. 2005.

naturalisation,⁷⁸ national citizenship (with passport),⁷⁹ long-term national visas,⁸⁰ financial support (the Homeland Fund, *Szülőföld Alap*),⁸¹ and support for autonomy, to name but a few—are a sign of both confusion and experimentation.

To the extent that looking to the past no longer provides a basis for kin-minority policies, however, decisions must now be made with regard to the goals to push for (and to those best left behind), as well as on how to achieve them, with the recognition that minority politics now functions, both simultaneously and institutionally, in the spheres of home-state and kin-state, regional and European politics. That the kin-minority question came down to the referendum *débâcle* in the first place is, unfortunately, a failure of politics on all of these levels: that of the home states in not having developed policies allowing the kin-minorities to integrate (politically, culturally and socially) into their states, rather than turning to Hungary for solutions to all their problems (here, the kin-minorities themselves also have a role to play, obviously); that of Hungary in not having formulated a coherent and internationally acceptable kin-minority policy; and that of the international community (particularly the European Union and the Organisation for Security and Co-operation in Europe, OSCE) for viewing minority matters in East, Central, and Southern Europe primarily in terms of a security (and sometimes economic) issue.

⁷⁸ See *Népszava*, 'Postán is lehetne állampolgárságot kérni', 4 Feb. 2005.

⁷⁹ See HVG, 'Ötletvadászat', 19 Jan. 2005.

⁸⁰ A national visa valid only for the territory of Hungary, would be granted, in its presently planned form, to individuals who wish to travel there for reasons related to the preservation of their language, culture or national identity, for education or health services, or for the maintenance of family ties. Although the first visas were to be issued by 31 March 2005, discussion on their exact form continues. See *Népszabadság*, 'Víták a nemzeti vízum körül', 4 April 2005. The basis for the visas (which, incidentally are echoed in the Proposal discussed in n. 8 *supra* [check still note 8] is to be the long-term visa exception of the Schengen system. See Art. 18 of the Convention Implementing the Schengen Agreement (1990) as incorporated by the Schengen Protocol to the Treaty of Amsterdam (1997), and by the Protocol on the Schengen *acquis* integrated into the framework of the EU, annexed to the Treaty Establishing a Constitution for Europe (2004); available at: <http://europa.eu.int/constitution/index_en.htm>. To the extent the possibility for such visas already exist through the bilateral treaties signed with Serbia-Montenegro and Ukraine in 2003, see government decrees 198/2003. (XII.10.) Korm.r. and 199/2003. (XII.10.) Korm.r., respectively.

⁸¹ See 2005. évi II. törvény a Szülőföld Alapról and the modifications introduced by T/12725 javaslat a Szülőföld Alapról (accepted 14 Feb. 2005), and T/14735 javaslat A Szülőföld Alapról szóló 2005. évi II. törvény módosításáról (accepted 18 April 2005).

IV. In lieu of a conclusion

Minority matters are, by definition, sensitive ones as they go to the heart of debates on individual and collective identity, and sovereignty. As such, they are embedded in specific social and historical contexts. Accession is certainly a change of context for the new Member States, but also for the Union. Along with the new voices in Brussels come new approaches, ideas and burdens which will, in time, impact on present practice, in many areas. To name but one change: the number of autochthonous minorities in the Union has jumped significantly with enlargement (and will do so again with the next round); on the other hand, the new Member States have not (yet) felt the effects of large-scale immigration which old Member States have been grappling with for some time. Will a change of focus result?⁸² Or a change of approach? In which areas?

The prospects for indirect effects are wide-ranging: fundamental rights and external (more specifically, neighbourhood) policy are likely targets.⁸³ The European Monitoring Centre on Racism and Xenophobia's Annual Report for 2003/2004, for example, discusses for the first time, in a serious manner, the existence of anti-Roma discrimination in old Member States; the newly visible concern is a direct result of the high profile of the question in new Member States.⁸⁴ In fact, the issue of Roma rights is likely to emerge as a special candidate for Community action, given its pan-European reach and a possible legal basis in Community law (Art. 13 TEC).⁸⁵ The Parliamentary Resolution on the Situation of Roma in the European Union, adopted in April 2005, and calling for recognition of the Roma as a 'European minority',⁸⁶ is a sign of increased interest. Minority matters may also make back-door entrances into other policy areas, however. The softening of the Schengen border regime that will result if local visas are in fact introduced is a good example. In addition, immigration (from

⁸² One test case will be the treatment of the issue in the soon-to-be published *Thematic Comment of the Network of Independent Experts on Fundamental Rights on the subject of Minority Rights*, by the EU Network of Independent Experts on Fundamental Rights.

⁸³ In this context, see the European Parliament Resolution on Mari El, P6 TA-PROV(2005)0185, 2005, on the treatment of the Mari people in the Russian Federation, adopted on the basis of motions primarily by delegates from Estonia, Finland and Hungary.

⁸⁴ See European Monitoring Centre on Racism and Xenophobia (EUMC), *Annual Report 2003/2004*, Part II, p. 16; available at: <http://www.eumc.eu.int/>.

⁸⁵ See, for example, European Commission, *Report on the Situation of Roma in an Enlarged European Union*, p.46ff, 2004; available at: http://europa.eu.int/comm/employment_social/fundamental_rights/.

⁸⁶ Art. 2 of the European Parliament Resolution on the Situation of Roma in the European Union, P6 TA-PROV(2005)0151, 2005.

asylum policy to economic migration to integration and non-discrimination), fundamental freedoms (from freedom of movement to freedom of goods), citizenship (from equal treatment to specific rights), fiscal and structural matters (from the role of regions to the allocation of structural funds), not to mention the meta-discourse regarding the values the Union stands for and the identity (or identities) it hopes to harness.

What then is the likelihood of a 'Union effect' in the new Member States on minority matters, besides the change of context that has already led to re-framed discourse and practical change of circumstance? Given the recent appearance of minority (and fundamental) rights in EU legislation,⁸⁷ they are, as yet, areas with little gravitas.⁸⁸ However, an approach based on the needs of immigrant minorities has been present in Union jurisprudence for some time,⁸⁹ and has a high profile. Nevertheless, the facile application of this approach to the problems of autochthonous minorities, which is what most minorities in the new Member States (and the candidate states) are, should not be assumed automatically.⁹⁰ The Race Equality Directive,⁹¹ in its focus on 'racial or ethnic origin,' is not easily transferable to some of the problematic cases in the new Member States, for

⁸⁷ See, in particular, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180; Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303. With regard to the general state of fundamental rights, the Charter of Fundamental Rights, though drawn up in 2000, will only become binding upon ratification of the Constitutional Treaty by all Member States. (As of 2 June 2005 ten states have ratified; and two have rejected the instrument in referenda).

⁸⁸ That said, the pace of development in the area of fundamental rights has been fast: the creation of the EU Network of Independent Experts on Fundamental Rights and the plan for an EU Human Rights Agency both point to an increasingly central place for these issues.

⁸⁹ Debate has been ongoing since the mid-1980s; the first official recognition of racism was through the *European Parliament Evrigenis Report* (Committee of Inquiry into the Rise of Fascism and Racism in Europe) from 1985. See also, *Joint Declaration against racism and xenophobia*, [1986] OJ C 158. However, the first real binding measure came only in 1996, with the *Joint Action concerning action to combat racism and xenophobia*, [1996] OJ L 185.

⁹⁰ The comparison of the education situation of immigrant and autochthonous minorities in the Report already mentioned, for example, highlights significant differences between old and new Member States as to areas of concern. See *EUMC Annual Report 2003/2004*, pp. 23–24.

⁹¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons regardless of racial or ethnic origin, [2000] OJ L 180. See also Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303.

example, since many of the national minorities in these states (here the Roma are an important exception) are not visible minorities; their distinctiveness is cultural.⁹² To the extent cultural, linguistic or other, similar traits may be considered 'ethnic' for the purposes of the Directive, however, we would be entering dangerous waters, enforcing, in legal terms, a creeping equation of culture with ethnicity in the social sciences.⁹³ In the short term, this approach, in addition to being simply wrong, may aggravate existing conflicts: while culture, as a process, has the potential for change (and thereby reconciliation), beliefs in the importance of ascribed characteristics (or ethnic boundaries based on this premise) are much harder to bring together. In the long run, it has the potential to boomerang into a grounds for attacking minority protection measures for cultural, educational or linguistic matters (as well as, in light of its broad scope as per Art. 3(1), other areas) that would otherwise be acceptable.⁹⁴

The competence of the EU in matters relating to national minorities is less than certain,⁹⁵ even assuming these minorities can (or may) be subsumed under the

⁹² Although there has been almost no discussion as to the meaning of 'racial and ethnic' origin, and while neither the ECJ nor the CFI have issued judgments on the matter, the context out of which the Directive developed (anti-racism policies and spillover from immigration and asylum matters) would seem to point to a concern with visible minorities. In fact, theorists consider the Directive almost exclusively in the context of immigrant groups. See, *inter alia*, the discussion in M. Bell, *Anti-Discrimination Law and the European Union* (Oxford: Oxford University Press, 2002), pp. 63–87, 191–98.

⁹³ See D. Conversi, 'Can Nationalism Studies and Ethnic/Racial Studies be Brought Together?', *Journal of Ethnic and Migration Studies* (2004) 30/4, p. 819 for a discussion of the phenomenon. See also, F. Barthes, 'Introduction', in F. Barthes, *Ethnic Groups and Boundaries: The Social Organization of Culture Difference* (Oslo: Pensumtjeneste, 1994 [1969]), p. 9, and C. Joppke, *Selecting By Origin: Ethnic Migration in the Liberal State* (Cambridge: Harvard University Press, 2005), pp. 3–8.

⁹⁴ The Directive allows for positive measures (see Art. 5) but considers these only in the context of racial and ethnic origin. Moreover, in light of ECJ case law on positive action in the context of gender equality, the scope for such measures may be limited. See, *inter alia*, case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] ECR I-3069; Case C-409/95 *Marschall v. Land Nordrhein-Westfalen* [1997] ECR I-6363; Case C-407/98 *Abrahamsson and Anderson v. Fogelquist* [2000] ECR I-5539.

⁹⁵ For example, the extent to which minority rights as understood in the Framework Convention on the Protection of National Minorities (which new Member States were strongly urged to sign) are to be a part of an EU fundamental rights policy is questionable. The Charter does not make direct reference to such rights (while the reference to diversity in Art. II-82 CT (Charter Art. 22) is a problematic basis for an indirect approach); nor is discrimination on the basis of language or membership in a national minority explicitly included among the bases of discrimination to be combated by European measures (Art. 13

existing ‘racial or ethnic origin’ rubric, since the former may take action with regard to such groups only “within the limits of the powers conferred upon it” (Arts. 5 and 13 TEC, Arts. I-9(1) and III-124 CT). In other words, although the Community competence extends into ever-wider areas, those of most concern to national minorities, namely cultural, educational, linguistic and administrative policies, remain for the most part outside the Community system. Thus, despite the fact that the Race Equality Directive took a huge step forward when it prohibited racial and ethnic discrimination in relation to everyone, national minorities—as opposed to for example, immigrants—remain for the most part outside the scope of Community law.

On the other hand, precisely because the Union has not dealt with the issues of national minorities, the frameworks that have been developed in Member States (new and old) are faced with an ever-extending *acquis*, touching on ever-larger areas. The Union, as such, does not (yet) serve as the creative force for policy development in the area of national minorities that it functions as for immigrant minorities: rather, existing schemes must be adapted to law that never developed with such considerations in mind. This is not necessarily bad, of course; but it should be noted that, while the EU may function as a “means to rebalance systems of minority protection”,⁹⁶ it will, in this context, only do so to the extent they already exist. Monitoring may prove a one way street, which allows for inspection, but not for new development:⁹⁷ the onus is thus on those developing or protecting such systems to explain their relevance, not on those who would change them. (It is questionable whether a number of elements of the existing systems in Italy, Sweden or Spain could have developed in light of certain Union requirements).⁹⁸ On the other hand, the Brussels’ focus on immigrant minorities may serve as an incentive for new Member States to begin addressing the needs of these groups,

TEC, Art. III-124(1) CT), although they are prohibited grounds of discrimination under Art. II-81 CT (Charter Art. 21).

⁹⁶ G. N. Toggenburg, ‘Minority Protection in a Supranational Context: Limits and Opportunities’, in G. N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (2004: 31).

⁹⁷ See, however, the European Parliament’s *Civil Liberties, Justice and Home Affairs Committee Report on the protection of minorities and anti-discrimination policies in an enlarged Europe*, A6-0140/2005, 2005, calling on the Commission to establish a “policy standard for the protection of national minorities”, par. 6. See also pars. 5 and 7–10.

⁹⁸ For a contemporary critical view in the context of *Südtirol*, see C. Pan, ‘Autonomierecht und Europarecht: zur Auseinandersetzung um die Sprachgruppenerklärung in Südtirol’, *Europa Ethnica*. 2004/61: 104.

which although still relatively small are certain to grow significantly in the future, in addition to those of national minorities.

A final consideration is that while the debate in Hungary on minority matters both within and outside the country may seem peculiar—even an instance of excessive preoccupation—they go to the heart of questions of identity and membership that all states in Europe and the Union itself have to grapple with. However, to the extent minority matters, in all cases, deal with ‘community’ boundaries—how they should be defined, who should be ‘in’ or ‘out’ or ‘in-between’—we arrive at a discussion of what ‘our’ essence is, and to the larger dilemma of the relationship between law and social identity. These are matters for ongoing deliberation, with results that cannot be measured in months.

Chapter 16

The Impact of Accession:

Old and New Member States and the Legacy of the Past

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I. Introduction

Coincidentally (as is usual in the history of European integration), the entire long and difficult debate preceding the ratification of the Constitutional Treaty has overlapped with the sixtieth anniversary of the end of the Second World War. On the one hand, the constitutional text purports to send a clear signal that common ground for a reunited European identity does already exist. On the other hand, the sixtieth anniversary of the victory over Nazism provoked confusion among Europeans from East and West, rather than any firm conviction that they share one and the same vision of Europe's past. The recently exacerbated tensions between the Poles and the Germans, the Germans and the Czechs, the Slovaks and the Hungarians, caused by their discordant views of the twentieth century could be understood and interpreted as a *specialité de la maison* of Central Europe, a peculiar historical leftover inherited from the times of communist ideology which dominated this part of Europe for several decades. However, in the case of the celebrations staged in Moscow to mark the sixtieth anniversary of the end of the Second World War, the increasing confusion cannot be confined merely to that particular region of Europe which long remained behind the iron curtain. This confusion has had an impact across Europe and has had far-reaching consequences for what has been lately promoted as a European sense of the common past. Moreover, it is likely to grow deeper and more disturbing if George W. Bush, rather than a political representative of Europe, makes a clear statement on the issue of Yalta at the celebrations on 9 May. This very new situation emerges

as a direct consequence of the latest enlargement. I would even venture to say that had it not been for enlargement, this confusion in Europe would probably have been much less.

II. The Preamble: towards a uniform identity?

All this coincides with the debate on the text of the European Constitutional Treaty. The text of the Preamble of the Constitutional Treaty was composed on the assumption that there are two main sources of a common European identity. On the one hand, in the third Recital we find an explicit reference to a common European destiny: “the peoples of Europe are determined [...] united ever more closely, to forge a common destiny”. As Armin von Bogdandy notes, a common destiny “implies that future challenges will not belong to any specific people; rather, all European peoples fundamentally share one common future”¹ This incorporation of the common destiny formula in the Preamble appears so surprising and paradoxical in view of the fact that it belongs to the most popular and strongest nineteenth century collective national identity concepts. Every instance of self-definition of a nation at that time in Europe was rooted deeply in that specific Messianic meaning of a community of destiny giving the particular nation a unique sense and mission in the history of Europe and of mankind. Now it seems that the EU, in search of its new political identity, is trying to use old notions from the dictionary of collective identity.

In addition to a common destiny, another strong element of collective identity appears in the Preamble. Following a Polish suggestion, the previous versions of the first two passages were changed by the Intergovernmental Conference. A reference to a ‘reunited Europe’ was replaced by a ‘Europe, reunited after bitter experience’.² This alteration may be regarded as an attempt to impose serious limitations on the progressive optimism that dominates all the other passages of the Preamble. And these were, by design, precisely the new EU Member States that voiced this kind of scepticism deriving from the past. The reference to the bitter experiences at the very beginning of the Constitutional Treaty not only serves as a pragmatic reminder that everyone has to learn from the past, but suggests something more: the existence of a common European experience from

¹ A. von Bogdandy, ‘The European Constitution and European Identity: A Critical Analysis of the Convention’s Draft Preamble’, in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective*, Jean Monnet Working Paper, 2004/5 available at: <http://www.jeanmonnetprogram.org/papers/>.

² C. Joerges, ‘Confronting Memories: European “Bitter Experiences” and the Constitutionalization Process’, *German Law Journal* (2005) 6/2: 248.

the past, something like a common legacy of the past that shows all the good and bad, positive and negative, light and dark, bitter-sweet aspects of the whole 'European project'.

The common European destiny and the common European experience referred to in the Preamble introduce the idea of a common European identity. In that sense, the Preamble suggests the prospect of, and the need for, such an identity. It is intended to show that the common future and the common past emotionally bind all people in the Union. This is much more than merely setting some common aims to be achieved in the future by technical means of European integration on the supranational level. And this is much more than merely recalling the obvious fact that European integration is preceded by European history.

Historically, constitutionalisation is consistently linked with the process of democratisation in the nineteenth century. One can see it as a response to the threats posed by established democracy within the nation state. Following this Kantian understanding of constitutionalisation, this response brings together a system of formal rules that help us tackle the democratic problem. Another way of understanding constitutionalisation, for example the Rousseauian conception, sees it as a direct expression of democracy. A constitution is here an expression of the will of the people; it is a constitutional act of common will. Despite the debate on which of the two constitutional concepts is right—Kant's or Rousseau's—the process of constitutionalisation is consistently related to democracy and democratic identity based on the concept of a common past and a common destiny.

The consciousness of a common, collective memory is the foundation of democracy right from the moment of its birth. Hannah Arendt notes with reference to the democracy of the ancient Greeks that political activities to establish and protect a political body (in this case the *polis*) first create the preconditions for remembering and, by the same token, the preconditions for history.³ The interdependence between the democratic political community and its identity located in collective memory was successfully transformed into the nineteenth century model of the democratic nation state responsible for the coherent identity of the whole community making up the state. That explains the emphasis put by most national democracies on cultural and ethical homogeneity; achieved, for example, by pursuing a political history which is the main way for a democratic state to evoke a sense of a common past and a common destiny as the

³ H. Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), pp. 194–99.

indispensable elements of a common democratic identity. This concept touches on the very essence of what is called *demos* in its nineteenth and twentieth century form. As Ernst-Wolfgang Böckenförde notes:

The nation in the state, perceived not only as the inhabitants, people enjoying the same citizenship, is first of all a community of people bound by common memory, common hopes, common bitter experiences, common pride and, finally, by common myths... The nation is constituted less by the natural and biological elements and more by the pre-rational, living memory and consciousness, handed down by the previous to the next generations.⁴

It is worth remembering that this democratic concept found its shape in the constitutionalisation process of the nation state. The constitutional order emerged on the basis of the national *demos*. It was a matter,

[n]ot simply of legal obedience and political power but of moral community and identity. We perceive our national constitutions as doing more than simply structuring the respective powers of government and relationships between public authority and individuals. Our constitutions are said to encapsulate the fundamental values of the polity and this, in turn, is said to be a reflection of our collective identity as a people, as a nation, as a state.⁵

This means that there is more to the constitutional order than simply performing the technical and formal functions assigned to it; its other function is to reflect collective identity and its values.

For Habermas, every constitutional order has to be rooted in some kind of identity, which he calls a constitutional culture, as an inevitable condition for the emergence of constitutional patriotism. He denies, however, that national homogeneity is its necessary element.⁶ To others, like Dieter Grimm, the constitutional order can play a significant role in creating new patterns of identity thanks to the mechanism which he calls integration through constitutionalisation.⁷

⁴ E.-W. Böckenförde, 'Welchen Weg geht Europa?', in E.-W. Böckenförde, *Staat, Nation, Europa*, (Frankfurt am Main: Suhrkamp, 2000), p. 93.

⁵ J. H. H. Weiler, 'Europe's Constitutional *Sonderweg*', in J. H. H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), p. 15.

⁶ J. Habermas, *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp, 1992).

⁷ D. Grimm, *Integration durch Verfassung*, *Forum Constitutionis Europae*, 2004, No. 6, pp. 6–11; available on-line at: <<http://www.whi-berlin.de/grimm.htm>>.

The intention to anchor the European constitutional framework in the vision of a common European history seems to be first of all an attempt to recall the memory of the dark and light legacy of European history. Such attempts always appear justifiable at critical moments, and the Eastern enlargement should be doubtlessly regarded as such. The recalled memory should play the role of a memento for the future of the enlarged Union, and for a further evolution of the European project, and explain where European integration is today and what its origins are. It is meant to strengthen the Union politically, to ensure its stronger integration. However, it may be very hard to accomplish such a task now in the enlarged and decisively more heterogeneous Union. One may even doubt whether the Union should be assigned a task of this kind at all. Let us discuss three examples which illustrate how inconsistent the same fundamental elements of European history can appear.

The post-Westphalian order

The Peace of Westphalia is often seen as the first step in the European past preceding the European integration which commenced in the second half of the twentieth century. From this viewpoint, the space between the Thirty Years' War and today's European Union pretends to represent evident progress from the modern concepts of politics and the state, now inevitably culminating in Europe as a concept of the post-modern world. This process, assumed to be logical and entirely legitimate, turns out in fact to involve different, and at times contradictory, expectations and ideas. Firstly the Peace of Westphalia is interpreted as sealing the transition from the religious concept of Europe gradually developed through the nightmare of European religious wars to the secular political order (*ius publicum europeum*) of sovereign states. However, this positive interpretation with its main focus on the transition from the pre-modern to the modern world has been often countered with the argument that the new system introduced a very aggressive international mechanism of checks and balances of power in Europe. In the words of Robert Cooper "Before 1648, the key organizing concept for Europe was the unity of Christendom... After the Peace of Westphalia, it was the balance of power".⁸ Finally, this new system not only appeared very aggressive (for instance, it led to the partition of Poland towards the end of the eighteenth century); it was also evidently insufficient to ensure peace in Europe, and it can therefore be held directly responsible for the First and the Second World Wars. This other interpretation leads to the conclusion (expressed, for example, by Joseph Fischer in his Berlin speech of 2000

⁸ R. Cooper, *The Breaking of Nations* (New York: Atlantic Monthly Press, 2003), p. 4.

at the Humboldt University)⁹ that after all those cruel experiences of modernity, it has to be now replaced by a post-modern system, of which “the European Union is the most developed example”.¹⁰ But precisely at that stage where the fundamental thesis is posed that Europe urgently needs a transition from the modern to the post-modern world, one is faced with a new problem. What exactly should this transition mean? Following Fischer’s arguments, he appears to see this process as a substitution of the state structures of modernity by new European state-type structures. To others (for example, Jan Zielonka, Peter Koslowski),¹¹ such a replacement of modernity by quasi-European state structures, in other words by the same structures of modernity but exposed at the European level, appears equally misleading and unacceptable. A real transformation requires that all modern illusions be given up and that some of the solutions from the pre-modern period be restored (the neo-medieval thesis).¹²

From the Central and Eastern European (CEE) perspective this kind of dialectic does not work for a very simple reason. The model of the modern state: territorial, with centralised sovereign power and a restrictive division between politics and religion, has not taken root in this part of Europe. The reason for this is not an insufficient understanding among its inhabitants of what modernity is about, but rather their firm conviction that they have a better model of organising common political space. In the seventeenth century, this conviction prevented the people of the Polish Commonwealth from becoming involved in the Thirty Years’ War which was perceived mostly as *bella germanica*. As modern sovereign states emerged in Western Europe, in the other part of the continent the Poles, Lithuanians, Ruthenians, Ukrainians and Germans from East Prussia successfully pursued an entirely different model of state and politics, rooted in the conception

⁹ J. Fischer, *Vom Staatenverbund zur Föderation—Gedanken über die Finalität der europäischen Integration*, 12.05.2000, see website: <<http://www.auswaertiges-amt.de/>>.

¹⁰ R. Cooper, *The Breaking of Nations* (2003: 38).

¹¹ J. Zielonka, ‘Enlargement and the Finality of European Integration’, *Jean Monnet Working Paper*, (2000) (7) *Symposium: Responses to Joschka Fischer*, <<http://www.jeanmonnetprogram.org/papers/>>; see also, P. Koslowski, ‘Die Europäische Union und das Ende der Einheit von Staatsvolk und Staat. Die Nation als Club, in den man geboren wird’, *International Centre for Economic Research Working Paper* 2004/11; see website: <<http://ideas.repec.org/>>.

¹² M. Wind, ‘The European Union as a Polycentric Polity: returning to a neo-medieval Europe’, in J. H. H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (2003: 119–22).

of a peaceful federalisation of nations, multicultural citizenship and symbiotic cooperation between politics and religions.¹³

The 'European Enlightenment'

To judge by the standard speeches and declarations made by some of the politicians and intellectuals in EU countries, the 'European Enlightenment' seems to be the most frequently quoted historical turning point in Europe, with far-reaching consequences for the integration process of today. Does the Enlightenment in fact remain some kind of ideological compass for the European Union? Given below are a few examples. One of the most prominent representatives of the European Commission has recently declared: "I agree that everyone can pursue their own vision of identity but, on the other hand, we have to have something in common despite our Christian, Jewish, Muslim or any other background. This common thing is doubtlessly our unequivocal attitude and acceptance for [sic] the values of the Enlightenment".¹⁴ During the celebration of the sixtieth anniversary of D-Day in Normandy, Chancellor Schröder said:

The war cemeteries and the scars of the two World Wars have imposed a lasting duty on the peoples of Europe, and on the people of Germany in particular: To rise up against all forms of racism, anti-Semitism and totalitarian ideology. Our democratic goals are liberty, justice and a life in dignity for everyone in peace, free of religious intolerance, national arrogance and political delusions. We believe in the legacy of the Enlightenment, tolerance and the beauty and comforts of European culture.¹⁵

In numerous statements made by French politicians, such as former Prime Minister Raffarin, we find the explicit idea that Europe, our Europe, came into being with the Enlightenment. With the same firm intention the Enlightenment was inserted into the draft Preamble proposed by Valéry Giscard d'Estaing during the work of the Convention. That is, of course, hardly surprising in the case of French politicians, but it does not appear entirely understandable in the case of German intellectuals. But that is precisely the case of Jürgen Habermas and his

¹³ K. Zernack, *Polen und Russland. Zwei Wege in der Europäischen Geschichte* (Berlin, Frankfurt am Main: Propyläen Verlag, 1994).

¹⁴ G. Verheugen, 'Europa muss Weltmacht werden!', *Internationale Politik* (2005) 60/1: 24.

¹⁵ Speech by Chancellor Gerhard Schröder at the Franco-German Ceremony Commemorating the 60th Anniversary of D-Day in Caen, 6 June 2004, see website: <<http://www.bundesregierung.de/>>.

letter which he published together with Jacques Derrida in 2003,¹⁶ and which contains such a clear and unequivocal declaration concerning the European Enlightenment, a letter so openly and enthusiastically lauded by the previously mentioned representative of the Commission as very welcome and long-expected.

Where the Enlightenment is indicated as the main element of the legacy of a European past, no-one can of course reasonably question the fact that it was one of the principal turning points in European history and remains one of the essential elements of European identity. However, one can and should pose the reasonable question of which particular Enlightenment the European politicians and intellectuals are referring to as the main value of European identity, providing a foundation for the constitutional process in the EU. Accordingly to Gertrude Himmelfarb there are at least three main traditions of the 'European Enlightenment': the French Enlightenment of reason, the 'English Enlightenment' of social virtues and the 'American Enlightenment' of liberty.¹⁷ To this, one could also add the 'Polish Enlightenment', which tried to combine the old republican virtues with the concept of the modern state as laid down in Europe's first written constitution.¹⁸ Moreover, even the German Enlightenment is not consistent with the French one in the way suggested by Habermas and Derrida in their famous article of May 2003.

It seems to be noble and inspirational intellectually to see the Enlightenment as one of the basic foundations in constructing a united Europe. On the other hand, however, it would be completely misleading if someone wanted to draw from that any practical conclusions for the way in which the Union should function. For instance, it is not possible to find any common model of how, practically, to tackle the problem of interdependence between religion and the public domain on the basis of the very simple declaration of the values of the Enlightenment, because the exponents of the English, German and French Enlightenments approached this problem in very different ways. In that sense, there is no such thing as common legacy of the European Enlightenment for the purposes of identifying an ideological basis for European unification.

¹⁶ J. Habermas and J. Derrida, 'Unsere Erneuerung', *Frankfurter Allgemeine Zeitung*, 31 May 2003.

¹⁷ G. Himmelfarb, *The Roads to Modernity* (New York: Alfred A. Knopf, 2004).

¹⁸ A. Walicki, *The Enlightenment and the Birth of Modern Nationhood. Polish Political Thought from the Noble Republicanism to Tadeusz Kościuszko* (Notre Dame, Indiana: University of Notre Dame Press, 1989), pp. 23–35.

The Second World War

There is a broader consensus among those who regard the experience of the Second World War as the most powerful motivation for launching the integration project in post-war Western Europe. Franz A. Mayer and Jan Palmowski pointed out in their article on European identity: “This is not to deny, following the Second World War, many political and intellectual leaders were inspired to overcome the nadir of European history with a return to European humanism, enlightened and democratic traditions”.¹⁹ From this viewpoint, European integration with its supranationalism and its emphasis on a constitutionalised system of human rights appears as a ‘by-product in the wake of World War II’,²⁰ or as a direct response to it. There is of course no need to question the interdependence between the experience of the Second World War and European integration. But if you look at it from the East European point of view, one specific pattern of interpretation is immediately observable, which has established itself during the last decades of integration in Western Europe. Integration has been perceived chiefly as a democratic response given by the new community of law, i.e. first the European Communities and later the EU, to the threats emerging repeatedly from the experience of Nazi totalitarianism and the possibility of its revival in Europe. If one carefully analyses the whole overreaction in the EU to the coalition of the Austrian People’s Party with populists from the FPÖ, and to the disturbing opinions expressed publicly by its leader Jörg Haider, one can see clearly what kind of threats the EU was established to counter.

The Germans appear particularly sensitive to this way of interpreting the historical essence of European integration and for purely internal political reasons; their post-war democracy. But as the Eastern enlargement came closer, the historical interpretation of European integration as a response to Nazism has evidently seemed inadequate to create a sufficiently strong sense of belonging among all Europeans in the expanded Union. It excludes the fundamental experience of communism as a totalitarian system rooted deeply in the historical identity of the CEE. An effort to compensate for that omission simply by directly accepting the historical narrative from the CEE might turn out to be very tricky and misleading as is illustrated by an incident involving the Latvian Foreign Minister, Sandra Kalniete. In Germany last year, she expressed an opinion shared

¹⁹ F. C. Mayer and J. Palmowski, ‘European Identities and the EU: the Ties that Bind the People of Europe’, *Journal of Common Market Studies* (2004) 42/3: 573–98.

²⁰ R. Hirschl, ‘Hegemonic Preservation in Action? Assessing the Political Origins of the EU Constitution’, in J. H. H. Weiler and C. L. Eisgruber (eds.), *Altneuland: The EU Constitution in a Contextual Perspective* (2004: 5).

widely by people in Latvia, Estonia and Poland that both Nazism and communism caused the demise of Europe in the twentieth century; a comment for which she was condemned by the German public. For the same reason, people from the new Member States agree that the public display of symbols such as the hammer and sickle as well as the swastika should be prohibited in Europe.

III. In favour of ‘constitutional tolerance’

Given the increasing disparities in European identity and the different ways in which the past is remembered in the public domain, observed now as a consequence of EU enlargement, two different approaches to the European past should be considered. The first is a restrictive approach, in which the past, especially the twentieth century, is perceived first of all in terms of shame and the dark legacy. From this viewpoint, the commemoration of the monstrous crimes committed during the Second World War, crimes in which almost all Europeans were involved, seems to be ethically the lowest but practically the most obvious common point from which we can start constructing a European identity in this restrictive way. It is no wonder that this European identity has to be post-historical, post-national and cosmopolitan.²¹ It should provide us with evidence that we are able to draw the right lessons from the twentieth century and to come to terms with the past and its dark legacy encapsulated in nationalist ideologies. The enlargement of the EU means, from that viewpoint, extending this restrictive approach to the past to the CEECs or, in other words, expecting that the newcomers will accept and come to share this restrictive approach despite, or even because of, their historical experiences. The unification of identities and interpretations of the past appears here as an inevitable consequence of enlargement and the best way to ensure stability in a larger Europe and to face up to the new threats resulting from its increased diversity. Practically it means that something like an *acquis historique communautaire* should be conceptualised and developed for the new Europe, as proposed recently by Fabrice Larat,²² and the newcomers will be assessed according to their ability to adopt and implement the provisions of such an *acquis historique*. In reality, it is of no consequence whether the contents of the European *acquis historique* will be post-national or neo-

²¹ U. Beck, *Der kosmopolitische Blick oder: Krieg ist Frieden* (Frankfurt am Main: Suhrkamp, 2004); see also, T. Judt, ‘The past is another country: myth and memory in post-war Europe’, in J-W. Müller (ed.), *Memory and Power in Post-War Europe* (Cambridge: Cambridge University Press, 2002).

²² F. Larat, ‘Presenting the Past: Political Narratives on European History and the Justification of EU Integration’, *German Law Journal* (2005) 6/2: 274–90.

national. As Joseph Weiler pointed out, this kind of reunification of European identity and memory peruses a typical national logic: ‘come, be one of us’, the logic which manifests both arrogance and belief in one’s own superiority.²³

This approach to the past is the wrong answer to the increased diversity and heterogeneity in an enlarged Europe because it generates new conflicts. It restrictively establishes the ground for a common historical identity at the ethically lowest level of the crimes committed in the twentieth century. It reduces different aspects of the memory of others and, last but not least, it creates a common European memory by flattening and simplifying different perspectives and experiences. Instead of uniformisation, the best response to the new situation is the constitutional tolerance proposed by Weiler. European identity and memory in the enlarged Union, which embrace the historical and political experiences of the CEE, cease to be the domain of one dominant narrative. It must increasingly evolve into the sphere of different negotiated narratives and interpretations, none of which can dominate to the detriment of the others. This is the very essence of the supranational mechanism and institutions which cannot be perceived as a sphere of a single created (even democratically created) and uniform narrative. Supranationalism allows us to avoid the main threat emerging from the concept of identity, namely “the high potential of abuse of boundaries”,²⁴ on which every kind of identity is based regardless of in whose name it has been created: in the name of the nation state or in the name of Europe. Strengthening the supranational institutions, especially their negotiating functions, is the best way of avoiding a clash of memories as a consequence of Eastern enlargement. Institutionally, it is the European Parliament, firstly (paradoxically, the EU institution most widely viewed as a product of democracy) that is undergoing the process of strengthening the supranational method of cooperation and negotiation, resulting in some spectacular effects, such as the Auschwitz Declaration or the recent report on EU–Russia relations. As one of the Members of the European Parliament from the old Member States, Cecilia Malmström, admitted, this report would have been entirely different in content if representatives of the new EU Member States had not participated in completing it.

²³ J. H. H. Weiler, ‘Europe: The Case Against the Case for Statehood’, *European Law Journal* (1998) 4/1: 61.

²⁴ J. H. H. Weiler, ‘Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision’, *European Law Journal* (1995) 1/3: 247–49.

Chapter 17

Challenge from the Pace-setting Periphery:

Causes and Consequences of Slovakia's Stance on Further European Integration*

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I. Introduction

The Member States of the European Union can be classified in a number of different ways. Distinctions can be drawn between founders, long established members and newcomers; those in the core and those on the periphery; net contributors and net recipients; and large and small. In terms of power and influence in the EU many of the new Member States fall into the less advantageous categories. Not only are they recent entrants, but they are also small, net recipient states which remain outside the Eurozone and Schengen. Moreover, these states suffer from other disadvantages. In addition to having undergone the complicated, time-consuming and occasionally painful 'triple transition'¹ of marketisation, democratisation and state-building during the past decade, during the accession process these countries were forced to accept the

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¹ C. Offe, 'Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe', *Social Research* (1991) 58/4: 865–92.

one-way transfer of rules and norms to fulfil their long-cherished goal of getting into the club. Although now Member States they have been further hindered by their relative lack of experience and understanding of the workings of the European Union.

As a small, new and relatively poor Member State we might predict that Slovakia would be an enthusiastic advocate of further European integration. Although small states “do not constitute a coherent group of members in the European Union”², in a system which includes states of varying sizes some analysts argue that smaller states will adopt strategies with a preference for strong common institutions and the consequent ceding of a degree of sovereignty in order to better defend their interests “against the dominance, perceived or real, of large member states”.³ During the process of accession Slovakia demonstrated itself to be one of the most enthusiastic soon-to-be-members. In the course of 2001, for example, Slovakia achieved ‘remarkable progress’ in its accession negotiations with the European Union, managing to catch up with the leading candidate countries in terms of the number of preliminary closed chapters of the *acquis*, even though it had only begun negotiations in February 2000, two years after Poland, Hungary and the Czech Republic.⁴ The absence of strong demands on the part of Slovakia during accession negotiations made the process much easier compared to many of the other accession states.

Since joining the EU Slovakia has been an advocate of further integration, especially on grand strategic issues, such as the Constitutional Treaty, enlargement (especially to the Western Balkans), and the Hague programme’s aim of strengthening freedom, security and justice in the EU.⁵ From the beginning of 2003 in its declarations of priorities, however, Slovakia has focused largely on the maintenance of national control in a number of policy areas. Indeed the Slovak government has shown itself to be trenchantly opposed to greater integration particularly in the spheres of fiscal policy and welfare. For example,

² E. Antola, ‘The Future of Small States in the EU’, in M. Farrell, S. Fella and M. Newman (eds.), *European Integration in the 21st Century: Unity in Diversity?* (London/New Dehli: SAGE, 2002), p. 69.

³ *Ibid.*, p. 75.

⁴ V. Bilčík, ‘Slovakia’s Integration to the European Union’, in G. Mesežnikov *et al.*, *Slovakia 2001: A Global Report on the State of Society* (Bratislava: Institute for Public Affairs, 2002), p. 286.

⁵ V. Bilčík, ‘Slovakia and the European Union’, in G. Mesežnikov and M. Kollár (eds.), *Slovakia 2004: A Global Report on the State of Society* (Bratislava: Institute for Public Affairs, 2005), pp. 353–70.

Prime Minister Mikuláš Dzurinda, and the architect of Slovakia's economic reforms, Finance Minister Ivan Mikloš, have stated categorically that Slovakia is in favour of retaining the national veto on tax and social policy.⁶

In this chapter we try to explain why a small, new EU Member State expresses and pursues an enthusiastic, integrationist stance on broad strategic issues, such as the Common Foreign and Security Policy (CFSP), joining the single currency and further EU enlargement, whilst simultaneously maintaining a stubborn refusal to consider ceding national control in other areas, particularly tax and welfare. We argue that the explanation lies partly in Slovakia's transition process, its delayed accession start and the dynamics of party politics in Slovakia. The key factor, however, is the shift from accession state status to full Member State. We maintain that this has forced Slovakia to define its national priorities. EU membership has, therefore, been a stimulus for completing the process of nation-state building.

After examining the reasons behind Slovakia's stance, we explore the implications of that stance both for Slovakia and the EU as a whole. We argue that the country's stance on further European integration poses significant challenges for the EU and the other member states not least in the perceived threat that Slovakia's economic and social policies pose to the European Social Model.

II. Slovakia's transition and accession

Slovakia's political trajectory over the past decade and a half has not been straightforward. After the period 1990–1992 when politics was dominated by a series of protracted and seemingly interminable negotiations surrounding the future of Czechoslovakia, politics in independent Slovakia became dominated by the conflict between two rival camps which revolved around the liberal aspects of democracy and the isolation or integration of Slovakia into international bodies.⁷ Central to both of these phases is the distorting role played by the party created and led by the three-time Prime Minister, Vladimír Mečiar, the Movement for a Democratic Slovakia (*Hnutie za demokratické Slovensko*, HZDS). HZDS built its

⁶ See, for example, *Pravda* 12 September 2004; Mikloš's comments at the SDKÚ conference Slovensko v európskom kontexte, 12 July 2003, Prešov. See, <http://www.sdkuonline.sk/>; and Dzurinda's declaration on Slovak radio in September 2004 that "tax policy is within the sovereign power of national states and it will remain so", Radio Slovakia, Bratislava, 8 Sept. 2004.

⁷ D. Malová, 'Neľahká inštitucionalizácia parlamentnej demokracie na Slovensku', *Politologická revue* (1998) 4/1: 43–59.

appeal on a programme of managed economic reform, a rhetoric and concern for those who lost out from the process of marketisation, an appeal to the Slovak nation and the charisma and personality of Mečiar.⁸ During the mid-1990s Slovakia became what Madeline Albright called ‘the black hole of Europe’, thanks to a combination of the nationalist policies advocated by HZDS and its allies, a series of murky privatisation deals, a disregard for the constitutional niceties of democratic politics and the deteriorating image of the country held by international organisations such as NATO and the EU.⁹ Although fragmented for much of the Mečiar years, the opposition eventually put aside their differences and agreed to work together. Following the 1998 elections, the *civic bloc* formed an ideologically broad-based government, encompassing Christian Democrats, market liberals, Greens and the post-communist left, held together by the desire to return to the status of a normal European state and to achieve entry into NATO and especially the EU.

During the 1998–2002 government Slovakia made great strides towards achieving its integration goals.¹⁰ Following the Helsinki European Council, accession negotiations were opened in February 2000. By the time of the 2002 elections the EU and NATO were ready to welcome Slovakia into their clubs, which were however concerned about the outcome of the parliamentary elections and the risk of an unpalatable government. Their fears were not to be realised, however, as Slovaks voted in such a way as to facilitate the creation of a centre-right government led by Mikuláš Dzurinda, paving the way for the invitations for NATO and EU entry issued at the Copenhagen and Prague summits.¹¹

During the period 1998–2002 Slovakia’s overriding national aim was to achieve EU membership.¹² At times Slovakia resembled an obedient dog faithfully

⁸ T. Haughton, ‘HZDS: The Ideology, Organization and Support Base of Slovakia’s Most Successful Party’, *Europe-Asia Studies* (2001) 53/5: 745–69.

⁹ K. Henderson, ‘Slovakia and the democratic criteria for EU accession’, in K. Henderson (ed.), *Back to Europe: Central and Eastern Europe and the European Union* (London/Philadelphia: UCL Press, 1999), pp. 221–40.

¹⁰ D. Malová and M. Rybář, ‘The European Union’s policies towards Slovakia: the carrots and sticks of political conditionality’, in J. Rupnik and J. Zielonka (eds.), *The Road to the European Union*, vol. 1 *The Czech and Slovak Republics* (Manchester/New York: Manchester University Press, 2003), pp. 98–112.

¹¹ T. Haughton, ‘“We’ll Finish What We’ve Started”: The 2002 Slovak Elections’, *Journal of Communist Studies and Transition Politics* (2003) 19/4: 65–90.

¹² G. Pridham, ‘The European Union’s Democratic Conditionality and Domestic Politics in Slovakia: the Mečiar and Dzurinda Governments Compared’, *Europe-Asia Studies* (2002) vol. 54 (2), pp. 203–27. Although it is worth pointing out that membership of western clubs,

following its master's instructions. Given the rejection at Luxembourg and Slovakia's desire not to miss the boat, such a position was understandable. What is striking is that the aim of entry hindered the emergence of a debate within Slovakia as to what type of European Union the country wanted to be part of. Membership, however, has forced Slovakia to define its national priorities. Pressure for a clear promulgation of these national interests came in the run-up to the Rome Intergovernmental Conference in December 2003. As a new Member State without a tradition of independent foreign policy whose agenda in many policy areas had been dominated by EU and NATO entry in the preceding decade and with political actors in Slovakia holding such diverse interests, it was perhaps no surprise that the country struggled to define its position. Indeed the country's official position which highlighted the government's opposition to further integration in a number of areas, particularly the desire to maintain unanimous decision-making in taxation, social policy and defence was agreed just two days before the Rome summit.¹³

From this inauspicious start Slovakia has begun to articulate its position more clearly. In contrast to fiscal issues, in the realm of foreign policy the thrust of the government's stance has been pro-integration. On the eve of Slovakia's accession to the EU, Prime Minister Dzurinda highlighted both the Western Balkans and Ukraine as top priorities for Slovak foreign policy. Following his speech the Foreign Ministry drew up documents outlining policy priorities which "build upon the EU's Stabilization and Association Process, the European Neighbourhood Policy and the pursuit of an ever wider EU."¹⁴ Slovakia demonstrated its commitment to the Western Balkans by becoming a vocal supporter of beginning accession negotiations with Croatia, opening its own embassy in Bosnia and Herzegovina and sending a highly experienced diplomat to head the country's mission in Sarajevo. Whilst Slovakia has expressed its support for European initiatives such as the European Security Strategy, the government has expressed some reservations about further integration in this

including the EU, was only one of the government's seven stated fundamental aims on taking office. See *Programové vyhlásenie vlády Slovenskej republiky* reproduced in M. Kollár and G. Mesežnikov (eds), *Predsavzatia a skutočnosť: hodnotenie plnenia programového vyhlásenia vlády Mikuláša Dzurindu* (Bratislava: IVO, 2002), p. 121.

¹³ V. Bilčík, 'Slovakia's Integration to the European Union', in G. Mesežnikov and M. Kollár (eds.), *Slovakia 2003: A Global Report on the State of Society* (Bratislava: Institute for Public Affairs, 2004), p. 316.

¹⁴ V. Bilčík, 'Shaping the EU as an External Actor: Slovakia's Shifting Role Conceptions', *Slovak Foreign Policy Affairs* (2005) 5/2: 42.

field especially where new structures might put relations between NATO and the EU under strain.¹⁵

III. Party politics in Slovakia

The shift from the status of an accession to a Member State provided politicians in Slovakia with extra room for manoeuvre. What the shift does not explain, however, is why the Slovak stance shifted from an enthusiastic accession state to one largely of opposition to further integration, particularly with regard to economic and social issues. The explanation for the change lies in four aspects of domestic party politics, all of which have played an important role in shaping the Slovak government's stance: ideology; government/opposition dynamics; intra-government dynamics; and party organisation.

EU membership has opened up new prospects. Ideological concerns were not absent from party competition during accession, but because membership was the overriding priority up until that goal was achieved ideological concerns took a back seat. The issue of joining the European Union was not the only political issue during the run-up to accession, but it shaped the contours of party competition, helping to bolster positions and proving to be useful ammunition in warfare between the parties. With accession achieved, parties such as Prime Minister Dzurinda's Slovak Democratic and Christian Union (*Slovenská demokratická a kresťanská únia*, SDKÚ), for instance, which had placed EU entry at the centre of its campaign, shifted its focus to more ideological concerns. At the heart of SDKÚ-nominated ministers' agenda, particularly those of the Finance Minister, Ivan Mikloš, are neo-liberal policies inspired and encouraged by international financial bodies such as the World Bank.¹⁶ The government has, for example, brought in the much-vaunted 19% flat-rate tax, cut welfare benefits and embarked on radical pension and health reforms. These reforms are driven by a belief in the superiority of the market compared to state provision and involve the replacement of public provision with largely market-based solutions. The new healthcare system sees hospitals and healthcare insurance firms operating as businesses which compete for patients and insurance clients. The pension reforms allow citizens to deposit part of their current contributions into a personal account managed by a private pension fund company.

¹⁵ Ibid., p. 44.

¹⁶ See the very positive reports issued by the World Bank. Slovakia, for example, was described as the world's top reformer in improving its investment climate over the past year. See *The World Bank's Doing Business in 2005 report*, see: <http://web.worldbank.org>.

Ideology *per se*, however, does not explain Slovakia's stance. Government/opposition dynamics, intra-government dynamics and party organisation all need to be put into the equation. The government faces a weak and divided opposition within parliament. The 2002 election results were a disaster for the left. The main post-communist left-wing party, the Party of the Democratic Left (*Strana demokratickej ľavice*, SDL), failed to cross the 5% threshold. This was thanks to a lethal cocktail of poor leadership, tensions between the social democratic and the more traditional wing of the party exacerbated by the party's unhappy experience in the 1998–2002 government which provoked a split a few months before Slovaks went to the polls, and the emergence of a new party, Smer ('Direction') led by a former leading light in SDL and the most popular politician in the country, Robert Fico.¹⁷ Since the 2002 election, therefore, the parliamentary opposition has consisted of the populist Smer, Mečiar's HZDS, the Slovakian Communist Party and a rag-bag of independents. The fragmented opposition in contemporary Slovakia has played a significant role in providing Mikloš and his allies with an opportunity to push through their policies.

It is not just the opposition which is divided. Although the current Slovak government can be labelled as centre-right it is not homogenous. Indeed—at least since mid-2003—we can discern two blocs within the government:¹⁸ One with Dzurinda's SDKÚ and the party created and led by the media magnate Pavol Rusko, the Alliance of the New Citizen (*Aliancia nového občana*, ANO); and the bloc with the Christian Democratic Movement (*Kresťansko demokratické hnutie*, KDH), and the Party of the Hungarian Coalition (*Strana maďarskej koalície*, SMK). The former bloc has been driving the neo-liberal agenda and has control of key ministries central to this agenda such as finance, economy, health and employment. In contrast, KDH took control of the so-called power ministries of the interior and justice (although SDKÚ has defence) and the education portfolio, whilst SMK took regional development, environment and agriculture. The different complexions of the parties making up the coalition are reflected in the agenda pushed by the government: religion and the neo-liberal agenda. The former demonstrated by the desire to incorporate a reference to 'God' in the constitution and what Kieran Williams has called the 'Californication of criminal

¹⁷ T. Haughton, 'Explaining the Limited Success of the Communist-Successor Left in Slovakia: the Case of the Party of the Democratic Left (SDL)', *Party Politics* (2004) 10/2: 177–91.

¹⁸ Contrast, for example, the different views expressed by KDH deputy František Mikloško and ANO deputy Ľubomír Lintner in *Národná obroda*, 14 Sept. 2004.

justice in Slovakia',¹⁹ and the latter by the desire to retain the national veto on tax and social policy.

One other aspect of party politics in Slovakia helps explain the government's stance: party organisation. The two parties, which are at the forefront of the neo-liberal agenda (ANO and SDKÚ), which were recent élite creations. The former's creation was largely down to media-magnate Pavol Rusko, and the latter was created by a group of ministers and parliamentary deputies. The 'genetic' moment has left a mark on both parties.²⁰ Élite-created parties tend not to have strongly developed mechanisms of accountability and they can be largely personality-based. Both appear true in the cases of SDKU and ANO. Indeed to a significant extent party politics in Slovakia is personality-based. The neo-liberal reform package is closely associated with the respective ministers Kaník (employment and social affairs), Mikloš (finance), and Zajac (health).

The current government's agenda as a Member State, therefore, is shaped in a significant way by domestic party politics. Thanks to the ideological conviction of leading politicians, the élite nature of two of the parties in the coalition and the weak and fragmented opposition, the government is pursuing a radical World Bank inspired neo-liberal agenda distinct from European mainstream. Whilst domestic conditions have acted as a facilitator for the pursuit of such policies, the European dimension provides a threat. Relinquishing the national veto on tax, for example, would lead to tax harmonisation and would jeopardise the neo-liberal agenda. The Slovak case contrasts starkly with Spain after its accession. Keen to demonstrate its European credentials and facilitated by the weakness of the opposition, weak civil society, a ruling party obedient to its leader and with strong links with the trade unions, the Spanish government pursued a strong pro-European line. A more critical line only emerged in the early 1990s when the opposition was stronger and the position of Gonzalez less guaranteed the emergence of a more critical line.²¹

The stance of the Slovak government is also facilitated by the lack of an effective extra-parliamentary opposition. The public is convinced of the need for reform, but is not convinced that the current reform package is the best way to

¹⁹ K. Williams, 'The Californication of Criminal Justice in Slovakia', paper presented at the School of Slavonic and East European Studies, University College London, 20 Oct. 2004.

²⁰ A. Panebianco, *Political Parties: Organization and Power* (Cambridge: Cambridge University Press, 1988).

²¹ R. Youngs, 'The Domestic Politics of Spanish Economic Policy, 1986–94', *South European Society & Politics* (1999) 4/1: 55.

achieve it.²² What is striking is the failure to mobilise this discontent. We argue this inability to galvanise discontent lies in a combination of a lack of powerful social actors, the social conditions of the electorate and the end of the accession process.

Whenever similar neo-liberal packages have been suggested elsewhere in Europe, trade unions have taken centre-stage in mobilising opposition. The main trade union body in Slovakia, the Confederation of Trade Union (*Konfederácia odborových zväzov*, KOZ), however, thanks to poor leadership and a lack of political links (the lack of a clearly defined strong centre-left party can be factored in here) has failed to mobilise citizens against the government. The referendum it initiated on early elections failed due to low turnout even though the government was unpopular.

The blame, however, cannot be laid solely on the shoulders of the trade unions and the opposition, as part of the explanation for the lack of mobilisation lies with the large number of apathetic voters, indicated by the derisory 17% turnout in the 2004 European parliamentary elections and which demonstrates the inability of both government and opposition to mobilise voters. The political upheavals experienced by citizens in Slovakia combined with the catalogue of broken promises made by scandal-ridden politicians act as a turnoff for many voters who wonder whether investing time in political activity would reap any rewards. Moreover, as in new Member States such as Latvia, weak civic participation can be partly explained by “the present economic hardships which do not leave much spare time or energy for public activities”.²³

Non-governmental organisations (NGOs) have played a significant role in Slovak politics over the past decade.²⁴ Not only did they help mobilise voters in the 1998 election, but during the accession process frequent reference was made to conforming to European standards in an attempt to force the government to accept their demands. With accession complete such rhetoric has less clout. It is too soon to make definitive judgments, but recent months suggest that only two

²² Z. Bútorová *et al.*, ‘Public Opinion’, in G. Mesežnikov and M. Kollár (eds.), *Slovakia 2003: A Global Report on the State of Society* (2004: 189).

²³ A. Pabriks and A. Purs, ‘Latvia: the challenges of change’, in D. Smith *et al.*, *The Baltic States: Estonia, Latvia and Lithuania* (London: Routledge, 2002), p. 82.

²⁴ See, for example, M. Bútorová and P. Demeš, ‘Občianske organizácie vo voľbách 1998’, in M. Bútorová, G. Mesežnikov and Z. Bútorová (eds.), *Kto? Prečo? Ako? Slovenské voľby ‘98* (Bratislava: IVO, 1999), pp. 129–40; and P. Demeš, ‘Non-Governmental Organizations and Volunteerism’, in G. Mesežnikov *et al.* (eds.), *Slovakia 2002: A Global Report on the State of Society* (Bratislava: Institute for Public Affairs, 2003), pp. 637–56.

major interests have succeeded in being represented in the government's position: the Roman Catholic Church and what can be labelled capital. Both interests are, of course, closely tied to the interests of parties in the governing coalition.

IV. The Euro and Europe in domestic politics

Although Slovakia is opposed to further integration in fiscal policy, the country remains committed (and treaty-bound) to join the single currency. Finance Minister Mikloš and his party are keen to stress Slovakia's goal of joining the single currency.²⁵ Indeed the Finance Ministry's policy document outlining the rationale for the tax reforms emphasised Slovakia's obligations regarding the Maastricht criteria such as a budget deficit not exceeding 3% of GDP.²⁶ What is striking, however, is the role *Europe* has played in policy debates.

Given the treaty obligations imposed on all new Member States to join the Euro, we might expect the government to engage in smokescreening and scapegoating, that is, using the European issue to mask real motivations and blaming the demands of Euro entry for the introduction of unpopular policies. Surprisingly in the case of Slovakia there has been little evidence of scapegoating and only a small degree of smokescreening. It is important to emphasise that the Maastricht criteria specifying acceptable levels of debt, inflation and the budget deficit are not strongly prescriptive, and indeed they offer room for manoeuvre. The Slovak government, therefore, does not have to follow a policy package along the lines of its radical neo-liberal agenda. Moreover, low inflation, balanced budgets, and so forth, are examples of what one of the political gurus of neo-liberalism, Margaret Thatcher, described as 'good housekeeping', so the demands of Euro entry and neo-liberal economics sit easily together.

The question then is, why does the current Slovak government not play the scapegoating card? The bureaucrats of Brussels are after all an easy and frequently invoked target for politicians wishing to point to the need to introduce unpopular measures. Europe can and has been used "as a justification for what would otherwise be unpopular policies".²⁷ The reasons seem to stem from three factors. Firstly, the ideological convictions of the leading figures behind the reform

²⁵ Slovak Ministry of Finance, *Návrh rozpočtu verejnej správy na roky 2005–2007*, <<http://www.finance.gov.sk/>>; SDKÚ, *Generálna línia SDKÚ 2004*, see <<http://www.sdkuonline.sk/>>.

²⁶ Slovak Ministry of Finance, *Koncepcia daňovej reformy v rokoch 2004–2006*, <http://www.finance.gov.sk/>.

²⁷ K. Featherstone, "Europeanization" and the Centre Periphery: The Case of Greece in the 1990s', *South European Society & Politics* (1998) 3/1: 34.

package (both the politicians and their advisers). Convinced of the merits of their case and of the superiority of their ideological stance,²⁸ Mikloš and company continue to trumpet their neo-liberal agenda, emboldened by the plaudits showered on them by Steve Forbes and prizes such as Euromoney's 'Finance Minister of the Year, 2004'. Secondly, it is the opposition which has emphasised the distance between the current government's stance and the European mainstream.²⁹ Thirdly, Dzurinda's government was elected on a strongly pro-European platform. All the parties in the current government articulated a broadly pro-EU stance before accession, none more so than SDKÚ which had placed EU entry at the heart of its campaign in 2002.³⁰ The government's credibility and legitimacy are therefore tied to a broadly pro-European message.

One of the most striking aspects of the first twelve months of Slovak membership was the decline in salience of Europe in domestic Slovak politics. Europe ceased to be the all or nothing issue it was in the run-up to the 2002 elections with parties articulating more complex positions on the EU for principled, contingent and opportunistic reasons. Parties have not been shy to emphasise those aspects which they dislike. KDH, for example, has criticised the EU's social liberalism calling for national control over cultural and moral issues. Whereas EU membership was integral to so much debate in the 2002 election, it looks set to play a back seat in 2006. Indeed, the main opposition party, Smer, declared in its first press conference of 2005 that whilst 2004 was dominated by the EU, this year would be 'the year for Slovakia'.³¹ Given the sharp internal debate surrounding the government's reform package this strategy is not only good politics on the part of the opposition it is also indicative of Slovak politics resembling normal European countries where Europe is at best a minor issue in parliamentary elections.

V. The impact of Slovakia on the EU

The accession of eight former communist states from Central and Eastern Europe (CEE) has already shaped, and will continue to shape, the development of the EU. Slovakia is only one small Member State of the enlarged Union, nonetheless it is making an impact. New entrants to the European club have often had a swift and

²⁸ Television channel TA3, 'V politike' debate between Fico and Mikloš, 24 Oct. 2004.

²⁹ Ibid.

³⁰ T. Haughton, "'We'll Finish What We've Started': The 2002 Slovak Elections", *Journal of Communist Studies and Transition Politics* (2003) 19/4: 74.

³¹ *Rok 2005 bude pre Smer rokom Slovenska*, see website <http://www.strana-smer.sk/>.

direct impact on foreign policy towards new and near neighbours. The entry of countries such as Slovakia, Poland and Lithuania, especially in light of the 'Orange Revolution' has shaped the EU's policies towards Ukraine, providing echoes of the Barcelona Process which followed Spain and Portugal's accession and the Northern Dimension (ND) proposed by Finland.

Slovakia's neo-liberal agenda, especially the low rates of corporate taxation, has provoked criticism in some of the more established Member States of the EU and has led to calls in Paris, Berlin and elsewhere for tax harmonisation across the Union,³² confounding Moravcsik and Vachudova's prediction that, "[b]udgetary policy aside, there is little evidence that they [the new Member States] will import divergent or destabilizing policy agendas into the EU. On most issues they will instead join existing coalition".³³ Slovakia's stance and its neo-liberal agenda (along with similar policy packages pursued by other new entrants such as Estonia) has, therefore, provoked demands for further integration from the more established Member States, precisely the outcome Slovakia does not want. Nevertheless, Slovakia has managed to forge some supportive inter-state alliances with countries such as Estonia and the UK, both of which reject the idea of tax harmonisation.³⁴

The reaction of Berlin and Paris to the pursuit of such policies in Slovakia and elsewhere is in part driven by a concern about the impact that these policies may have on Europe as a whole, particularly the European social model. If the neo-liberal experiment in Slovakia is successful will it increase pressure on the well-established members of the EU to shift towards the Slovak neo-liberal model? Will countries like Slovakia act as a 'Trojan horse' for the Americanisation of European economic and social policy?³⁵ Slovakia's fiscal policy has already played a role in the lowering corporate tax rates in Germany and Austria and proposals for low flat-rate taxes in Poland, the Czech Republic and Romania have provoked fears of a race to the bottom. There are also real concerns in the established Member States that enlargement is causing jobs and investment to move to the

³² BBC News Online, *EU Ministers Clash on Tax Policy*, see website <http://news.bbc.co.uk/>.

³³ A. Moravcsik and M. A. Vachudova, 'National Interests, State Power, and EU Enlargement', *East European Politics and Societies* (2003) 17/1: 55.

³⁴ See, for example, EUobserver, 'Estonian PM attacks France on corporate tax stance', <http://www.euobserver.com/>; and EUobserver, 'Brown vows to resist tax moves', <http://news.bbc.co.uk/>.

³⁵ G. Meardi, 'Trojan Horse for the Americanization of Europe? Polish Industrial Relations towards the EU', *European Journal of Industrial Relations* (2002) 8/1: 77–99. See also, C. Tenbrock, 'Real existierender Kapitalismus', *Die Zeit*, 9 Sept. 2004, p. 26.

newer Member States where skill levels are high, but labour costs are relatively low. As debate in the French referendum highlighted, therefore, there is concern not only that the outsourcing of work to the new Member States will be detrimental to France, but that the neo-liberal policies of states such as Slovakia may force France to dilute or abandon its post-war socio-economic arrangements based on markets, generous welfare payment and regulated labour markets.³⁶

At the Lisbon European Council in 2000 EU leaders declared their aim to turn Europe into the most dynamic and competitive knowledge-based economy in the world by 2010. In a recent European Commission study, it was estimated that if the effects of the increased knowledge investments foreseen within the Lisbon strategy GDP growth is likely to increase by 7–8% over a ten-year period.³⁷ The report suggests that Member States could follow an Anglo-Saxon model of low tax and regulation or a Scandinavian model with active labour market policies.³⁸ The Slovak government believes its economic strategy provides a blueprint for the rest of Europe. Indeed in the government's national Lisbon strategy it trumpeted its tax, health, welfare, labour market and pension reforms as solutions to the significant structural problems faced by Slovakia and other European countries. Not only does the government see itself as a trailblazer for other Member States, but it also emphasises the need to ensure Slovakia and the rest of the EU take an “active stance against process which threaten the competitiveness of the EU”.³⁹

VI. Conclusion

Although the new Member States which joined the club in May 2004 are not yet full participants in all areas of EU policy as they remain outside both the Euro and Schengen, the transition from accession-state status to that of Member State has had significant implications. Many changes are self-evident, but one change is worth flagging. Until membership was achieved the relationship between the EU and accession states such as Slovakia could be largely characterised by ‘a one-way

³⁶ See, for example, ‘La crainte pour l'emploi est la raison principale du rejet de la Constitution par les Français’, *Le Monde*, 30 May 2005.

³⁷ Directorate General for Economic and Financial Affairs, *The economic costs of non-Lisbon: A survey of the literature on the economic impact of Lisbon-type reforms*, March 2005, p. 39.

³⁸ *Ibid.*, p. 29.

³⁹ Ministry of Finance, *Competitiveness Strategy for the Slovak Republic until 2010: National Lisbon Strategy*, <http://www.finance.gov.sk/>.

transfer of EU rules and norms'.⁴⁰ During the accession process the EU was able to shape policy choice through the 'carrots and sticks of conditionality',⁴¹ and the largely undifferentiated process of accession negotiations.⁴² Paradoxically, membership has acted to allow more room for manoeuvre and allowed states to pursue policies out of kilter with the West European mainstream, because the state is no longer a mere object of EU decisions, but is rather a co-maker and co-author.

Slovakia is an example of this process largely as a product of the rejection in 1997 and the desire to catch-up. Slovakia, therefore, focused its attention on achieving entry and concentrated on doing all the deeds prescribed by Brussels. The Slovak case suggests, therefore, that the EU cannot assume that a very enthusiastic accession state will necessarily become an enthusiastic advocate of further integration when it becomes a Member State. A desire to integrate prior to joining does not necessarily imply that a country will be strongly in favour of further integration once in the club. The Slovak case also suggests the European Union should be wary of countries where there is little debate on the European issue before joining. Moreover, the EU should be wary of countries with a weak and fragmented opposition, as this is likely to diminish horizontal accountability and increase the unpredictability of elections allowing more scope for unpalatable parties to come to power.

Entry into the EU club has meant that Slovakia has had to define its national priorities. EU membership has thus proved a stimulus for the completion of nation-state building. Given the fact that the majority of the eight CEECs which joined the EU on 1 May 2004 were new states which emerged from multi-ethnic federations, we would suggest that Slovakia's experience may not be unique, although given its difficult transition and accession paths the contrast between accession status and membership are likely to be much starker. Nonetheless, the Slovak experience is a lesson for what might happen to other new nation-states which experience difficult transition and accession paths (the case of Croatia

⁴⁰ V. Bilčík, 'The Institutionalization of Integration Policy', in P. Brežáni (ed.), *Yearbook of Foreign Policy of the Slovak Republic 2003* (Bratislava: Research Centre of the SFPA, 2004), p. 35.

⁴¹ D. Malová and M. Rybář, 'The European Union's Policies towards Slovakia: the carrots and sticks of political conditionality', in J. Rupnik and J. Zielonka (eds.), *The Road to the European Union*, vol. 1 *The Czech and Slovak Republics* (Manchester/New York: Manchester University Press, 2003), pp. 98–11.

⁴² J. K. Glenn, 'From Nation-States to Member States: Accession Negotiations as an Instrument of Europeanization', *Comparative European Politics* (2004) 2/1: 3–28.

immediately springs to mind.) The starkness of the Slovak case is also brought out by the nature, composition and agenda of the current government. Whatever government had been in power in May 2004 would have had to define Slovakia's priorities, but the neo-liberals in charge of Slovakia have laid out an agenda which poses a challenge the predominant view of economic and social organisation in Western Europe.

The government, however, has been keen not to portray itself as anti-European partly because of the role Europe played in the governing parties election in 2002. Indeed, Slovakia has been keen to dress up its support for the Lisbon Agenda as evidence of its commitment to European goals. The government's policies of liberalisation, deregulation and flexible labour markets are portrayed as a model for the EU to achieve its aim of being the most dynamic and competitive knowledge-based economy in the world by 2010.

The entry of countries, such as Slovakia, into the EU, has therefore raised significant questions for the European club. Not only does enlargement *per se* raise calls for institutional changes to make the EU more effective, but the radical economic and social agenda pursued by the Slovak government highlights some of the major policy options facing European decision-makers. In the light of the French rejection of the Constitutional Treaty and the competition posed by the rapidly developing future economic powerhouses of India and China, enlargement has helped revive the debate about what kind of European Union is needed to meet the challenges of the twenty-first century.

Chapter 18

The European Neighbourhood Policy of the European Union after Enlargement 2004:

Empire with a Human Face?

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I. Introduction

There are many good reasons to review the European Neighbourhood Policy (ENP). Indeed, this policy, which is designed to extend the zone of stability and security around the wider Union, emanates directly from the 2004 enlargement, and is based on experience gained in this regard.

This chapter presents arguments to the effect that the ENP is strictly about security and prosperity of Europe and hence should be a top strategic priority for the EU. However, presently, the ENP is seen on a political level of the EU more as a routine bureaucratic and diplomatic enterprise than as a strategy. In effect, the ENP, which is a masterpiece of programming, lacks strategic context and solid political backing. This may hamper its implementation, especially in those regions covered by it which are so turbulent, where the issues of religion and ethnicity are the most explosive, and where the world's biggest reserves of gas and oil are found.

The ENP has the potential to unify EU-25, old and new Member States, around common goals and values, which are rightly identified therein. At the same time, it may be implemented successfully on the level of grand strategy only, while below this level it may end as a costly failure. The ENP will thus be a complicated multilateral game involving over forty countries. In the regions covered by the

ENP, the EU will also meet external partners, well established there and having rooted political, military and economic interests: the USA and Russia.

The ENP is examined here in a wider context, mainly from a historical and strategic perspective. It will be treated as a hybrid evolution of the last enlargement of the EU, which embraced mainly Central and Eastern Europe (CEE), on the one hand, and Cyprus and Malta, which were covered by partnership policies in the Mediterranean, on the other. After the enlargement of 2004, the greatest ever *projet politique* accomplished without violence and built on law, which successfully transformed eight post-communist CEECs with 75 million people into democratic states and market economies, the ENP is second biggest challenge for EU's external policy. But this is very different challenge.

II. The European Neighbourhood Policy: high hopes

The ENP is based on the set of policies and instruments adopted in last enlargement process: common values, market opening, legal and institutional adjustment, a diversified approach, conditional and targeted assistance, structured political dialogue, including security, cultural cooperation, benchmarking, etc. But it does not offer EU membership—in fact, the membership perspective is only of practical importance for 2–3 countries out of the 16–17 covered by the current version of the ENP. It remains to be seen whether the EU is really an attractive partner when membership is not on offer.

The Commission has stated that the “European Neighbourhood Policy’s vision involves a ring of countries, sharing the EU’s fundamental values and objectives, drawn into increasingly close relationship, going beyond cooperation to involve a significant measure of economic and political integration”.¹ In Europe this applies to Russia, Ukraine, Belarus, Moldova and three states of the Southern Caucasus, Armenia, Azerbaijan and Georgia. In the Mediterranean region, the ENP applies to all the non-EU participants in the Euro-Mediterranean Partnership (the Barcelona process), with the exception of Turkey: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria and Tunisia.

The objective of the ENP is to share the benefits of the EU’s 2004 enlargement with neighbouring countries in strengthening stability, security and well-being for all concerned [...] principally within the fields of the rule of law, good governance, the respect for human rights,

¹ European Commission, *Communication from the Commission: European Neighbourhood Policy*, Strategy Paper, Brussels, 12 May 2004; the following quotations, unless otherwise stated, are drawn from the same document.

including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development [...], the fight against terrorism and the proliferation of weapons of mass destruction, as well as abidance by international law and efforts to achieve conflict resolution [...], to promote infrastructure interconnections and networks, in particular energy. [...] Enhancing our strategic energy partnership with neighbouring countries is a major element of the ENP.

The ENP also provides for “the possible involvement of partner countries in aspects of CFSP and ESDP, conflict prevention, crisis management, the exchange of information, joint training and exercises and possible participation in EU-led crisis management operations”.²

The policy will be implemented through:

[j]ointly agreed Action Plans, covering a number of key areas for specific action: political dialogue and reform; trade and measures preparing partners for gradually obtaining a stake in the EU’s Internal Market; justice and home affairs; energy, transport, information society, environment and research and innovation; and social policy and people-to-people contacts.

A new European Neighbourhood Instrument was “designed in a way to support implementation of ENP and adequate financial resources will be allocated to that effect” after 2006, probably exceeding the present level of EU’s assistance for the whole region, which amounted in 2000–2003 to €3716 million (TACIS: €1332 million; MEDA: €2384 million).³

The Commission rightly stresses that “[i]n the implementation of the ENP it is of utmost importance that the Institutions and Member States act in a consistent and coherent way”, and this is the implementation phase exactly where and when real problems may arise.

There are also less convincing declarations as to the principles of the ENP: “The EU does not seek to impose priorities or conditions on its partners”. Do we really have no intention to promote and even to force ‘priorities or conditions’ established in the ENP? If we do not, it would be senseless to initiate the ENP.

The ENP is good example of ‘European foreign policy’ which is the sum of the EU’s international activities, including output from all three of the EU’s pillars,

² Common Foreign and Security Policy (CFSP); European Security and Defence Policy (ESDP).

³ Technical Assistance for the Commonwealth of Independent States (TACIS); The Euro-Mediterranean Partnership, The MEDA Programme (MEDA).

and not just that relating to the Common Foreign and Security Policy.⁴ The ENP is probably the best ever plan of EU external activities, combining resources from all three pillars, offering a series of horizontal policies structured logically into concrete action plans, with a single financial instrument and prepared in cooperation with the Secretary-General, High Representative for the CFSP. During the last five years, the EU, while simultaneously building a political union and enlarging eastward, has also developed institutional capacity, making its more active participation in international relations practically possible. However, it is precisely this rapid extension that poses new challenges.

The EU is well prepared conceptually and has financial resources and administrative capacity to do the 'democratisation' job around Europe, and the ENP is a good piece of analytical and programming work. However, there may also be concerns because the real test for ENP will come with the implementation phase, which possibly may affect the interests of other powerful players in the four sub-regions covered by ENP: 1) the Mediterranean, 2) the Middle East, 3) Eastern Europe, and 4) the Southern Caucasus. All of these regions are of strategic importance and are partly or fully located in what a renowned expert has called the new 'global Balkans'.⁵

III. European Neighbourhood Policy: concerns

The ENP is an ambitious, complex and far-reaching EU initiative, on a scale planned never before. This is the first time in history that the EU aims to extend its external policies and commitments on such a scale, beyond Europe, into such unstable areas. If successful, it will increase the EU's security and prosperity in an extended area of free trade or even an Internal Market and area of freedom, security and justice embracing all European neighbours. However, there are potential barriers for the ENP's successful implementation.

The first barrier is created by weak political backing from the Member States, which makes the ENP strategy vulnerable and places it surprisingly low on the list of the EU's priorities.⁶ This was caused both by an internal factor (inconclusive

⁴ C. Hill, 'European Union Foreign Policy since 11 September 2001', *Journal of Common Market Studies* (2004) 42/1: 145.

⁵ Z. Brzezinski, *The Choice: Global Domination or Global Leadership* (New York: Basic Books, 2004), p. 42: "Heavily inhabited by Muslims, we might term this crucial subregion of Eurasia [...] between Europe and the Far East [...] the new 'Global Balkans'".

⁶ *Presidency Conclusions*, Brussels, 17–18 June 2004; see p. 15, points 65–67 of the Conclusions, where a short reference to ENP was made.

debate on a Constitution for the EU), and by an external factor (strained transatlantic relations). This connection between the progress of European political union and the quality of EU relations with the USA is natural, and it only goes to show that the ENP is a strategic game.

The second barrier arises from cultural differences between the EU and the regions covered by the ENP.⁷ These differences make it relevant to question the degree of applicability of approaches and instruments used in the CEE, where cultural differences were absent, to the realities of the area covered by the ENP.

In the case of the ENP, the policies and procedures adopted in the last enlargement may prove to be less effective. Practically, most local conditions in the southern Mediterranean, south-eastern Europe, the Middle East and the Caucasus are products of different civilisations: 1) political, institutional and judiciary systems, 2) society and family models, 3) perception of freedom and human rights, 4) financial accountability and transparency, and so forth.⁸

The last EU enlargement was a bilateral game played practically within a Community of shared values and interests (EU-candidate countries). The ENP

⁷ See S. Huntington, 'The Clash of Civilisation?', *Foreign Affairs* (1992/93), 72/3: 22: "It is my hypothesis that the fundamental source of conflict in this new world will not be primarily ideological or primarily economical. The great division among humankind and the dominating source of conflict will be cultural".

⁸ See, for example, *Country Report on Palestinian Authority* (working document), Brussels, 12 May 2004, which presents an impressive list of problems to be solved by ENP: 1) the Palestinian-Israeli conflict and the problem of organised terrorism; 2) the extremely poor court infrastructure, ineffective procedures and lack of training in the judiciary; 3) the existence of ten autonomous police and security forces ('Police unable or unwilling to carry out arrests of criminals and armed militants'); 4) a high level of corruption and lack of public confidence in Palestinian public institutions and financial accountability ('far from being fully operational'); 5) human rights ('international organizations reported numerous violations of torture, ill treatment, detention of persons and use of excessive force, and limited control over interrogation methods'); 6) freedom of the press is restricted and censorship is practiced by the government; 7) equality of rights ('has not been given highest priority in the past'), including a number of issues bearing on women (who account for only 13% of the labour force and who have been subjected to unprosecuted marital rape and 'honour crimes'); and 8) economic crisis (as indicated by a very high dependence on Israel's market and subsidies from the EU; a rate of unemployment of 32%; and the fact that 60% of population lives on a daily income of US\$2). A similar picture is presented by the Polish Centre for Eastern Studies, *CES Project, Interim Project Report, NATO and Its Partners in Eastern Europe and Southern Caucasus*, (2003), Part II. Country Reports: Armenia, Azerbaijan, Georgia: "Like other post-Soviet countries, Armenia has to deal with economic difficulties, malfunctioning of political system and lack of reforms".

will be implemented in a very different environment. It remains to be seen whether the simple transfer of experiences from the CEE to the Muslim and Orthodox traditions within the area covered by the ENP will work.

Corruption is a burning issue in the countries covered by the ENP, and one cannot exclude its becoming the most souring obstacle for implementing the ENP. In the Corruption Index listing 145 countries in the world, only Israel (26), Jordan (37), and Tunisia (39) are not listed among the most corrupt, while others scored very poorly: Egypt and Morocco (tied at 77), Russia (90), Algeria and Lebanon (tied at 97), the Palestinian Authority (108), Moldova (114), Ukraine (122), and Azerbaijan (140).⁹

The reforms envisaged in the ENP within the area of trade, banking and the judiciary (not to mention human rights or functioning democracy) are hardly politically neutral. There will be influential groups of interests which might be against such reforms and they may mobilise public opinion in line with their interests. The changes in trade patterns, in terms of investment or new regulations on gas and oil markets, may be perceived as dangerous for external partners operating for a long time on these national markets.

That brings us to the third barrier to the ENP's implementation: lack of clarity as to the role played by the US and Russia. This time, contrary to the last enlargement, we will have other (at least two) powerful players already present within the ENP zone. These players, even when generally friendly towards the EU, may have goals in the region not fully corresponding with those of the EU, and have the means to undermine or weaken the ENP's implementation. Skilful diplomacy on the part of the EU will be needed to safeguard the ENP's goals.

It remains a mystery as why the US was not mentioned even once in the text of the ENP Strategy. In the area covered by ENP, the US is the primary political, economic and military player, with assets much greater than those of the EU, especially in the energy sector and the financial-banking net (with US financial assistance to Israel alone amounting to US\$80 billion since 1974): "Not only does America benefit economically from the relatively low costs of Middle Eastern oil, but America's security role in the region gives it indirect but politically critical leverage on the European and Asian economies that are also dependent on energy exports from the region".¹⁰

⁹ Internet Center for Corruption Research, *2003 Corruption Perceptions Index (CPI)*, University of Passau, Germany.

¹⁰ Z. Brzezinski, *The Choice: Global Domination or Global Leadership* (2004: 63).

The US leaves no doubts as to the strategic importance of the region and potential dangers resulting from unresolved differences:

For the next several decades, the most volatile and dangerous region of the world—with the explosive potential to plunge the world into chaos—will be the new Global Balkans. It is there that America could slide into a collision with the world of Islam while American-European policy differences could even cause the Atlantic Alliance to come unhinged. The two eventualities together even put the prevailing American global hegemony at risk.¹¹

Political actors in the European Union, when preparing to implement the ENP, should be fully aware that, until EU–US ‘policy differences’ (trade and related issues, environment, subsidies, soft and hard security issues, war against terrorism, and so forth) are not agreed bilaterally, the ENP may even worsen their relations. From this perspective, one may say that alleviating EU–US relations would mean a strengthening of the ENP: transatlantic relations and the European Neighbourhood Policy go together.

Russia, albeit for different reasons, is also an important partner in the ENP’s implementation, and especially in Eastern Europe, the Southern Caucasus and the Middle East. Moreover, after the enlargement of 2004 the EU has no clear vision of its relations with Russia, its direct and biggest neighbour. Strategic partnership was declared in 1999, but in fact relations between the two sides have not really advanced. The partnership is rather formal and has been poisoned mainly by Russia’s unacceptable behaviour in Chechnya and its bad record on democracy and human rights.¹² Lack of unity in the approach to Russia is clearly visible on the EU side and this is exacerbated by the initiatives of largest Member States to deal with Russia bilaterally. Presently, the EU has placed high hopes on the concept of creating four common spaces with Russia: a common economic space, a common space of freedom, security and justice, cooperation in the field of security, and a space of research and education.

This general lack of clarity in how to deal with Russia is reflected in the ENP: is Russia a partner or addressee? The experiences that can be drawn from the

¹¹ Ibid., p. 59. See also, A. Lieven, ‘The Secret Policemen’s Ball: the United States, Russia and International Order after 11 September’, *International Affairs* (2002) 78/2: 257.

¹² A. Harasimowicz and P. Żurawski vel Grajewski, ‘European Union Policy Towards Russia and Ukraine: The Tasks for Polish Foreign Policy’, *Studies & Analyses* (2003) II/3: 33, ‘Polska w Europie’ Foundation, Warsaw.

Northern Dimension (ND) as to the democratisation of Russia as a function of cooperation with the EU are not very encouraging:

The specific regional multilateral nature has been both the strength and weakness of the ND. The exclusion of hard security and other politically sensitive issues has helped to make the initiative uncontroversial and acceptable to all partners. While hard security issues tend to be politically sensitive and conflict-oriented, the improvement of soft security problems requires and promotes cooperation.

However, the weaknesses of this focus are apparent. To the extent that the ND pursued the larger aim of promoting good-neighbourly relations between the EU and Russia, it can hardly be called a success, considering the current state of the relationship. It is also questionable whether the ND has helped to soften the dividing line on the EU's north-eastern border. It has not touched upon politically and strategically important issues such as, for example, the situation of democracy and human rights in Russia, relations between Russia and the Baltic States, or the status of the CFE Treaty (Conventional Armed Forces in Europe) in the region.

The large number of actors has also been a burden and not just an asset. One can speak of an overload of institutions in the region: the preparation and implementation of the ND has involved, in addition to EU institutions, the Council of Baltic Sea States, the Barents Euro-Arctic Council, the Arctic Council, and the Nordic Council of Ministers. At the same time the ND has lacked its own organization and budget.¹³

Contrary to the role of the US, Russia's important role for the ENP does not result from its power but from its weakness which, paradoxically, gives it a huge potential to export or to control instability in the region. The ENP's most salient goals, namely, the fight against terrorism and the proliferation of weapons of mass destruction, efforts to achieve conflict resolution, safety of energy supplies, cross-border cooperation, the environment, human rights and the protection of minorities, etc., are all highly dependent on Russia's loyal cooperation. Few things would be worse for the ENP than an uncooperative and frustrated Russia along the 1,000-kilometre long, remote borders of the ENP's south-eastern regions. The experiences gained by the EU hitherto show that such cooperation cannot be taken for granted. One may cite a long list of factors that could facilitate Moscow's loyal support for the ENP: liberal reformers in the Kremlin, low oil prices,

¹³ K. Raik, 'Finland and Northern Dimension: towards a broader approach?', paper delivered at Warsaw-Natolin working seminar on The Eastern Policy of the enlarged Union—new fields of cooperation, 13–14 May 2005.

diplomatic deals or formidable pressures from the Far East, but these are mostly accidental in nature. The real issue and most solid guarantee for Russia's ability and will to cooperate with the EU in implementing the ENP is a *well-functioning democracy*.

This conclusion strengthens the view that the ENP should be a top priority for the EU and should be implemented at the level of grand strategy. This is probably the most important immediate political response, along transatlantic relations, to the enlargement of 2004.

The roles of the US and Russia in the ENP are generally different, but they are similar in one respect: both need EU pre-emptive agreements on a bilateral level with the US and Russia to avoid a situation in which such policy differences dominate and possibly destroy the agenda and implementation efforts of the ENP. Until bilateral issues are resolved, the ENP is in danger. For this reason a thorough political guidance and backing from the highest EU level is vitally needed. Without priority status, clearly, the ENP may trigger competing EU-US-Russia policies in the area. The ENP has strategic and global implications and its effective implementation will require thorough political guidance from the European Council and European Parliament as well as well-balanced and coherent initiatives on the part of the General Affairs and External Relations Council. An incoherent and unguided ENP may prove counterproductive and weaken the EU's international position and political unity. What is at stake in relation to the ENP is democracy and a stable security in vast regions of Eurasia and the Mediterranean (25 million square kilometres), in a turbulent area of three major monotheist religions and different races, settled by more than thirty nations with a long record of wars, competition and hatred, and inhabited by 850 million people. If carried out successfully the ENP will enable all these people to live in cooperative harmony and prosperity within a relatively high integrated economic, legal and political frame within the space of 15–20 years.

On the other hand, historians used to characterise this 'frame' as *empire*. Romano Prodi, President of the European Commission, left no doubt as to this imperial dimension when answering a question on the optimal level of the EU's integration with the area covered by the ENP: "Everything but institutions", meaning that decision-making power remains in Brussels.

In Europe the terms 'empire' or 'imperialism' do not have entirely positive connotations with an ever present element of coercion. But is there really anything wrong with a friendly human empire? Not at all, some would argue, provided that democracy functions, human rights are observed, and sustainable

growth corresponds with stable security, and so forth. However, the true source of ambivalence the Europeans have with 'empire' is the sequence they know well from the history of the Roman, British, Ottoman and all other Empires: rise, growth and fall. Can we avoid the fall? Is good governance and democracy a prescription for everlasting empire? There is no one simple answer to these questions. What is clear, however, is that we should be more aware that in launching the European Neighbourhood Policy the European Union is entering into a new intercultural phase of development, and with it, the EU will increasingly be a producer of global security and stability.

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