RECONSTITUTING DEMOCRACY IN EUROPE

WP 2 – The Constitutionalisation of the EU, the Europeanisation of National Constitutions and Constitutionalism Compared

Research Report

European Integration from the Baltic Perspective

Constitutional Challenges, Conflicting Interests and Eastern Neighbours of the EU

Tatjana Evas (ed.)

December 2011

Table of contents

Outline of the report

Tatjana Evas
Jean Monnet Centre for European Studies, University of Bremen

The contributions to the present volume are substantially reworked conference papers that were presented at the RECON Workshop '*European Integration – Challenges and Visions from the Baltic Perspective: Debates on the Future of Europe from the Constitutional to the Lisbon Treaty and beyond*' on 20-21 November 2008 at the Riga Graduate School of Law.[1]

The following section gives an overview of the main arguments that the contributors to this report bring to the better understanding of the process of European Constitutionalisation from a Baltic perspective. Analytically the report has two Parts. Part I (Chapters 1-7) adopts an internal EU outlook and explores the European constitutional process, including the enlargement and reforms of the founding Treaties, from the perspective of the Baltic countries. Part II (Chapters 8-13) shifts the focus from internal EU policy to the highly politically acute issue in the Baltic region, namely, the EU policy and relations of the Baltic countries with the immediate Eastern neighbours.

Part I: Legal challenges and dilemmas in the process of EU reforms

In the first chapter, the editor explores how Eastern enlargement is influencing the constitutional dynamics of the European Union. Evas outlines and discusses four interconnected challenges posed by Eastern enlargement for the process of EU constitutionalisation: (1) legal-political; (2) economic; (3) deliberative; and (4) geo-political, partnership with Eastern non-EU neighbours. Evas argues that the democratic meaning, significance and positive dimensions of the Eastern enlargement for the EU are not adequately addressed in the academic literature and often misconceived in the public debates in the 'old' member states.

Irmantas Jarukaitis (Chapter 2) and Vytautas Siriojs Gira and Laurynas Kasčiūnas (Chapter 3) address the question of EU democratic legitimacy and the EU's constitutional future against the background of the EU Constitutional Treaty ratification failure.

Jarukaitis, building on an extensive review of the literature and adopting a comparative constitutionalism approach, compares the EU Constitutional Treaty with the Lisbon Treaty in order to answer the questions to what extent the EU is a *sui generis* constitutional community and how well the formal abandonment of the constitutional language of the Constitutional Treaty by the European Council correlates with the essence of the Lisbon Treaty. The analysis is supplemented with insights from the jurisprudence of the Lithuanian Constitutional Court. Jarukaitis concludes that in spite of the formal rejection of the EU Constitutional Treaty the constitutional process in the EU continues and with the adoption of the Lisbon Treaty the 'EU would become a "more serious constitutional entity"' than under the pre-Lisbon legal framework.

In their critical assessment of the democratic foundations of the EU and the role of Lithuania in the common house of the EU, Siriojs Gira and Kasčiūnas argue that the EU is faced with serious democratic challenges both at the political and the institutional level, including among other things, lack of participation of people in the decision-making process on the European level. Reviewing different possible scenarios for EU

[1] For the programme and further details, please see: <http://www.reconproject.eu/projectweb/portalproject/RigaNov08.html>.

development, Siriojs Gira and Kasčiūnas conclude that under current EU arrangements Lithuania should attempt to increase its structural power in the EU decision-making process. In discussing the Lithuanian position, Siriojs Gira and Kasčiūnas argue that Lithuania is against a further federalisation of the EU and at the same time that a dissolution or pure intergovernmentalism is also against their perceived national interests.

The contribution by Živilė Šukytė (Chapter 4), offers an example of a detailed analysis of the Lithuanian experience in the EU agricultural policy. Scrutinising the meaning, understanding and practice of democracy at the national and EU level, Šukytė argues that both levels face a democratic legitimacy crisis. On the EU level, policy formation is highly technocratic and complex. Small countries like Lithuania, due to lack of experience and equipped with very limited institutional and human capacities, have difficulties in effectively representing their national interests at the EU level. Šukytė points out that on the national level, EU policy formation and implementation is a process driven by the political elite (often initiated by the populist self interests of party leaders) with little participation of other actors, including for example non-governmental organisations (NGOs) and the public at large. Thus, to enhance the democratic functioning of the EU, both reforms at the national and EU level are necessary. Šukytė concludes that democracy at the EU level should be reconstituted through better coordination between national and EU political institutions, which could best be implemented through the model of a federal multinational democracy.

In Chapter 5 Christoph Schewe addresses the possibilities and current practice of cooperation between the three Baltic States on EU legal matters. Schewe concludes that in general (with exceptions in some policy fields), although a number of inter-Baltic institutional structures exist, there is still little synergy and cooperation among the Baltic countries in terms of elaborating common strategies on EU policies and law-making. Schewe argues that a closer Baltic integration could enhance the efficiency of national EU politics and contribute to a more effective articulation of national interests at the EU level.

In Chapter 6 Uladzislau Belavusau reconstructs the Laval case in the context of enlargement and concludes that although Laval is indeed benefitting the Latvian providers of services, it is not correct to argue that this judgment and the reasoning of the European Court of Justice (ECJ) significantly undermined the position of social rights in Europe. Moreover, Belavusau points out that the ECJ judgment in the Laval case follows the reasoning and practice of the European Court of Human Rights.

Auksė Balčytienė and Aušra Vinciūnienė present in Chapter 7 research findings on the information management presses in Lithuania and Estonia. On the basis of the findings of the AIM project and interviews with Lithuanian journalists covering EU matters for Lithuanian publics, Balčytienė and Vinciūnienė argue that the Baltic media is characterised by a high level of commercial logic and low level of social responsibility of journalists.

Part II: Neighbourhood policy, Eastern enlargement and relationships with Eastern neighbours

In Chapter 8 Toms Rostoks analyses the emerging patterns and challenges related to the EU's Eastern Partnership Initiative and the Latvian national position in this context.

Roman Petrov discusses and compares new developments and future perspectives in cooperation between EU and Ukraine and EU and Russia in Chapter 9. This theme, but in relation to the cooperation between Belarus and EU, is also analysed by Aliaksei Anishchanka and Maryia Yurieva in Chapter 10.

In Chapter 11 Alena Babkina addresses the relationship between the EU and Belarus and offers an extensive analysis of the resolution mechanisms to conflict of law problems in commercial disputes. Babkina argues that Belarusian legislation regulating conflicts of law generally corresponds to the provisions regulating conflict of law in the EU. Vadzim Samarin complements the assessment of cooperation between Belarus and EU through the analysis of legislative acts and practice in relation to legal assistance in criminal matters in Chapter 12.

In the final chapter of the report, Chapter 13, Csaba Törő examines the legal arrangements of the highly politically charged and economically complex project of the North Stream gas pipeline under the Baltic Sea. Törő effectively shows that economic initiatives of this scale touch upon not only country-specific interests but also regional and EU wide security and environmental concerns.

Part I

Legal challenges and dilemmas in the process of EU reforms

Chapter 1

Editorial note

EU constitutionalisation from the Baltic perspective

Tatjana Evas
Jean Monnet Centre for European Studies, University of Bremen

'*Europe did an extraordinary thing, namely [Eastern] enlargement […] as a major contribution to peace*'
(Jonas Gahr Støre, 25 November 2011)

It is fascinating to observe how Eastern enlargement has influenced and is still influencing the constitutional dynamics of the European Union (EU). One cannot but agree with Norwegian Foreign Minister Jonas Gahr Støre (2011), that Europeans have still not fully appreciated the democratic meaning and significance of the peaceful transformation and integration of the Eastern and Central European member states. The national Constitutional Treaty debates and ratification failures (Liebert, 2007), but even more so, the current EU crisis are examples of how the existing vertical and horizontal asymmetries of the labour and financial markets in the EU-15 became more evident if not painful within the societies of the EU-27. Estonia and Latvia have been amidst those member states that harbour deeply contested understandings of the process of constitutionalisation of the Union. Shortly after their accession, Latvia (*Laval* case)[1] and Estonia *(Viking* case)[2], through litigation in the Court of Justice of the European Union (ECJ), have been versed in one of the most furious recent debates on the socio-economic diversity in the enlarged EU.

Questions informing the line of *Laval*, *Viking* and *Ruffert* litigation in the ECJ, as well as reactions by academia to those ECJ decisions, have had wide constitutional implications not only for EU law, but also for the common understanding of the constitutional transformation of the EU in the new legal, political and social realities of the enlarged Europe. Based on what normative and legal conditions should EU continue its constitutional development? Can increased heterogeneity of constitutional traditions and cultures of the EU member states be inclusively accommodated in the enlarged EU? Is the solution to the current crisis and vector for the democratic development of the EU – the return to intergovernmental cooperation (model 1)? Or is it rather the formation of a federal state-type entity (model 2), or a supranational union based on cosmopolitan values (model 3)? (Eriksen, 2009; Fossum and Menéndez, 2011; Eriksen and Fossum, 2012).[3]

[1] C-341/05 *Laval v Bygnadds et al*. [2007] ECR I-11767.

[2] C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

[3] The Reconstituting Democracy in Europe (RECON) project tests these three competing options for the reconstitution of democracy in the European context (Eriksen and Fossum, 2012): first, democracy in Europe could be reconstituted at the national level, with a concomitant reframing of the EU as a *functional regulatory regime*; second, democracy could be reconstituted through establishing the EU as a *federal state* based on a collective identity; third, democracy in Europe could be reconstituted through developing a *post-national Union* with an explicit cosmopolitan imprint. For more details on the project, see: <http://www.reconproject.eu>.

In the context of the EU Sixth Framework Programme Integrated Project 'Reconstituting Democracy in Europe' (RECON) the present report brings together contributions from leading experts from Estonia, Latvia, and Lithuania to explore the EU's constitutional future from a Baltic perspective. Through analysing constitutional and legal-institutional adaptations at the national levels as well as the role of the intermediary organisations and mass media in each country, this report seeks to explain and compare the prospects for democracy in Europe as conceptualised by the three RECON models in the context of selected Baltic countries. Informed by the geopolitical location of the Baltic region and the historical legacy of the Soviet Union, in addition to the contributions analysing the dynamics of the EU constitutional process (Part I), the report also contains a number of contributions on the position of Baltic countries on EU Neighbourhood policy, Eastern enlargement and their relationships with Eastern neighbours (Part II).

The main questions addressed in the report include the following: first, what are the positions of the main political and social/economic actors from the Baltic countries on the reform of the European Union? In other words what are the 'visions' and understandings of the legal-political construction of the European Union in the context of the on-going reforms and possible further enlargements? Second, building on the RECON models, what are the Baltic countries' position(s) on the further construction and reform of the European Community and understanding of the meaning/functioning of supranational democracy? Third, what are the models of co-operation and the position of the national actors from the Baltic countries on the Eastern non-EU member countries (with specific but not exclusive focus on Belarus)?

The report introduces a little-known literature that has emerged from the process of EU enlargement, with scholarly as well as practice oriented contributions from the three Baltic countries on the constitutional process of the Union. It thus aims to fashion a broader understanding of the EU's constitutional dynamics that considers enlargement as a new normative frame of reference. In line with the theory of constitutional synthesis that understands the European constitutional process as a social practice defined by the 'double constitutional life' of national constitutions (Fossum and Menéndez, 2011), we bring together insights about the national post-accession experiences. In order to clarify how EU constitutional dynamics have been understood by the new eastern member states and what eastern enlargement brings to the development of the EU, we focus on four central challenges to the EU: legal-political, economic, deliberative and geopolitical.

Eastern enlargement as a challenge to the EU's legal-political constitutionalisation

In current political debates in Europe as well as in the academic literature, the importance of enlargement is often confined to three sets of debates: 'economic', 'institutional' (Hix and Noury, 2009) and 'cultural' (with particular focus on diversity). The legal-political debate is often side-stepped, especially in terms of normative values, ideas, and visions of the process of EU constitutionalisation in the new geographical and historical frames. Therefore, instead of prioritising socio-political debates and academic scholarship searching for new frames representing common understandings of the normative constitutional foundations and structures of the EU-27[4] the legal-political dimension is often reduced to the 'compliance oriented' approaches where the new EU-12 membership is urged to accept and act in full compliance with the systemic-dogmatic characteristics of the old EU-15.[5]

[4] See, however, RECON's Work Package 2 on the constitutionalisation of the EU, the Europeanisation of national constitiutions, and constitutionalism compared, more details at: <http://reconproject.eu/projectweb/portalproject/WP2.html>.

[5] This is not to suggest that compliance based analysis is not important but rather that it is not sufficient for the understanding the democratic dynamics of the EU.

The normative debate on the role and the future development of the EU as well as the role of citizens however is not absent in the national arenas of the Eastern member states. Consider the ratification of the Lisbon Treaty in the Czech Republic and Poland. The democratic challenge to the constitutional process of the EU as well as national EU politics was equally centrally staged in the ratification of the Lisbon Treaty in Latvia. In 2005, the day following the French 'No', the Latvian parliament ratified the Treaty Establishing a Constitution for Europe.[6] Equally, without intensive deliberations the Parliament ratified on 8 May 2009 the Lisbon Treaty by adopting the law 'On the Treaty of Lisbon Amending the Treaty on the European Union and the Treaty Establishing the European Community'.[7] The lack of public debate and a politically driven process of ratification of the major EU reforms in Latvia led to a complaint to the constitutional court.[8] In the constitutional complaint a group of citizens, argued, *inter alia*, that the failure to call a public referendum on ratification of the Lisbon Treaty violated their constitutional rights to participation in the state affairs (Evas and Liebert, 2011; Evas, 2012). Latvian citizens have been discontent due to their lack of participation in EU decision-making. Similar criticism and detachment of people from the EU policy-making and national political process was also voiced in Lithuania (see Siriojs Gira and Kasčiūnas, Chapter 3 in this report).

The report contributes to this normative debate from the perspective of the Lithuanian and Latvian experiences. Two contributions by Irmantas Jarukaitis and Vytautas Siriojs Gira, and Laurynas Kasčiūnas address the question of EU democratic legitimacy and the EU's constitutional future against the background of the EU Constitutional Treaty ratification failure. Živilė Šukytė argues that both national and EU levels face the democratic legitimacy crisis where small countries like Lithuania have difficulties to effectively represent national interests at the EU level. This finding by Šukytė is also confirmed by recent comparative studies on representation of new member states in European Parliament committees and decision-making in the Parliament (Kaeding and Hurka, 2010). While the limited human and financial resources and well as lack of experience still negatively influence the representation and political representation of small new member states, as Christoph Schewe points out, there is still little synergy and cooperation among Baltic countries in terms of elaborating common strategies on EU policies and law-making in the EU.

Enlargement as a challenge to the 'economic constitution': Labour, money, land

In the context of the developments triggered by the widening of the Union, the conceptualisation by Hungarian historian Karl Polanyi (1944) of the transformation of modern societies has received considerable attention by scholars to explain the current dynamics and the crisis of the EU (see e.g. Joerges, 2011). Polanyi explained the politics of national contestation through the tensions between the society and the forces of expanding markets, specifically the commodification of land, labour and money, so-called 'three fictitious commodities'.

Without necessarily agreeing with the theoretical foundations of the Polanyian approach or the current accounts based on Polanyi's theory, the semantic banners of three 'fictitious commodities' and more generally *conflict and genuine balancing of liberalisation and social protection* within the state and in the EU captures well the challenge deriving from Eastern enlargement.

---

[6] For details see transcript of the parliamentary debates from 2 June 2005. Available at: <http://www.saeima.lv/steno/2002_8/st_050602/st0206.htm> (last accessed 30 December 2011).

[7] For the transcript of the parliamentary session discussion on 8 May 2008, see: <http://www.saeima.lv/steno/Saeima9/080508/st080508.htm> (last accessed 30 December 2011).

[8] Case No. 2008-35-01, Latvian Constitutional Court [2009].

Eastern enlargement has been mistakenly instrumentalised in national public debates and in the media as a dividing line, as a new ideological cleavage between 'old' and 'new', between a more developed 'west' and a still catching-up 'east' or between a more 'social' west and a more 'liberal' east (Liebert, 2007). Confronted with the institutional and economic challenges the EU is facing there has been a growing trend to focus primarily on what is perceived as the negative consequences of enlargement, including, to name but a few, economic slowdown, instability of the financial markets, erosion of national welfare systems, and social dumping. In other words, it is highly tempting to reduce the *problematique* of the current EU crisis to the costly downside of enlargement. The available empirical studies, however, across policy fields such as, for example, the decision-making processes in the European Parliament (Hix, 2009), in labour market policy (Guerrieri, 2008) and in trade unions *(*Crespy and Gajewska, 2010) all disconfirm the perception that enlargement had mainly negative effects. Thus, negative approaches to Eastern enlargement have often been not only short-sighted and lacking in empirical evidence but have also precluded the emergence of innovative solutions to current problems of European integration.

The field of *labour* market mobility was at the centre of attention during the immediate pre-accession and post accession period. The (in)famous 'Polish plumber' became well known across the EU in the Constitutional Treaty debates. In fact, fears about the influx of labour immigrants from Eastern member states and the disturbance of national equilibriums between market and social protection developed through the years arguably contributed to the 'no' vote of the French citizens in the Constitutional Treaty ratification referendum in 2005. The potential distortions of the labour markets and welfare systems also resulted in a number of legal measures including transitional restrictions for up to seven years on the labour market mobility imposed by Germany and Austria (for criticism see e.g. Reich and Harbacevica, 2002).

Following the heated debates on the Services Directive (Directive 2006/123/EC of 12 December 2006 on services in the internal market), on EU labour market mobility and on the freedom to provide services again polarised East and West in the context of the posted-workers Directive. The series of ECJ *Laval*, *Viking* and *Ruffert* cases highlighted deep controversies. Regrettably, the predominant understanding of the essence of the two cases is focused on the contrast between 'old' and 'new' member states and not on the principles of solidarity and social foundations in the enlarged EU. Christian Joerges defines the *problematique* of the two cases as follows:

> In both cases, 'old' (high wage) Member States defend the principle that their wage level must not be eroded by low wage offers from the new Member States, and invoke the economic freedoms guaranteed by the Treaty that they had made strategic use of in the past, namely in order to operate at home at the wage levels of their eastern neighbors.
>
> (Joerges, 2008: 246)

This account is only partly correct. It is true that the differences between wage levels in the Nordic and Baltic countries are substantial. It is equally true that wage differences informed the action of the trade unions. However, the central legal questions addressed in the case by the court was not *per se* on the wage gap but rather on the conditions under which restrictions to the freedom to provide services are acceptable and whether national practice on collective bargaining that is not codified in the legal rules could be considered as a legitimate restriction to one of the basic Community freedoms. Importantly, the court did not deny that social policy objectives can in principle overbalance the Community economic freedoms provided certain conditions are met.

The Court recognised that the right to take collective action is a fundamental right that forms an integral part of the general principles of Community law (paragraphs 90-91).

The Court also recalled that even under Swedish constitutional law the right to take collective action may be exercised unless otherwise provided by law or agreement (paragraph 92). In other words, this right as other fundamental rights both under national and EU legal doctrine are not unconditional. Furthermore, the Court has pointed out - with reference to the previous case law - that under certain conditions the protection of fundamental rights is a legitimate interest which may justify a restriction on the four fundamental freedoms. However, in balancing freedom to provide services with fundamental right to take collective action the Court found that the current national practice on determining minimum pay is overly difficult or even impossible for a foreign company to comprehend. Put it differently, not the existence of the national practice on collective action but rather a lack of sufficiently precise and accessible national rules that determine the obligations which foreign undertakings must comply with is not an acceptable obstacle to freedom to provide services. Thus, as Reich (2008: 160) accurately concluded that the *'Laval* case […] concerned a "non-proportional" social action of labour unions against service providers and their workers from another, namely a "new" Member country; this action violated the principle of solidarity in the EU and was clearly aiming at protecting and segregating the national (Swedish) labour market from competition'. In the present volume Uladzislau Belavusau generally shares this account and additionally points out that the ECJ judgment in the *Laval* case follows the reasoning and practice of the European Court of Human Rights.

The 2008 global financial crisis hit the three Baltic countries extremely hard and in comparative terms considerably more substantial than the EU average and even the rest of the world (except Ukraine). Thus, if average decline in GDP in EU in 2009 was 4.2 percent, USA 2.7 percent and Japan 6.3 percent than decline in Latvia was 18 percent, in Lithuania 14.7 percent and Estonia 13.9 percent (European Commission, 2011: 204). In 2008-2009 Latvia experienced severe financial crisis resulting in the harsh austerity measures forced by European Union and International Monetary Fund. Against those serious financial and monetary difficulties the Baltic countries showed remarkable persistence and achievements in their capacity to overcome the crisis.

Despite pessimism in the euro zone following the Greek crisis and doubts by leading European Central Bank officials on the preparedness of Estonia to adopt the euro (Tere, 2010), Estonia was able to comply with the euro zone requirements and adopted the euro from 1 January 2011. In the same way Latvia became a positive reference point to suggest that concerted action by major world financial players coupled with efficient institutional measures result not only in the stabilisation but also in the recovery of the national economy and growth in a very short time.

The importance of the accession to euro zone for the Baltic countries goes beyond pure rational choice motivations and signifies the belonging to the fundamental core of the EU states as well as beginning of new phase in the history of the country. The President of Estonia, Toomas Hendrik Ilves, addressing the Estonian parliament in September 2010, defined the importance of accession to the euro zone as follows:

> The transition of Estonia to the euro marks completely new phase in the domestic and foreign policy. We have arrived. Estonia's nearly 20 years long journey back to Europe at least formally and institutionally came to the end. To put it simply – the transition period is over and with that the pretexts and excuses retrieved from our difficult past are no longer valid. No longer rules or objectives would be set by someone else. We fulfil our obligations and agreements with our allies and parents and as co-decision makers also voice common goals, but from now on formulating new objectives and directions are primarily our own deed. What society and the state we want, what do we want to become, what to aspire for? What is our ideal? And what is central – whether a new development phase requires change in our way of thinking and action?
>
> (Ilves, 2010)

There are increasingly strong voices calling to take a closer look at the efficient fiscal and monetary crisis management experiences in the Baltic countries (Åslund, 2010; Åslund and Dombrovskis 2011). Based on the analysis of the European Financial Crisis in 2008-2010 and specifically the Baltics experience Anders Åslund concludes:

> Western Europe will have to learn from Eastern Europe, erasing the current division between first- and second-class members within the European Union. The East European countries have persistently had much higher growth rates than the West European countries, and economic convergence between them in terms of GDP per capita has been impressive for the last nearly two decades. Thanks to the East Europeans, the West Europeans have slashed their corporate profit tax rates and have also been enticed to liberalize their labor markets. Now, they will also learn fiscal policy from the east. Rather than being the laggards, the East Europeans will be the leaders in economic policymaking.
>
> (Åslund, 2011)

In December 2011 Estonian Prime Minister Andrus Ansip and Latvian Prime Minister Valdis Dombrovskis were awarded the Friedrich August von Hayek Foundation prize for implementing a liberal economic policy. This prize had earlier been awarded by the Germany based foundation to Margaret Thatcher (2003), Mario Monti (2005) and Vaclav Klaus (2009), among other political leaders. In his opening address during award ceremony Leszek Balcerowicz (2011), the former vice Prime Minister of Poland and former President of the Central Bank of Poland, characterised the Prime Ministers of Estonia and Latvia as 'the most radical free market reformers in Central and Eastern Europe' and underlined that the achievements of Estonia and Latvia serve as role models for the international community. In contrast to Greece and Portugal, the political leadership in Estonia and Latvia was able to take measures to contain the fiscal crisis, maintain fiscal stability and sharply reduce labour costs to recover the competitiveness that lead to the fast re-emergence of growth (Balcerowicz, 2011).

Enlargement as a challenge to the active participation in the public sphere

In addition to the socio-political and economic challenges, the enlargement and the accession to the EU also brought new challenges to the European public sphere. In comparison to the citizens in 'old' member states, citizens in the Baltic states often have less limited quality coverage of European issues (for comparison, see Liebert, 2007; on Estonia and Latvia, Evas, 2007). Ansis Bogustovs (2008), who has first hand experience working as a Latvian public TV journalist in Brussels, argues that Baltic media unfortunately is very weakly presented in Brussels and coverage of EU events is still rather poor. Bogustovs points out that faced with constant personnel change, due to financial limitations, the coverage of EU news and events is incidental, incremental and often with a low level of professionalism. Auksė Balčytienė and Aušra Vinciūnienė support the critical outlook of Bogustovs. On the basis of the findings of the AIM project and interviews with Lithuanian journalists covering EU matters for Lithuanian publics, Balčytienė and Vinciūnienė argue that the Baltic media is characterised by a high level of commercial logic and low level of social responsibility of journalists.

Enlargement as geopolitical challenges: EU Neighbourhood Policy

The dimension of the land in the Baltic countries is most and foremost concerned with issues of security and defence and cooperation with Eastern neighbours. The Prime Minster of Estonia, Andrus Ansip, in addressing the Estonian Parliament stressed:

> In relation to Estonia it should never be forgotten that we have joint European Union first and foremost for security considerations. All Estonian people know that EU is not a NATO, it is not a security and defence organization, but at the same time our people know, that when EU project was initiated, that it was a foremost a war preventive project, and our people remember very clearly what were the

> consequences of the last war. On those reasons EU as a peace project for Estonia is of outmost importance.
>
> (Ansip, 2011)

Contributions to the present report confirm the strategic importance of the EU neighbourhood policy for the Baltic countries.

Conclusions

The intense and rich presentations and discussions during the workshop in Riga as presented in this report allow us to draw some preliminary conclusions on the overall lessons that can be learned from the challenges of European enlargement in general, and from a Baltic perspective specifically.

While the three Baltic countries Estonia, Latvia and Lithuania are small, geographically close and have joined EU at the same time, there is more competition than cooperation among these countries (Schewe, Chapter 5). Thus, on the legal, political and public mass media levels the 'competition logic' that has signified the pre-accession negotiations stage still prevails.

The EU policy formation and implementation at the national level is a political elite-driven process with little participation of other actors including for example non-governmental organisations (NGOs) and publics at large (Šukytė, Chapter 4). Thus, to enhance the democratic functioning of the EU both reforms at the national and EU level are necessary (Jarukaitis, Chapter 2), in particular more active participation of citizens in the decision making process. The predominant understanding of political elites in these three countries is to seek enhanced competences of the EU and closer cooperation among EU countries in the fields of energy and security policies and continue a more liberal competitive regulation of other policy fields. Thus, although it seems that the 'federal model' of the further development of the EU is not considered to be in the best interest of the Baltic countries, the 'intergovernmental model' also cannot fully meet the national interests (Siriojs Gira and Kasčiūnas, Chapter 3).

The mass media as well as intermediary organisations from Baltic countries play a significantly less permanent role in the national context than their colleagues in 'old' member states. Thus, mass media, have not yet fully accepted the social responsibility for being a 'watchdog' of EU affairs for national publics. The limited financial and human resources in the context of the small, liberal and concentrated media markets lead to a commercialisation of EU coverage (Balčytienė and Vinciūnienė, Chapter 7). Trade unions and civil society organisations, while formally present in European and international networks, have still not developed their full capacity to undertake coordinated efforts on EU policies. The *Laval* and *Viking* cases from the ECJ have directly impacted Baltic countries and have been the first lessons for national political elites and trade unions on the uneasy accommodation of the appropriate level of social protection of workers enjoying the EU freedom of movement (Belavusau, Chapter 6).

Cooperation with Eastern neighbours on security issues is an important cross-cutting theme in the national discussions on the further development of European integration and the understanding of supranational democracy in all countries (Rostoks, Chapter 8; Petrov, Chapter 9; Törő, Chapter 13). At the same time the current scheme of EU cooperation with Belarus, Russia and Ukraine, through the Eastern Neighbourhood Policy (ENP), does not fully correspond to the national strategic interests of the Baltic countries nor is it fully effective from the perspective of other neighbouring countries, like Belarus (Anishchanka and Yurieva, Chapter 10; Babkina, Chapter 11; Samarin, Chapter 12).

In conclusion, the impact of enlargement on the socio-political, economic, geo-political as well as deliberative constitutionalism in the EU needs further analysis and a re-

conceptualisation of the analytical approaches to the analysis of the EU. As the chapters in this report indicate, the 'labour', 'money' and 'land' became to some extent the dividing lines between 'old' and 'new' member states (Evas, Chapter 1). Those dividing lines are not always rationally justified or even empirically proven but they reflect deeply rooted national perceptions. Further analysis of the constitutional dynamics of the EU that is able to accommodate EU increasing diversity is urgently needed.

Postscript

The contributions to the present volume are the conference papers that have been presented in Riga at the RECON Workshop '*European Integration – Challenges and Visions from the Baltic Perspective: debates on the Future of Europe from the Constitutional to the Lisbon Treaty and beyond*' on 20-21 November 2008, and thus all the papers reflect the situation as of November 2008.[9] The reader is invited to judge on his/her own whether the subsequent political and economical developments in the EU proved the arguments of the authors correct.

The editor preserved the original style and format of the contributions. Since the main aim of the workshop was to initiate the debate and reflections we invited contributions to the conference and to the current volume not only from academics but also from practitioners and journalists. This results in a somewhat 'incoherent' academic level of the contributions that on another hand provides a possibility to the reader to immerse to the fullest into the ideas and discussions from a variety of disciplines and personal experiences of the contributors presented at the workshop as reflected in the current report.

[9] The editor would like to thank Professor Dr. Lesley Jane Smith and Helena Stare as well as all other Riga Graduate School of Law colleagues who have helped organise the RECON Workshop in Riga in November 2008 and Susan-Gale Wintermuth for the language editing. Special thanks for editing, formatting and great assistance in preparation of this report to Hanna Karv from ARENA, University of Oslo. The Riga RECON Workshop was organised as a part of the research activities of the RECON project WP 2 'Constitutional Politics' in cooperation with the Latvian Diplomatic Mission in the Republic of Belarus.

References

Ansip, A. (2011) 'Estonian and Latvian Prime Minister Awarded Hayek Prize for Liberal Economic Policy', Estonian Government Communication Unit, 4 December 2011. Available at: <http://www.valitsus.ee/en/news/press-releases/50372/estonian-and-latvian-prime-minister-awarded-hayek-prize-for-liberal-economic-policy>.

— (2011) Transcript of the Parliamentary Session from 15 November 2011, Riigikogu, Tallinn.

Åslund, A. (2010) *The Last Shall Be the First: The East European Financial Crisis 2008–10*, Washington: Peterson Institute for International Economics.

Åslund, A. and Dombrovskis, V. (2011) *How Latvia Came through the Financial Crisis*, Washington: Peterson Institute for International Economics.

Balcerowicz, L. (2011) Opening Speech at the Hayek Prize Award Ceremony, December 2011. Available at: <http://failiem.lv/u/xflnwcj>.

Bogustovs, A. (2008) 'No watchdog, no worries...', RECON Conference Presentation, Riga, 21 November.

Crespy, A. and Gajewska, K. (2010) 'New Parliament, New Cleavages after the Eastern Enlargement? The Conflict Over the Services Directive as an Opposition between the Liberals and the Regulators', *Journal of Common Market Studies*, 48(5): 1185-1208.

Eriksen, E. O. (2009) *The Unfinished Democratization of Europe*, Oxford: Oxford University Press.

Eriksen, E. O. and Fossum, J. E. (eds) (2012) *Rethinking Democracy and the European Union*, Abingdon: Routledge.

Evas, T. (2007) 'Elitist with a Russian Twist: Mass Media Discourses on European Constitutional Ratification in Estonia and Latvia', *Perspectives on European Politics and Society*, 8(3): 373-413.

Evas, T. (2012) *Domestic Courts and Application of European Union Law: Sources and Methods of Coherence: Westphalian, Regulatory or Post-Sovereign?*, Ashgate.

Evas, T. and Liebert, U. (2012) 'Enhancing Democracy through Constitutional Pluralism? The Czech, German and Latvian Lisbon Rulings in Dialogue', in T. Evas, U. Liebert and C. Lord (eds), *Multilayered Representation across the European Union in Question: Parliaments, Courts, Civil Society and the Public Sphere*, Baden Baden: Nomos.

Evas, T., Liebert, U. and Lord, C. (2012) *Multilayered Representation in the European Union: Parliaments, Courts, Civil Society and the Public Sphere*, Baden Baden: Nomos.

Fossum, J. E. and Menéndez, A. J. (2011) *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, Lanham, MD: Rowman and Littlefield.

Guerrieri, P. (2008) 'The Economic Goals of the Enlargement and the Challenges to the 27 EU Countries', in A. Q. Cruzio and M. Fortis (eds), *The EU and the Economies of the Eastern European Enlargement*, Berlin: Physica-Verlag.

Hix, S. and Noury, A. (2009) 'After Enlargement: Voting Patterns in the Sixth European Parliament', *Legislative Studies Quarterly*, 34: 159–74.

Ilves, T. H. (2010) Transcript of the Parliamentary Session on 13 September 2010, Riigikogu, Tallinn.

Joerges, C. (2008) 'A New Alliance of de-legalisation and legal formalism? Reflections on Responses to the Social Deficit of the European Integration Project', *Law Critique,* 19: 235–53.

— (2011) 'The Future of Integration through Law - in Conflicts-Law Perspectives' , paper presented at RECON final conference 'What is *Left* of European Democracy?', Oslo, 26 November 2011.

Kaeding, M. and Hurka, S. (2010) 'Where are the MEPs from the Accession Countries? Rapporteurship Assignments in the European Parliament after Enlargement', *EIPASCOPE* 2010/2.

Liebert, U. (ed.) (2007) 'Europe in Contestation: Debating the Constitutional Treaty', *Perspectives on European Politics and Society*, Special Issue, 8(3).

Polanyi, K. (1944) *The Great Transformation*, Boston: Beacon Hill.

Reich, N. (2008) 'Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the ECJ', *German Law Journal,* 9(2): 125-61.

— (2011) 'How Proportionate is the Proportionality Principle? Some Critical Remarks on the Use and Methodology of the Proportionality Principle in the Internal Market Case Law of the ECJ', paper presented at 'The Reach of Free Movement', Oslo, 18-19 May 2011. Available at: <http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf>.

Reich N. and Harbacevica S. (2002) 'The Stony Road to Brussels', *Europarättslig Tidskrift*, 411.

Støre, J. G. (2011), keynote speech at the RECON Outreach Conference 'Europe's Democratic Challenge', Oslo, 25 November 2011. Available at: <http://www.reconproject.eu/projectweb/portalproject/OutreachOsloNov11.html>.

Tere, J. (2010) 'ECB's Jürgen Stark Expressed Doubt over Estonia's Preparedness to Adopt the Euro', *The Baltic Course*, Tallinn, 16 April 2010. Available at: <http://www.baltic-course.com/eng/baltic_states/?doc=25918>.

Vilpišauskas, R., (2011) 'National Preferences and Bargaining of the New Member States Since the Enlargement of the EU: The Baltic States – Still Policy Takers?'. Available at: <http://www.lfpr.lt/uploads/File/2011-25/Vilpisauskas.pdf>.

Chapter 2

The EU Constitutional Treaty and the Lisbon Treaty

Matrix reloaded?

Irmantas Jarukaitis
Vilnius University

Introduction

Negative referenda results concerning the European Union (EU) Constitutional Treaty in the Netherlands and France turned to be a serious blow to the further EU integration process. Two years after those events were devoted to uneasy search of various solutions, which would allow a reanimation of ratification process of the Constitutional Treaty. However, the political reality proved it to be impossible. Because of that the European Council decided to abandon the process of ratification of the EU Constitutional Treaty and to return to so-called 'classic' method of amendment of the Founding Treaties at the meeting of 21-22 June 2007. The conclusions of the European Council, among the other things, hinted about 'not any more constitutional character' of the Lisbon Treaty which was destined to take place of the ill-fated EU Constitutional Treaty.

However, in order to speak about the 'no more constitutional' character of the Lisbon Treaty one may pose questions to what extent a constitutional language could be applicable to the EU before the Lisbon Treaty came into being, especially, to what extent the application of such language was justified before drafting of the EU Constitutional Treaty. Was there really a consensus what the EU was before the Lisbon Treaty in order to speak about the abandonment of the constitutional concept? How we could/should conceptualise the EU and to what extent we may apply a constitutional language when speaking about its existence and functioning?

These questions are especially relevant, as noted above, given the fact that the European Council has decided in its conclusions of 21-22 June 2007 that 'the constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution", is abandoned' and 'the TEU and the Treaty on the Functioning of the Union will not have a constitutional character'. Does this mean that there will be no constitutional future for the EU at all with the Lisbon Treaty?

Discourse on EU constitutionalism before the Lisbon Treaty and conclusions of the European Council of 21-22 June 2007

The process of the European integration, with its nature, aims and future direction, has always been one of the main sources of political, academic and judicial disputes. Recent events – the formation of the European Convention and its functioning, its final outcome the EU Constitutional Treaty and its (unsuccessful) process of ratification, the emergence of the Lisbon Treaty – all fuelled yet another wave of heated debates on the subject.

---

* The chapter is an expanded version of the paper presented at the conferences 'The European Union: Towards a Legal Reform' organised by the European Law Department under the Ministry of Justice of Lithuania and Vilnius University Faculty of Law on 5 June 2008 and 'European Integration – Challenges and Visions from the Baltic Perspective: Debates on the Future of Europe from the Constitutional to the Lisbon Treaty and Beyond' organised by Riga Graduate School of Law on 20-21 November 2008. The author would like to thank Professor Thomas Schmitz and Dr. Anneli Albi for their comments on the earlier version of the contribution. The usual disclaimer applies.

One may note an interesting coincidence: just before the formation of the European Convention and during its work, the Wachowski brothers presented a true delicacy to admirers of science fiction – the Matrix trilogy – in which they depict a stunning vision of the future world. In the film machines rule the Earth, whereas a majority of mankind is plugged to a supercomputer, called the Matrix. Machines simulate the ordinary life at the end of 20th century in the minds of plugged people with the use of the Matrix in order to control them. However, some of people plugged into the Matrix know by intuition that something is wrong and attempt to free themselves from living in such a virtual world.

When observing the process of reformation of the EU's 'architecture' during these several years, one may note some interesting similarities between that process and twists of the Matrix trilogy. First, machines try continually to picture/programme an ever more beautiful, happier world within the Matrix (that is, the Matrixes themselves, the environments in which people virtually live are being constantly changed, or upgraded, in order to persuade people to accept it as a real world). However, as one of the 'native' inhabitants of the Matrix, programme-agent Smith admits machines are not very successful in achieving this aim, because, as they suspect, *the programming language* used to create the Matrix is not expressive enough to describe all nuances of human subsistence.

When we look at the European Communities (EC)/EU we may trace a similar tendency: every step of the European integration, which fits uneasily with the traditional binary Westphalian legal order, is marked by numerous attempts to find a 'programming' language, the application of which in the context of the EC/EU would be acceptable to all the EC/EU member states and citizens. Broadly speaking at least three such programming languages may be distinguished in academic, judicial and political discourse used for description of the European integration process: that of public international law,[1] constitutional law[2] and *sui generis* law[3]. What is even more interesting, sometimes it is possible to find examples of the *explicit* renouncement of the language, which was invoked before in a certain discourse.[4] In this particular case, the author has the

[1] See, among others, judgement No. K 18/04 of 11 May 2004 of the Polish Constitutional Court. At paragraph 6 of the Judgement, the Court basically states that the Communities and the EU may not be called supranational organisations simply because of the fact that the Polish Constitution uses the term 'international organisation', although several passages below it already recognises that EC law may not be treated as international law, since interrelation between EC law and national law 'may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law'. The summary of the judgement in English is available at: <http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf>. As regards the rare academic doctrine characterising EC/EU law as international law: D. Wyatt, 'New Legal Order or Old?', *European Law Review*, Vol. 7, 1982, 147-66; B. de Witte, 'Direct Effect, Supremacy and the Nature of the Legal Order', in P. Craig and G. de Búrca (eds), *Evolution of EU Law* (Oxford University Press, 1999), at pp. 208-10.

[2] For example, see the ruling of the ECJ of 23 April 1986, Parti écologiste 'Les Verts' v. the European Parliament (case 294/83, ECR, 1986, at p. 1339). For initial steps of the academic doctrine in invoking a constitutional language in the context of the European integration, see, for example: E. Stein, 'Lawyers, Judges and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75, No. 1, 1981, 1-27; J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, Vol. 100, No. 8, 1991, 2403–83.

[3] Without any doubt, a definition of EC/EU law as *sui generis* legal system is the most common one. Still, it is not very instructive and simply reflects the fact that it is compared with something which is not '*sui generis*', but ordinary and possibly has historically predetermined meaning.

[4] Of course, a question may be posed, why the issue of use of a certain programming language is relevant at all? See, for example: J. Cohenand *C.* Sabel, 'Directly-Deliberative Polyarchy', *European Law Journal*, Vol. 3, No. 4, 1997, 313-42; K. H. Ladeur, 'Towards a Legal Theory of Supranationality: The Viability of the Network Concept', *European Law Journal*, Vol. 3, No. 1, 1997, 33-44.

conclusions of the European Council of 21-22 June 2007[5] in mind. To be more precise, the mandate attached to the conclusions of the Council prescribes that by drafting the Lisbon Treaty '[t]he *constitutional concept*, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution" is abandoned' and that 'the TEU and the Treaty on the Functioning of the Union *will not have a constitutional character*' [emphasis added]. Since these propositions are very interesting they will be discussed further.

The above-mentioned similarity between the Matrix trilogy and reformation of the EU foundations can also be extended to another similarity. The authors of the Matrix trilogy exalted the mind of a man and tried to show that even a single man with strong convictions may change the world and even erase the boundaries between the real and virtual worlds. Equally, a social reality, differently from a physical world, is not inert, but depends on convictions and attitudes of people who conceive and interpret it. Differently from a physical world, a social world is a world that has already been interpreted by someone and this fact may not be ignored. If the majority agrees that a certain social institute/phenomenon exists, it will exist, but if a belief about its necessity vanishes, it will simply disappear.

But let us return to the conclusions of the European Council. As has been mentioned, they find that the EU Treaty and Treaty on the Functioning of the Union, that is, the EU Treaty and the EC Treaty amended by the Lisbon Treaty, will not have a constitutional character. Such conclusions logically lead to two propositions.

Firstly, if the Lisbon Treaty has no constitutional character it would mean that the EU Constitutional Treaty *was* of a 'constitutional character', whatever meaning such description could have. Of course, one may argue that the explicit renouncement of a constitutional language with regard to the Lisbon Treaty does not necessarily mean that the European Council implicitly or explicitly recognised that the EU Constitutional Treaty *had* some kind of constitutional character. On the contrary, it might be argued that the Council simply wanted to make it very clear (especially having in mind various allegations about a transformation of the EU into a super state and negative referendum results in the Netherlands and France) that the 'fathers' of the EU Constitutional Treaty had no such constitutional ambitions at all.

However, such an interpretation seems unconvincing for several reasons. Looking back one should not forget about the general mood and tone of the discourse during the last several years: the Declaration on the Future of the Union of 2001,[6] the Laeken Declaration of 2001[7] with its statements about Europe being 'at a crossroads, a defining moment in its existence' and the possibility of drafting a 'constitutional text in a long run'; discussions on the *finality* of the European integration; the formation of the European Convention and promotion of its activities as a different (allegedly, bringing more legitimacy to the whole European integration project) tool comparing with traditional Inter-governmental conferences (IGCs) (and ratification by national parliaments) and all parallels with the Philadelphia Convention[8]; the title of the Treaty, establishing a *Constitution* for Europe and rhetoric about 'Europe's constitutional moment'.[9] Besides, the European Council conclusions in no uncertain terms speak about

[5] See the text of Conclusions at: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf>.

[6] See the text of Declaration at: <http://www.ena.lu/treaty_nice_declaration_future_union_26_february_2001-030302579.html>.

[7] See the text of Declaration at: <http://www.saxonbooks.co.uk/laeken_declaration.htm>.

[8] For example: M. Rosenfeld, 'The European Convention and the Constitution Making in Philadelphia', *International Journal of Constitutional Law*, No. 1, 2003, 373-78.

[9] For a critical tone see, for example: I. Ward, 'Bill and Fall of the Constitutional Treaty', *European Public Law*, Vol. 13, No. 3, 2007, 461-88.

the *abandonment* (*'abandonné'* in French; *'aufgegeben'* in German; *'zrezygnowano'* in Polish) and not about a denial of something that never existed. To sum up, it would be too easy to wipe away all of the past by simply saying that it never occurred.

Secondly, if the Lisbon Treaty is deprived of such a character, it means that it has to be *essentially* different from the EU Constitutional Treaty. Here, one fact should be mentioned *a priori*: there is no secret that more than ninety percent of the content of the Lisbon Treaty are simply taken from the EU Constitutional Treaty.

Thus, two further questions may be posed. What does it mean 'to have a constitutional character'? Once the answer to this question is provided one may try to answer the second one: do these less than ten percent of the Lisbon Treaty which differ from the EU Constitutional Treaty, allow the change of rhetoric – allow for speaking about the 'non-constitutional character' of the founding documents of the EU? In this regard it is very important that the European Council conclusions do not confine themselves to a general declaration about 'not any more constitutional character' of the Lisbon Treaty, but indicate certain differences that should persuade us that this is really the case.

According to the European Council such a shift in language is justified taking into account that:

1. instead of one the EU Constitutional Treaty consolidating the whole primary EU law, it remains scattered across dozens of legal documents;
2. certain titles used in the Lisbon Treaty will be different: words like 'the Constitution', 'the law', 'the minister of foreign affairs' disappear;
3. provisions embedding the symbols of the EU are deleted; the same is done with provisions explicitly recognising the primacy of EU law over national law.

One may note that in essence these elements (including the term 'Constitution') are traditionally associated with a state.[10] Accordingly, it could be argued that the European Council simply wanted to get rid of the 'ballast', which pulled the EU Constitutional Treaty

[10] Evidently, this statement does not cover the principle of primacy of EU law, since it is obvious, that the current 'version' of the principle may not be equated to the principle of supremacy of federal law found in federal states. Further, a majority of academic doctrine agrees that Article I-6 of the EU Constitutional Treaty would not essentially change the nature of relationship between EU and national law. See, for example: K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law', *European Law Review,* Vol. 31, No. 3, 2006, 287-315, at p. 289; U. di Fabio*,* 'The European Constitutional Treaty: An Analysis', *German Law Journal*, Vol. 5, No. 8, 2004, 945-56, at p. 946; R. Kwiecień*,* 'The Primacy of European Union Law over National Law Under the Constitutional Treaty', *German Law Journal*, Vol. 6, No. 11, 2005, 1479-95; M. Kumm and and V. F. Comella, 'The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty', *Jean Monnet Working Paper* 5/04, 2004, at pp. 9-10; F. C. Mayer, 'Supremacy-Lost? Comment on Roman Kwiecień', *German Law Journal*, Vol. 6, No. 11, 2005, 1497-1505, at pp. 1498-99; I. Jarukaitis, 'Ratification of the Treaty Establishing a Constitution for Europe in Lithuania and its Impact on the National Constitutional System', *Teisė/Mokslo darbai,* No. 61, 2006, at pp. 64-65; M. Claes, 'The European Constitution and the Role of National Constitutional Courts', in A. Albi and J. Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Amsterdam: Kluwer Law International, 2007), at pp. 242-44; A. von Bogdandy, 'Constitutional Principles', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2005), at p. 42. Attention should be drawn to the fact that the French *Conseil Constitutionnel* took the same approach once judging the compatibility of the EU Constitutional Treaty with provisions of the Constitution of France. Besides, it had no problems as regards the name of the EU Constitutional Treaty. See decision No. 2004-505 DC of 19 November 2004, in particular, points 9-13 of the Decision, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2004/2004-505-dc/decision-n-2004-505-dc-du-19-novembre-2004.888.html>. The same view was adopted by the Spanish *Tribunal Constitucional* in its decision of 13 December 2004.

to the bottom.[11] Still, a question may be posed, whether the naming or renouncement of these elements allows for the denial of a constitutional character of the Lisbon Treaty and how such denial could be conceived.

Thus, according to the Council, all these changes allow a statement that the EU Treaty and the Treaty on the Functioning of the Union will not have a constitutional character. In order to evaluate the validity of such statements it is necessary to answer the question what the above-mentioned proposition could mean in the context of the European integration process, and that task in turn requires one to look at the understanding of constitutionalism itself.

The possibility of using the rhetoric of constitutionalism in the context of the European integration is closely related to its nature and aims as well as to the perception of a state, its nature and aims in general. Although discussions on the issue have lasted for decades, they gained a new momentum before the last waves of accession. These discussions showed entirely different approaches to many aspects of the future (and even the present) of the EU. If one is to speak about the academic community, at least partial disagreements on various issues may be attributed to the fact that there is no consensus on some core concepts like, for example, a constitution,[12] constitutionalism,[13] the sovereignty[14] and, consequently, the question as to what extent these concepts, some of which were born in the Westphalian world, could be 'translated', adapted to post-national environment.[15] Therefore, it comes as no surprise that there is no consensus neither among politicians nor among the academic community, lawyers and ordinary citizens as well concerning if, or to what extent, a constitutional language may be applicable to the EU at all.

If one looks at that discourse within the academic community one may find several broadly defined schools of thought.[16] First, there are those, who totally reject the idea of using a constitutional language in the context of the European integration.[17] Such an

[11] Of course, it could be argued that there was a necessity to find and expose the main 'culprits' of the failure of the EU Constitutional Treaty and an easy option was to point to the EU symbols.

[12] For more detailed analysis on the ambiguity of the term in general and within the EU context in particular, see, for example, C. Möller, 'Pouvoir Constituant – Constitution – Constitutionalisation', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2006), p. 183-226 and rich references therein.

[13] See further described different approaches to constitutionalism in the EU context.

[14] For example, Samantha Besson defines sovereignty as 'essentially contestable concept'. As she puts it, 'disagreement and conflict are constitutive elements' of the concept of sovereignty: S. Besson, 'Sovereignty in Conflict', *European Integration online Papers*, Vol. 8, No. 15, 2004, at p. 15. For one of recent extensive pieces of academic discourse concerning the concept of sovereignty in contemporary world, see: N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003).

[15] See, for example: N. Walker, 'Postnational Constitutionalism and the Problem of Translation', in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003).

[16] Of course, due to space constraints, the summary presented below is extremely generalised and simplified.

[17] See, for example, D. Grimm, 'Does Europe Need a Constitution?', *European Law Journal*, Vol. 1, No. 3, 1995, 282-302; P. Kirchhof, 'The Balance of Powers Between National and European Institutions', *European Law Journal*, Vol. 5, No. 3, 1999, 225-42; T. Schilling, 'The Autonomy of the Community Legal Order: An Analysis of Possible Foundations', *Harvard International Law Journal*, No. 37, 1996, 403-09. For a generalisation of the views of the academic doctrine in the 'old' member states see, for example: J. D. Rochere and I. Pernice, 'European Union and National Constitutions', General Report to FIDE XX Congress 2002 in London, *WHI-Paper* 17/02, 2002. As regards Lithuanian academic doctrine a discourse on post-national constitutionalism is very fragmentary, but a dominant view is similar to described above. Still, for example, Vilenas Vadapalas submits that 'the notion of federalism in the EU multilevel governance system does not

attitude is mainly based on the idea, that from the point of view of public law a constitution (or constitutionalism in general) is a property only of a state, whereas a state is based at least on the legal presumption of the existence of the single, homogeneous people, which form and sustain that state.[18] A state is, in principle, an ideal form of a political community, an ideal forum, the main 'gravity centre' for formation and realisation of preferences of its citizens. The basic tenet of such an approach is the existence of inseparable connection between the people, a state and the principle of democracy.

A constitution is understood not only in a functional sense, but is treated as an essential symbol of a polity, which *per se* induces integration within a certain community. On the contrary, the EU is treated as functional formation/regime, performing certain clearly defined public functions, delegated by the member states as the Masters of the Treaties. For some of these authors the EU is already mature enough to be transformed to an ordinary state in order to cure the lack of democratic legitimacy,[19] whereas others do not rule out that possibility but contend that the EU still lacks certain essential features for such transformation. Accordingly, the followers of such view treated the title of the EU Constitutional Treaty and the whole idea of exposing the document as the 'constitutional document' as mere misunderstanding which could even endanger a further integration since there is no 'European people' understood in traditional/national way.[20]

---

correspond to the notions of federalism in national constitutional systems. These are still based on the foundations of sovereignty and independence […] the Community method did not and does not changed these foundations'. V. Vadapalas, 'Constitutional Homogeneity in the Accession Process', in R. Miccù and I. Pernice (eds), *The European Constitution in the Making* (Baden-Baden: NOMOS, 2003), at pp. 101-02. Egidijus Kūris underlines that the concept of constitutionalism in Europe evolves in a direction, where a constitution traditionally understood as a 'higher law of a land', where a 'land' is equated with a national state, eventually becomes a phenomenon oriented not only towards a state, but to postnational entities as well: E. Kūris, 'Ekstranacionaliniai veiksniai Lietuvos Respublikos Konstituciniam Teismui aiškinant Konstituciją', *Justitia*, No. 50, 2004, at p. 82. Egidijus Šileikis when speaking about the EU Constitutional Treaty, before its final abandonment, noted that formally it was capable of performing functions of a traditional constitution. On the other hand, he raised doubts whether it is possible to speak about common constitutional identity of populations of all member states and stressed that the fact it was rejected by referendums in France and the Netherlands showed that attempts to create such an identity through the EU Constitutional Treaty were not very successful: E. Šileikis, *Alternatyvi konstitucinė teisė* (Vilnius: Teisinės informacijos centras, 2005), at p. 50.

[18] Although that kind of legal presumption of the single people establishing a (state) constitution is, as a rule, an underlying idea of national constitutional law, the social reality may sometimes be different. Besides, history provides examples that such legal presumption is not always inherent in national constitutions. For example, the first modern European Constitution – the Constitution of 3 May 1791 of the Polish-Lithuanian Commonwealth, amended by the Mutual Pledge of the Two Nations of 20 October 1791, explicitly spoke about the co-existence of two nations 'under the roof' of the single Constitution. Of course, it makes no sense to contemplate what would be the 'living' constitution of such commonwealth after several decades given the fact that under external pressure the Constitution was renounced two years later. See the text of the Constitution at: <http://en.wikisource.org/wiki/Constitution_of_May_3,_1791> (unfortunately, the author was not able to find the English translation of the Mutual Pledge of the Two Nations).

[19] G. F. Mancini, 'Europe: The Case for Statehood', *European Law Journal*, Vol. 4, No. 1, 1998, 29-42. For a strong critique of such ideas see: J. H. H. Weiler, 'Europe: The Case Against the Case for Statehood', *European Law Journal*, Vol. 4, No. 1, 1998, 43-62.

[20] For example, P. Kirchhof, 'The Legal Structure of the European Union', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (Oxford: Hart Publishing, 2006), pp. 768, 773. Some authors reach such conclusion on the basis of different reasoning: the EU lacks a constitution simply because of the fact that its legal system is not absolutely autonomous from national legal systems. For example, as Arthur Dyevre puts it: '[f]or the EU to have a constitution […] presupposes a revolutionary constituent act to severe the umbilical cord between the legal order of the EU and those of the Member States'. A. Dyevre, 'The Constitutionalisation of the European Union: Discourse, Present, Future and Facts', *European Law Review*, Vol. 30, No. 2, 2005, 165-89, at p. 172.

On the other hand, there are authors who argue quite the opposite. They suggest that, given the absence of a European *demos,* the EU *must* have a constitution that would act as an accelerator in a community-building process.[21] Accordingly, the European Convention and the EU Constitutional Treaty were treated as essential tools for the stimulation of true popular involvement in European matters thus ensuring a deeper sense of attachment to the supranational community in the long run. In this reading, the EU Constitutional Treaty amounts to a legal revolution, indicating profound social changes of the EU polity. This approach fits nicely with above-mentioned rhetoric about Europe's 'constitutional moment' and parallels between the European Convention and the Philadelphia Convention since drafting and adoption of the EU Constitutional Treaty was treated as a foundational/transformational moment for the EU and its re-emergence as a 'fully fledged' constitutional polity.

Then there are members of the academic community, who, while admitting that the EU is not a state, conceive the EU as a certain (almost) uniform political community and see no major problems in applying a traditional/state constitutional language to a post-national context.[22] The EU, generally speaking, is understood as a federal political community, whose existence and functioning is directly legitimated by the EU citizens.[23] According to this view, the EU *must* have (and already has it in the form of the Founding Treaties) the usual written constitution, which would give a sense, legitimate and frame the exercise of public powers within the EU. Thus, the EU Constitutional Treaty is understood as a traditional constitution, formally reflecting the already earlier expressed will of the EU citizens acting as the *pouvoir constituant*, which marks one more step of gradual EU development.

Finally, there are authors, who may be called *sui generis/pluralist* constitutionalists.[24] Here, one of the main points of departure is the thesis that the European integration is, first of all, a response to the 'fear of a state', which is not treated as an ideal form of a political community.[25] Division of public powers at supranational and national levels with means of reciprocal control of the exercise of these powers is treated as one of responses to this fear of a state. Instead of focusing on certain concepts which are fundamental to the state-centrist view (like the sovereignty, the supremacy of national constitutions, etc.), these authors try to purify the essence, the *raison d'être* of constitutionalism, its

---

[21] See, for example, J. Habermas, 'Why Europe Needs a Constitution', in E. O. Eriksen, J. E. Fossum and A. J. Menéndez (eds), *The Chartering of Europe* (Baden-Baden: Nomos, 2003).

[22] See, for example, I. Pernice, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and "Multilevel Constitutionalism"', in *German Reports on Public Law* (Baden-Baden: Nomos, 1998); I. Pernice, F. Mayer and S. Wernicke, 'Renewing the European Social Contract: The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism', *WHI-Paper* 11/01, 2001; A. von Bogdandy, 'The European Union As a Supranational Federation: A Conceptual Attempt in the Light of Amsterdam Treaty', *Columbia Journal of European Law*, Vol. 6, 2000, 27-54, at pp. 50-52.

[23] Pernice et al., *supra* note 22, at p. 4.

[24] See, for example, J. H. H. Weiler, 'In Defence of the Status Quo: Europe's Constitutional Sonderweg', in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), at pp. 18–20; M. P. Maduro, 'Europe and the Constitution: What If This Is as Good as It Gets?', in J. H. H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), 74-102; N. Walker, 'EU Constitutionalism in the State Constitutional Tradition', *EUI Working Papers* Law No. 2006/21, 2006; P. Craig, 'Constitutions, Constitutionalism and the European Union', *European Law Journal*, Vol. 7, No. 2, 2001, 125-38; M. La Torre, 'Legal Pluralism as an Evolutionary Achievement of European Community Law', in F. Snyder (ed.), *The Europeanisation of Law: The Legal Effects of European Integration* (Oxford: Hart Publishing, 2000), at pp. 137-38; V. Röben, 'Constitutionalism of Inverse Hierarchy: The Case of the European Union', *Jean Monnet Working Paper* 8/03, 2003.

[25] Otherwise, one may ask a very simple question (especially looking from perspective of a candidate country/future member of the EU): why become a member of the Union, which by definition significantly circumscribes powers of an ideal political community?

values/ideals and search for the answer to the question to what extent the membership in the EU helps to realise these constitutional ideals *better*, what added value (if any) the membership within the EU generates from the point of view of constitutionalism. Thus, their approach to constitutionalism is both existential, since they argue that national constitutionalism is not (the only) optimal philosophy providing solutions for organisation of public power, and functional, since the main emphasis is placed on the question, to what extent and from what perspective the constitutional language may be applied to the EU.

According to those authors, the European Court of Justice (ECJ), other EU institutions, *national institutions* (especially national courts) and individuals (mainly through preliminary rulings procedures) gradually transformed the European Communities into a unique constitutional community and the application of constitutional rhetoric to the EU is justified for several reasons. First of all, its use is valid because of tight both bottom-up (among the other things, in the form of direct participation in the elections of the European Parliament) and top-down (among the other things, in the form of the principle of direct effect of the EC law) relations between the EU level of governance and the EU citizens. Such close connections and very wide scope of competence cumulated at the EU level, among the other things, indicate that the EU has a character of a political community. Further, it is valid given the attitude of the ECJ to the EU law. It has been convincingly argued that over time namely the ECJ and national courts have developed through their discourse certain constitutional self-consciousness. The ECJ treats and develops EU law as *sui generis* constitutional law, not public international law. As Joseph Weiler puts it:

> The constitutional thesis claims that in critical aspects the Community has evolved and behaves as if its founding instrument were not a Treaty governed by international law but, to use the language of the European Court of Justice, a constitutional charter governed by a form of constitutional law.[26]

However, it should be emphasised that such constitutional thesis does not mean that EU constitutionalism is automatically equated with national constitutionalism or that such a thesis tries to negate or downgrade national constitutionalism, to place an emphasis on their differences. On the contrary, possibilities for their optimal co-existence are explored. However, proponents of a *sui generis* EU constitutionalism make it very plain that the logic of classical/state/documentary constitutionalism may not be mechanically applied to the EU, since it is not a state and, what is even more important, should not become one. Having such ideas in mind, it is not surprising that these authors were very cautious and even sceptic about the presentation of the EU Constitutional Treaty as the EU's 'constitutional moment' simply because of the fact that, according to them, the EU already has its *sui generis* constitution,[27] whereas the rhetoric of 'constitutional moment' was simply too similar to a statement about the (re)formation of the EU to a super state.[28] Besides, it could endanger the unique constitutional pattern through which the EU has developed. Accordingly, these authors treated the EU Constitutional Treaty as a mere and not very desirable formalisation, consolidation of what already is formed EU constitutionalism.[29]

---

[26] J. H. H. Weiler, *The Constitution of Europe: Do the New Clothes Have an Emperor? And Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), at p. 221.

[27] Interestingly enough, one of the first to use a constitutional rhetoric in the context of EC law was the German Federal Constitutional Court, which stated back in 1967 that 'the EEC Treaty in a sense represents the Constitution of the Community'. For extracts of decision see: 'EEC Regulations Constitutionality Case', in A. Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases.* (Cambridge, Cambridge University Press, 1994), at pp. 410-14.

[28] A. Somek, 'Postconstitutional Treaty', *German Law Journal*, Vol. 8, No. 12, 2007, 1121-31.

[29] See, for example: J. H. H. Weiler, 'On the Power of the Word: Europe's Constitutional Iconography', in D. Curtin, A. E. Kellermann and S. Blockmans (eds), *The EU Constitution: The*

Summing up, it might seem strange, but authors with entirely different views on the subject were similarly reserved and even sceptical with regard to the EU Constitutional Treaty, albeit for different reasons. For some of them the EU still lacked or lacks certain properties to 'acquire' the Constitution, whereas for others the EU constitutionalism is characterised by certain features, which by definition reject the necessity of following a path of traditional state constitutionalism. Still, given those very diverse and conflicting views to the EU as a peculiar organisation[30] and all the circumstances, surrounding the drafting, signing and ratification of the EU Constitutional Treaty *a priori* assumption may be made, that at least part of the 'fathers' of the EU Constitutional Treaty and the European Council in its conclusions of 21-22 June 2007 followed (and renounced) the above described traditional/documental constitutional approach,[31] although, in the author's opinion, such an approach could hardly be treated as optimal having in mind the history of EU's different, unique constitutional evolution, the form (still being not only the 'Constitution', but the Treaty as well, meaning unanimous ratification by the member states) and contents (for example, the explicit right of withdrawal of a member state) of the EU Constitutional Treaty. Following the above-mentioned traditional/documental approach, the EU Constitutional Treaty was far more important as *an event,* as a blatant expression of long-accumulated political powers, which allegedly begged for a clear and fresh acknowledgment.[32] This would explain why the conclusions of the European Council focus on some formal features of the EU Constitutional Treaty.[33]

One may wonder how a decision emerged to include the above-mentioned passage in the Conclusions of the European Council once it was decided to abandon the path of ratification of the EU Constitutional Treaty. As Gráinne de Búrca notes, once the decision was taken to proceed with a new treaty, the EU's political leaders relatively quickly decided to proceed with the substantive core of the Constitutional Treaty, which would be

---

Best Way Forward? (The Hague: T.M.C Asser Press, 2005), at p. 6; I. Jarukaitis, 'Lithuania', in A. E. Kellermann, J. Czuczai, S. Blockmans, A. Albi and W. T. Douma (eds), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-) Candidate Countries: Hopes and Fears* (The Hague: T.M.C. Asser Press, 2006), at pp. 404-5.

[30] It should be noted that views on what the EU nowadays are often mixed with views of a particular author on how the EU could/should look in the future. If one sees no problems in the EU choosing the traditional federal path leading to creation of a state, then at least psychologically it is easier to apply a state/documentary constitutionalism language to such 'almost' formed state. On the other hand, if one believes that the process of the European integration is based on the idea of the 'ever closer union among the peoples', then it is difficult to endorse a mechanical application of state/documentary constitutionalism language to the entity which by definition is different from a state.

[31] Such view is reinforced by the fact that decisions to hold national referendums concerning the EU Constitutional Treaty in the EU member states were, at least partially, based on the idea of its special pedigree. For example, in the Netherlands it was the first referendum in hundreds of years of that kind: L. F. M. Besselink, 'The Dutch Constitution, the European Constitution and the Referendum in the Netherlands', in A. Albi and J. Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Amsterdam: Kluwer Law International, 2007), at pp. 113-23. On the other hand, at least in some new EU member states discourse was quite different – it was argued that a referendum is not necessary given the fact, that in majority of these states referendums were held concerning the accession to the EU and the EU Constitutional Treaty, which came into being half a year later, would not essentially change the nature of the EU. See, for example: A. Albi, 'Introduction: The European Constitution and National Constitutions in the Context of 'Post-national Constitutionalism', in A. Albi and J. Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Amsterdam: Kluwer Law International, 2007), at pp. 10-13.

[32] Indeed, some treated it as an expression of *pouvoir constituant*.

[33] For example, the mandate attached to the Conclusions does not mention that Article I-1 of the EU Constitutional Treaty exposing double legitimacy roots of the EU (the EU citizens and the member states) is not going to be 'transplanted' to the Lisbon Treaty.

stripped of its 'distinctively "constitutional" dimensions'.[34] Thus, both the member states that ratified the EU Constitutional Treaty and those that have not decided to move forward with formally 'de-constitutionalised' treaty,[35] although majority of commentators claimed that the 'constitutional' dimension of the EU Constitutional Treaty was only one of many reasons of its failure, far from being the most important one.[36] One may speculate, that this concern was, technically speaking, the easiest one to address by mechanically removing certain elements of the earlier treaty, whereas others (like issues related to certain national policy problems, the possible accession of Turkey to the EU, etc.) were far more difficult or impossible to tackle in the context of drafting of primary EU law.

It should be noted as well, that reactions on the part of the academic community to the above-mentioned conclusions of the European Council are relatively scarce. It is interesting, that this move was received as more or less natural step after the failure of the EU Constitutional Treaty. For example, when discussing possible strategies in the aftermath of ratification of the EU Constitutional Treaty the editorial comments at the Common Market Law Review briefly noted that 'the Convention compounded the error of describing its draft as a "constitution" and that alternative strategy would be to move forward with a "basic Treaty", perhaps renaming it to the "Treaty establishing the European Union"'.[37]

Once the Lisbon Treaty was drafted it was viewed as a response to the fears that the EU Constitution 'would lead to a European "super-state", thus there was necessity to remove "any reference to the symbols of statehood"'.[38] Gráinne de Búrca, although referring to the above mentioned elements as 'distinctively "constitutional" dimensions of the EU Constitutional Treaty' emphasised at the same time that given the

> fact that by now, the collection of all previous EC and EU treaties are broadly understood as having established a constitutional framework for the EU, the concrete legal and political implications of the argument that the Lisbon Treaty has been 'de-constitutionalised' are not evident, even if the *symbolism* remains perfectly clear [emphasis added].[39]

The same spirit may be felt in Alexander Somek's contribution where he speaks about a 'treaty stripped of ornamentation' and regards the abandonment of a form of a single document as almost an 'act of revenge for the rejection of the Constitutional Treaty'.[40]

---

[34] G. de Búrca, 'General Report: Preparing the European Union for the Challenges of the Third Millennium: From the TECE to the Lisbon Treaty', in H. Koeck and M. M. Karollus (eds), *Preparing the Union for the Future: Necessary Revisions of Primary Law after Non-Ratification of the Treaty establishing a Constitution for Europe* (Vienna: Nomos, 2008), at p. 388.

[35] Vaughne Miller also draws attention to the fact that it was decided not to touch the issue of the EU Constitutional Treaty in the Berlin Declaration of 25 March 2007 and consultations held by the German presidency showed the willingness to abandon the parts of the EU Constitutional Treaty 'that could be interpreted as "impinging on statehood", such as the title "constitution", and the EU flag and hymn' already at the early stage: V. Miller, 'EU Reform: A New Treaty or an Old Constitution?', *Library of House of Commons Research Paper* 07/64, 2007, at p. 12. See as well: Editorial Comments, 'From the Constitution to a New Round of Treaty Amendments: Step-by-Step', *Common Market Law Review*, Vol. 44, No. 5, 2007, 1229-36, at p. 1231.

[36] For comments on various possible reasons of negative approach to the EU Constitutional Treaty in different member states see, for example: A. Albi and J. Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Amsterdam: Kluwer Law International, 2007).

[37] Editorial Comments, 'What should replace the Constitutional Treaty?', *Common Market Law Review*, Vol. 44, No. 3, 2007, 561-66, at p. 562.

[38] Editorial Comments, *supra* note 35, at pp. 1235, 1231.

[39] De Búrca, *supra* note 34, at pp. 391-92.

[40] Somek, *supra* note 28.

Michael Dougan, looking at the wording of the conclusions and content of the Lisbon Treaty suggests that the 'abandonment of the "constitutional concept" was meant only in a relatively narrow and technical sense, i.e. abandonment of the repeal-and-replace approach to the existing Treaties, the title "Constitution", and the various unnecessary trimmings'. On the other hand, taking more general perspective he claims that the 'constitutional concept' – now used in its broader sense – which underlies the European integration project should emerge from this reform all the stronger'.[41] Still, he accepts that an explicit renouncement of the constitutional language could have various consequences for the way in which the founding documents of the EU amended by the Lisbon Treaty are interpreted and applied.[42]

As we see, an agreement exists in essence; that the abandonment of constitutional rhetoric thus presented in the European Council conclusions is linked with a necessity to present the reformed EU less similar to a super state, but not to negate, to change the nature of the EU and its legal system. Here, one may note the careful language, used by the European Council in the passage cited above – it does not speak about the renouncement of the constitutional *nature* of EU's legal system, but only about the abandonment of the 'constitutional' concept of the single text and about the fact that the founding treaties would not have a constitutional *character*. All this kind of confirms the arguments presented above about the 'technical' character of changes. Still, in this case another question may be posed: if we speak only about technical changes, is the renouncement of constitutional language justified? In other words, was it not possible to formulate the passage simply without the word 'constitutional' and what would change with that?[43] In that case all technical questions would be addressed and there would be no necessity to contemplate what it means to have a 'constitutional character'. Looking from that perspective one may ask a question: is it really only technical amendments we speak about? Maybe it signals a recognition that the EU Constitutional Treaty was perceived as an expression of the claim that the EU will be, to use the terminology proposed by Neil Walker, more 'constitutionally serious entity'[44] than it was before, whereas the conclusions step back by saying that such claim is withdrawn? In this situation, it is necessary to evaluate whether this is really the case.

As we saw once, conceptualising the EU from a documentary/state constitutionalist perspective is not the only approach. There might be good reasons to use constitutional language in the context of the EU after the rejection of the EU Constitutional Treaty. As mentioned above, Dougan suggests that from a deeper perspective the 'constitutional' claims of the Lisbon Treaty are even more intensive.[45] If we perceive the European Council conclusions as something more than a mere renouncement of certain technicalities, there is a necessity to compare the EU Constitutional Treaty with the

---

[41] M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review*, Vol. 45, No. 3, 2008, 617-703, at p. 698.

[42] Ibid., at pp. 698-700.

[43] For example, one may imagine a very 'technical' and simple passage instead of one cited above: '[t]he concept, which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution" is abandoned' and '[t]he TEU and the Treaty on the Functioning of the Union will feature the following changes: the term "Constitution" will not be used, the "Union Minister for Foreign Affairs" will be called High Representative of the Union for Foreign Affairs and Security Policy and the denominations "law" and "framework law" will be abandoned, the existing denominations "regulations", "directives" and "decisions" being retained. Likewise, there will be no article in the amended Treaties mentioning the symbols of the EU such as the flag, the anthem or the motto. Concerning the primacy of EU law, the IGC will adopt a Declaration recalling the existing case law of the EU Court of Justice'.

[44] N. Walker, 'After the Constitutional Moment', in I. Pernice and M. P. Maduro (eds), *A Constitution for the European Union: First Comments on the 2003 – Draft of the European Convention* (Baden-Baden: Nomos, 2004), at p. 25.

[45] Dougan, *supra* note 41.

Lisbon Treaty from the point of view of constitutionalism. But to do that one must have at least a short glimpse at the question, how constitutionalism could be perceived/defined in general.

There is, of course, a huge body of literature on the subject, analysing a phenomenon of constitutionalism from various angles. For the sake of convenience the author will mainly rely on Miguel Poiares Maduro, who singles out three dimensions/understandings of constitutionalism.[46] It should be stressed that the approach followed here is mainly functional; therefore, it does not touch upon some dimensions of traditional state constitutionalism (like a concept of a constitution in the formal sense, etc.).

According to Maduro, constitutionalism may, first of all, be conceived as a normative theory, embracing a set of legal and political instruments limiting public power. This is constitutionalism *as limit to public power*: it is associated with a necessity of protection of personal freedom and autonomy. In this sense, constitutionalism (and a constitution which embeds it) is understood as an anti-majoritarian act drawing a boundary between individual freedom and autonomy, on the one hand, and demands of a community, to which he/she belongs, on the other. To put it simply, it provides certain tools for protection of human rights and freedoms. Second, constitutionalism may be conceived as a repository of the notions of the common good prevalent in a certain community and as a mean organising public power so that it pursues that common good. This is constitutionalism *as polity expression*, which is associated with the communitarian assumption of a thick form of association capable of supporting a notion of the common good. In this case, differently from the first dimension of constitutionalism the emphasis is placed on the communitarian spring of a political community, which is related to majoritarian decision-making within that community.

Finally, the two above-mentioned dimensions are linked by constitutionalism as deliberative system, creating a framework in which competing notions of the common good can be made compatible or arbitrated in a manner acceptable to all. This is constitutionalism *as deliberation*, which is associated with a republican ideal of a constestatory and deliberative polity whose identity is secured by engagement in its permanent discussion.[47] Without any doubt all these different dimensions of constitutionalism are closely related in various ways. Besides, it is not possible to speak about some kind of constant standard of these dimensions of constitutionalism in a sense that in every political community, not excepting the EU, every dimension may be developed more or less.

---

[46] Once analysing the concept of constitutionalism, various authors single-out separate dimensions of constitutionalism on the basis of different perspectives and different degrees of particularity. These dimensions of constitutionalism singled-out by separate authors intersect in different ways. For example, Neil Walker disaggregates state constitutionalism into five dimensions: (1) legal order; (2) specialised political system; (3) self-authorisation; (4) societal integration; (5) reflexivity: N. Walker, 'EU Constitutionalism in the State Constitutional Tradition', *EU Working Papers*, Law Nr. 2006/21, 2006, at pp. 7-14. By suggesting definition of a constitution in a thick sense Joseph Raz names seven following features: a constitution is constitutive of a legal system (or the main organ of government and its powers); it is stable, at least in aspiration; it is written; it is superior law of the land; it is justiciable in a sense, that it provides for a judicial procedure under which the compatibility of the ordinary law with the constitution is tested; it is entrenched, i.e., more difficult to change than the ordinary law; it is expressing a common ideology: J. Raz, 'On the Authority and Interpretations of Constitutions: Some Preliminaries', in L. Alexander *(*ed.), *Constitutionalism* (Cambridge: Cambridge University Press, 1998), at pp. 152-54.

[47] M. P. Maduro*,* 'How Constitutional Can the European Union Be? The Tension Between Intergovernmentalism and Constitutionalism in the European Union', *Jean Monnet Working Paper* 5/04, 2004, at pp. 1-3; M. P. Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism', in L. Azoulai and L. Burgorgne-Larsen (eds), *L'autorité de l'Union européenne* (Brussels: Bruylant, 2006).

Having this in mind, the content of the EU Constitutional Treaty and the Lisbon Treaty may be analysed in order to draw conclusions, whether they are radically different from perspective of those dimensions of constitutionalism.

The Constitutional Treaty and the Lisbon Treaty: Various dimensions of constitutionalism

Looking from a historic perspective, it is obvious that the Communities had quite wide public powers from the beginning of their existence. It could be said that over time the above-mentioned dimensions of constitutionalism developed within the Communities with differing and uneven pace and the influence of various supranational institutions on that development was different. Given the fact that the object of this chapter is the analysis of the EU Constitutional Treaty and the Lisbon Treaty, historical developments will not be touched upon. Simply, the legal environment existing before the entry into force of the Lisbon Treaty will be compared to that under the EU Constitutional Treaty and the Lisbon Treaty.

First, *constitutionalism* as *limit to public power*. It may be said, that this is the oldest and the most mature dimension of EU constitutionalism which finds its fountainhead in the *Van Gend en Loos* ruling.[48] The analysis of the content of the EU Constitutional Treaty and the Lisbon Treaty reveals that they are almost identical. Besides, if one is to compare envisaged changes with currently existing EU legal framework, an *a priori* conclusion may be drawn that this dimension of EU constitutionalism becomes more intense.

Accordingly, the following developments should be underlined. First of all, the Charter of Fundamental Rights of the European Union becomes compulsory.[49] Although the Court of First Instance (CFI)[50], the ECJ[51], and even the European Court of Human Rights[52] all have used provisions of the Charter as a doctrinal source of interpretation for quite a time, *de jure* it would become a binding instrument in the hands of private persons, seeking to protect their rights both against the EU as well as national institutions with the entry into force of the Lisbon Treaty.[53] Besides, it could be treated not only as the expression of constitutionalism as a limit to public power, but as one of the elements for development of the EU's political identity.[54] Further, a clear legal basis (actually, the legal obligation) is established for the EU's accession to the European Convention on Human Rights (ECHR).[55] In fact, such development could be treated as an *explicit* recognition that the

[48] Van Gend en Loos v Administratie der Belastingen (Case 26/62, ECR 1, 1963).

[49] Article 6 paragraph 1 of the EU Treaty amended by the Lisbon Treaty.

[50] For example, see the ruling of the CFI of 25 October 2005 Groupe Danone v. Commission (T-38/02, ECR, 2005, p. II-04407, paragraph 216).

[51] It took quite a while for the ECJ to 'notice' the existence of the Charter. Even the European Court of Human Rights was faster in this regard. For example, see the ruling of the ECJ of 3 May 2007 Advocaten voor de Wereld (C-303/05, ECR, 2007, p. I-03633, paragraph 46).

[52] For example, see decision of the ECHR of 11 July 2002 in the case Goodwin v. United Kingdom (Appl. no. 28957/95).

[53] See, for example, the Order of the ECJ of 19 June 2008 Kurt (C-104/08, not yet reported), where the ECJ for obvious reasons refused to rule on the compatibility of certain provisions of the Austrian legislation with provisions of the Charter of Fundamental Rights of the EU. On the other hand, see the ruling of the ECJ of 9 November 2010 Volker und Markus Schecke GbR and Hartmut Eifert (C-92/09 ir 93/09, not yet reported), which was adopted after the entry in to force of the Lisbon Treaty, where the Court partially acknowledged arguments concerning the contravention of provisions of regulations to the Charter.

[54] Admittedly, this aspect is weakened in the Lisbon Treaty given the fact that the text of the Charter was removed from the Treaty. Besides, Dougan considers that removal of the text of the Charter from the EU Treaty could curb the ECJ and national courts using it 'in a creative and ambitious manner'. Dougan, *supra* note 41, at p. 699.

[55] Article 6 paragraph 2 of the EU Treaty amended by the Lisbon Treaty.

EU becomes more of a political community and there is a need for the external supervision of the exercise of such powers. Besides, private persons acquired a little bit wider rights to initiate direct actions before the General Court concerning the annulment of secondary EU acts,[56] since former Article 230 paragraph 4 of the EC Treaty was supplemented with a long advocated passage concerning the right of private persons to seek the annulment of 'a regulatory act which is of direct concern to them and does not entail implementing measures'.[57] Further, the powers of the ECJ and the European Commission were strengthened with regard to former third pillar secondary EU legislation. On the other hand, the Lisbon Treaty[58] provides for a strengthening of these powers compared with the EU Constitutional Treaty. Finally, it should be noted that the infringement procedure is simplified given the fact that if it is initiated concerning a non-transposition of directives, the ECJ may specify a lump sum or penalty payment in a first judgement and these sanctions would become effective on the day set by the judgement.[59]

To summarise, all these developments under the EU Constitutional Treaty and the Lisbon Treaty make almost no differences from the point of view of the first dimension of constitutionalism. Both Treaties enhance the EU legal system[60] and create additional (direct or indirect) means to private persons for protection of their rights.

Further, the EU before the Lisbon Treaty and developments under the EU Constitutional Treaty and the Lisbon Treaty should be evaluated from the perspective of *constitutionalism as polity expression* and *constitutionalism as deliberation*. First, the emphasis should be placed on the fact that the EU could be treated as a political community of undefined goals[61] already under EU law before the Lisbon Treaty. Such characterisation of the EU is determined by the following features:

- A competence in ever wider fields where the EU possesses public powers (the *quantitative* criterion – who exercises public powers?);
- Ever-wider areas where the EU Council adopts decisions by Qualified Majority Voting (QMV).[62] This feature taken together with wide public powers held by supranational institutions means that EU citizens more and more form and express they preferences *on majoritarian basis* directly at the EU level, not only through national governments (*qualitative* criterion – how public powers are exercised?);
- *De facto* influence of EU law on the areas of policy, where control is retained by the EU member states (again *qualitative* criterion – how public powers are exercised?).

---

[56] Article 263 paragraph 4 of the Treaty on the Functioning of the Union. Still that right might not be as wide as suggested: see the Order of the General Court of 6 September 2011 Inuit Tapiriit Kanatami and Others v Parliament and Council (T-18/10, not yet reported).

[57] For more details see, for example: V. Vadapalas, *Teisė į teisminę teisių gynybą Europos Teisingumo Teismo Praktikoje: Teisė besikeičiančioje Europoje,* Liber Amicorum Pranas Kūris, Mykolo Romerio Universitetas, 2008, pp. 479-96.

[58] Article 10 of Protocol No. 11 of the EU Treaty.

[59] Article 260 paragraph 3 of the Treaty on the Functioning of the European Union.

[60] As mentioned above, Neil Walker points out that a legal system is both the most obvious and least remarked dimension of (state) constitutionalism. Walker, *supra* note 24, at p. 7.

[61] Maduro*, supra* note 47, at p. 19.

[62] Empirical data shows that in reality the use of the QMV is a norm rather than exception: according to Simon Hix, 79 percent of decisions in the EU Council were adopted by the QMV during 1994-1997. S. Hix, *Europos Sąjungos politinė sistema* (Vilnius: Eugrimas, 2006), at pp. 116-117. Sara Hagemann notes that during 1999-2006 the use of the QMV varied from 37,4 percent (January-April 2004) to 59,8 percent (2002). S. Hagemann, 'Decision-Making at 25/27: Presenting the Facts', European Policy Centre, 2007, at p. 2.

Accordingly, the following developments under the EU Constitutional Treaty and the Lisbon Treaty may be identified as relevant from the perspective of two remaining dimensions of constitutionalism.

Firstly, the EU acquired an *explicit* legal personality and inherited all rights and duties of the European Communities.[63] The pillar structure established by the Maastricht Treaty was abandoned and a universal status of the Community method was acknowledged. Such developments could be treated as an (strengthened) expression of an integral political community. Further, the expansion of the application of QMV within the EU Council to numerous new areas merits attention. What is especially important, the QMV is generally[64] applicable in the field of criminal law[65] – frequently labelled as the last bastion of sovereignty (of course, using the term not in legal, but in political sense) of the EU member states. Such change means that the EU defines the common good on majoritarian basis not only through (limited) redistribution of the economic welfare, but through direct definition of what is good and evil within a certain community.[66]

Then, the establishment of provisions concerning democratic principles,[67] the universal use of the co-decision procedure and the enhancement of powers of the European Parliament, respectively, should be noted: all these changes reflect the fact that the EU citizens would form their preferences through the EU level more frequently.

Again, all above-mentioned features are almost identical in both Treaties. Nevertheless, there are some differences. For example, provisions concerning the use of new voting system within the EU Council will become effective as of 1 November 2014 with a possibility to use the so-called Ioannina mechanism till 31 March 2017 under the Lisbon Treaty. On the other hand the Lisbon Treaty goes even further from perspective of the above-mentioned dimensions, since it contains new provisions concerning the Unions' competence with regard to climate change[68] and provisions concerning the energy solidarity,[69] the latter being inserted on initiative of Lithuania and Poland.

Besides, one interesting aspect should be mentioned in this context. The Preamble of the EU Constitutional Treaty offering a description of dynamics of the European integration process provided that 'the peoples of Europe are determined to transcend their former divisions and, *united ever more closely*, to forge a common destiny' [emphasis added]. One could say that the proposition creates a mood of certain finality – recognition that the process of European integration reached a certain point of stability, where the EU's 'architecture' would not change any more. Paradoxically, the EU Treaty amended by the Lisbon Treaty, in the same tone as the EU Treaty, still speaks about 'the process *of*

[63] Article 47 of the EU Treaty amended by the Lisbon Treaty.

[64] Of course, having in mind rulings of the ECJ in cases C-176/03 and C-440/05, theoretically certain behaviour could be criminalised by the QMV voting already under the legal framework before the Lisbon Treaty. However, its scope of application was rather limited. On the other hand, the Lisbon Treaty introduces a general clause, allowing adoption of various substantive (including definition of sanctions) and procedural rules of criminal law under the ordinary legislative procedure.

[65] See Articles 82, 83 and 84 of the Treaty on the Functioning of the European Union.

[66] Here, one may note, that the German Federal Constitutional Court adopted the judgement in so-called 'European Arrest Warrant Act case' on 18 July 2005. The Court noted among the other things that '[i]n spite of the advanced state of integration, European Union law is still a partial legal system that is deliberately assigned to public international law'. See the English version of the judgement at: <http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html>. One may speculate that the cited passage is not a simple statement of the present state of affairs, but the constitutional imperative for the future as well.

[67] Title II of the EU Treaty amended by the Lisbon Treaty.

[68] Article 191 paragraph 1 of the Treaty on the Functioning of the European Union.

[69] Article 122 of the Treaty on the Functioning of the European Union.

creating an ever closer union among the peoples of Europe' [emphasis added]. Thus, such change of language could be interpreted as a clue to perspectives of further development of the EU *as a closer political community*, and, one could speculate, a repeated attempt to acquire its formal constitutional credentials some time later.[70]

Thus, the conclusion could be made that the EU Constitutional Treaty and the Lisbon Treaty have no *fundamental* differences from the point of view of above-mentioned dimensions of constitutionalism. Of course, the analysis provided above is very loose. It gives a sketch of only *formal content* comparison of both legal documents. Given the fact that the EU Constitutional Treaty will never come into force it is impossible to evaluate how *living constitutions* of the EU, i.e. the actual practice of the EU and national institutions, would develop and look like under two different documents.

By the way, we should not forget features mentioned in the European Council conclusions, the absence of which is equated to the renouncement of a constitutional character. In principle, they could hardly be treated as rebutting such nature. As we have seen the withdrawal of the term 'constitution' in itself does not change the essence of the polity. Theoretically, the EU Constitutional Treaty could have stimulated a more intensive development of the EU's political identity and, what is even more important, could have prompted an explicit use of the language of constitutionalism not only in judicial, but in political discourse as well. However, it is impossible to determine a degree of difference between those two documents, given the fact that, as we saw, the EU Constitutional Treaty was regarded by some as 'just another treaty'[71] – thus, it is impossible to ascertain which approach to the EU Constitutional Treaty would dominate in real life.

The same conclusion about the impact on constitutional character is true with regard to titles of secondary legal acts as well as titles of officials. As has been mentioned, the majority of the academic doctrine agrees that the explicit establishment of the principle of primacy of EU law in the EU Constitutional Treaty would not have changed the nature of relationship between EU and national law.[72] Finally, the EU symbols already exist and their explicit establishment/non-establishment in the primary EU law *per se* does not change the nature of the polity.[73] However, the reference to these elements in the European Council conclusions does support the view that the EU Constitutional Treaty was projected on the basis of ideas of classical/documentary constitutionalism. Accordingly, if we accept an argument that the mimicry of a state symbolism on the EU side is not in itself capable of producing added value for reduction of a distance between the EU and its citizens the removal of these elements from the founding document of the EU is meaningful.

The most controversial aspect from perspective of constitutionalism is, in the author's opinion, a renouncement of the single form of the act (given the fact that it was already drafted and signed before). The thesis is confirmed by the telling fact that once a proposal to prepare official consolidated versions of the amended EU Treaty and the Treaty on the Functioning of the Union was tabled to the expert group that drafted the

[70] Of course, this mood of finality of the EU Constitutional Treaty should be not perceived as absolute, especially given the fact that it contained so-called *passarelle* provisions. Viewed from that angle the EU Constitutional Treaty did not pretend to be totally perfect imperative vision of the future and acknowledged its partial imperfection. Still, analogous provisions appear in the Lisbon Treaty, which means that a future of 'an ever closer union' is not limited to switch from unanimity to qualified majority voting or transition from special to the ordinary legislative procedure.

[71] Such conclusion could be drawn, for example, on the basis of analysis of the above-mentioned decisions of national constitutional courts.

[72] See *supra* note 10.

[73] In general about symbols as a tools of integration see, for example, D. Grimm, 'Integration by Constitution', *International Journal of Constitutional Law*, Vol. 3, No. 2-3, 2005, 193-208, at pp. 199-200.

Lisbon Treaty, several national delegates voiced a strong disagreement to that idea. Guliano Amato, one of the vice-presidents of the European Convention stated very plainly that the renouncement of the single document form was deliberate in order to avoid new referendums: 'if it is unreadable, then it is not constitutional. That was the sort of perception'.[74]

Here, some parallels with the Matrix trilogy may be found once again. One of the characters of the film, Cypher, is unplugged from the Matrix and starts living in the real world. However, after some time he becomes tired of such living and begins to regret his decision to leave the Matrix. He decides to make a deal with the machines and asks them to plug him into the Matrix again. Cypher explains his decision to Agent Smith this way: *'I know this steak doesn't exist … I know that when I put it in my mouth the Matrix is telling my brain that it is juicy and delicious … After nine years … You know what I realise? Ignorance is bliss*'. The Lisbon Treaty may be treated as a similar 'retreat'.[75] In this regard it is important to note that one of the main functions of constitutional law is to integrate certain political communities.[76]

Regrettably, it could be stated that the renouncement of the EU Constitutional Treaty and move to the Lisbon Treaty generates an, at least, hypothetical danger that EU citizens will live in different worlds. Even the process of ratification of the Lisbon Treaty exposed the potential of living in a different world: those EU member states which have ratified the EU Constitutional Treaty tried to persuade their citizens that the Lisbon Treaty is in fact the same EU Constitutional Treaty, whereas those, which failed to do that (or there was a potential danger of failure) claimed that the Lisbon Treaty was profoundly different. Of course, it is hard to evaluate what impact such rhetoric as well as the above mentioned conclusions of the European Council would have on the practice of political and judicial institutions, once the Lisbon Treaty came into force. Besides, this move is hard to comprehend if one takes seriously assertions that the negative results of referendums in France and the Netherlands were, at least in part, determined by the distance of the Union from the ordinary people and its impenetrability.

Thus, one may, at least theoretically, ask a question: will the ECJ still dare to call the EU founding treaties the Union's 'constitutional charter' after the Lisbon Treaty came into force, as it did in *Les Verts*?[77] This question is related to another issue. If the EU Constitutional Treaty (its drafting process, form and content) despite of all its shortcomings could be perceived as the ambitious vision of the future EU, the Lisbon Treaty does not create such feelings.[78] As has been mentioned, one of the main functions of a constitution is the integration of a certain society. If we speak about the construction

---

[74] Cited from de Búrca, *supra* note 34, at p. 406.

[75] If to look at the process of drafting and ratification of the EU Constitutional Treaty, attention should be drawn to the well-known fact that it pulled to the light some features of the EC/EU that existed already for decades. For example, French voters have learned about the existence of the (liberal) internal market. As the judgement of the Czech Constitutional Court of 26 November 2008 concerning the constitutionality of the Lisbon Treaty shows, it 'disclosed' the existence of categories of exclusive and shared competence of the EU to the Senate of the Czech Republic (in particular, see paragraph 4 of the Judgement). The English version of the judgement available at: <http://angl.concourt.cz/angl_verze/doc/pl-19-08.php>. The same tendency was seen in Lithuania during the process of ratification of the EU Constitutional Treaty and the Lisbon Treaty – there were various instances of discoveries of 'new' properties of the EU among politicians, ordinary citizens and even lawyers.

[76] If we accept the thesis that the EU integration is based on the idea of the 'ever closer union among the peoples of Europe', then it should be recognised that EU constitutional law by definition performs/should perform such integration function at least not more intensively than national constitutional law.

[77] Partie Ecologiste 'Les Verts', *supra* note 2.

[78] Such mood is also reflected in some (titles of) contributions providing the analysis of the Lisbon Treaty, for example: Dougan, *supra* note 41.

of a social reality one may pose a question – if the architects of the EU Constitutional Treaty believed in certain constitutional ideals, why did they give up so easily? If they did so, does it mean that they did not believe in them? If yes, it means that they will never become a reality.[79]

The Matrix trilogy ends at a point where a fragile equilibrium is established between different worlds. It is still too early to evaluate what kind of equilibrium was established by the Lisbon Treaty. Formally looking the institutional reform programmed by it strengthens the EU and allows it to react to various external and internal challenges of the ever more globalised world with better efficiency. One has to hope, that the 'programming language' of the Lisbon Treaty will be accepted as persuasive enough and that it will not create substantial existential problems for the EU.

Conclusions

The analysis performed above allows for two groups of conclusions. The first one is generally related to the renouncement of constitutional language, and the second one encompasses comparisons of the EU Constitutional Treaty and the Lisbon Treaty from the perspective of various dimensions of constitutionalism.

Once speaking about the use of constitutional language in the context of the process of European integration, it should be noted, that events of last several years show that it is dangerous to use a certain language/terminology for description of a social phenomenon, if this language has deeply rooted historic meaning and there is no common agreement to what extent and how this language may be used in different contexts. The renouncement of constitutional language in the context of drafting of the Lisbon Treaty, mentioned in the European Council conclusions of 21-22 June 2007, may be conceived at least in two ways. Firstly, it may be treated as a mere renouncement of certain elementary 'technical' elements of the EU Constitutional Treaty. On the other hand, it may be treated as the abandonment of the claims to the status of a deeper, more explicit political community on the part of the EU.

It is the author's opinion that the emphasis on formal constitutional attributes, which may be felt in the European Council conclusions, could be treated as additional evidence that the EU Constitutional Treaty was drafted drawing inspiration from traditional/documentary constitutionalism. Here, one may express a doubt, whether tools for integration of a political community provided by traditional/documentary constitutionalism are really the most suitable ones given fact that the EU is a political community of different nature if compared with a state. Still, a conclusion could be drawn that the abandonment of ideas of traditional/documentary constitutionalism does not demonstrate in itself the rejection of ideas of constitutionalism in general. In essence, despite the way chosen to interpret the above-analysed conclusions of the European Council, both the EU Constitutional Treaty and the conclusions may be treated as interdependent speech acts,[80] which could be understood only in the context of particular social discourse.

The whole process of drafting the EU Constitutional Treaty, its failure and the subsequent switch to the Lisbon Treaty is a good example, showing that a social reality may be interpreted differently despite of the fact that the objects of interpretation (in a given case – legal acts) in essence are the same. For the time being, it is too early to answer the question, what impact such renouncement of constitutional language would have on

[79] As has been mentioned, one of the main functions of a constitution is to ensure and stimulate integration of a certain society. If the EU Constitutional Treaty was conceived as a tool for such integration, then it means the recognition that such integration is necessary for a proper and lasting functioning of a polity. Does it mean that with the Lisbon Treaty this need simply vanished?

[80] J. Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969).

the actual practice of the EU and national institutions if the Lisbon Treaty comes into force. Having in mind the failure of the EU Constitutional Treaty and content of the above-mentioned conclusions of the European Council, it may be difficult to expect the use of explicit constitutional language in discourse of political institutions for quite some time.

The comparison of the EU Constitutional Treaty and the Lisbon Treaty from various dimensions of constitutionalism allows drawing a conclusion that these two legal documents are very similar. Despite certain differences between the two it may be said that under the Lisbon Treaty the EU would become 'more serious constitutional entity' than it is under the current legal framework. Still, given the renouncement of a single form of a founding document, its outer expression of being an integral polity would be weaker.

Chapter 3

Can the common house of Europe be built on democratic foundations?

Vytautas Sirijos Gira and Laurynas Kasčiūnas
Center for Eastern Geopolitical Studies (CEGS)

Introduction

We must first admit in advance that this chapter is critical of the current development trends in the European Union (EU). The main apprehension deals with the issue that, although EU has always been seen as 'a European union of people', some unanswered questions force the conclusion that the EU today is turning into merely a project of the political and bureaucratic elite. On the other hand, we should add that our criticism does not attempt to deny the fact that the EU remains the most successful example of voluntary regional integration in the history of Europe. Nevertheless, it is reasonable to pause to critically evaluate if the Common House of Europe is actually being built on the right foundations.

EU and political crisis are increasingly becoming synonymous terms. Although it is much too early to talk about bankruptcy of the EU project, the question if European integration has already reached its limits is truly relevant nowadays.

The Irish 'no-vote' to the Lisbon Treaty brought about a serious shock to 'Plan B' of European reform, which the Lisbon Treaty represented after the Netherlands and France vetoed the Constitutional Treaty in 2005. The Irish have implanted EU with a ratification phobia concerning popular referendums in member states, which will probably last. However, it appears that Irish society will have to return to the ballot-boxes and try to vote 'correctly'. At the moment this is the only scenario of rescuing Lisbon Treaty. Another possible way around is a temporary Irish withdrawal from the EU until the Lisbon Treaty comes into effect.

In both cases the question is if this method of deepening European integration does not contradict the principles of democracy. A brief analysis of the origin of the Lisbon Treaty is necessary to answer this question.

The prehistory of the Lisbon Treaty is truly exciting. This document generally symbolises the remains of EU Constitutional project. Allow us to remind you that the ratification process of the Constitutional Treaty was 'frozen' after unsuccessful referendums in France and the Netherlands in 2005. A period of 'considerations' followed and was only terminated by German EU presidency in 2007, due to German commitment to revitalise EU institutional reform. During 'the period of considerations' the EU member states discussed various scenarios of the fate of the Constitutional Treaty (including the option of a 'mini-treaty'). However, Germany was committed to preserving as much of the Constitutional Treaty as possible. Thus, a new treaty – the Lisbon Treaty – was elaborated.

How much does the Lisbon Treaty differ from its predecessor? Answering this question can explain another interrelated issue: why, contrary to the Constitutional Treaty, was ratification of the Lisbon Treaty transferred to national parliaments of the member states thus avoiding a new wave of popular referendums?

The above-mentioned documents differ mainly in symbolic details. The word 'constitution' was removed from the Lisbon Treaty, as well as the EU flag, anthem and other symbols.

On the other hand, the main provisions of institutional reform were maintained, such as a new system of majority vote, the position of EU presidency, and providing an EU foreign policy representative with more power. The fact that the two documents hardly differ in their contents was acknowledged by Giscard d'Estaing, former president of France and often considered 'the father' of the Constitutional Treaty. Both euro-federalists and euro-sceptics agree that about 90 percent of the contents of the Lisbon Treaty and the Constitutional Treaty coincide.[1]

Nevertheless, the Lisbon Treaty differs from the Constitutional Treaty in one crucial aspect: its legal status. The Constitutional Treaty was to replace all former treaties regulating how the EU works; the Lisbon Treaty will simply be one of many other EU treaties. What does this mean? It means that the EU architects gained a possibility to avoid popular referendums in EU member states that are (as the political practice shows) unfavourable to various projects of building a 'Common House of Europe'. This adds to the concerns of euro-sceptics about the increasing democratic deficit in the EU. It is obvious that changing the form of a treaty while maintaining the contents does not properly justify withdrawal from popular referendums.

Referendums were usually held in EU member states when powers of national governments were to be delegated to supranational institutions of the EU. To put it in other words, transfer of power to the EU used to be the criteria for holding a referendum. The Lisbon Treaty foresees removal of the national veto right during the decision-making process in over 50 areas. Thus, given its contents, the Lisbon Treaty was supposed to be subjected to referendums. The public opinion indicated a need for public approval as well. According to opinion polls, over 70 percent of population in the United Kingdom, France, Germany, Italy and Spain preferred a referendum for the ratification of the Lisbon Treaty.[2] Thus it is obvious that the only reason why Ireland was the only country to hold a referendum was fear that the Lisbon Treaty may be rejected. It is a paradox that a lengthy and complex elaboration of the Constitutional Treaty and the Lisbon Treaty that were supposed to bring the EU closer to its citizens, on the contrary deepened the gap. The reform treaty, instead of bringing the EU closer and making it more understandable to EU citizens failed entirely, made the citizens even more confused about what the Lisbon Treaty actually is and what the EU is turning into altogether.

Thus the question arises: how can the EU be defined today and does building the 'Common House of Europe' contradict the principles of democracy?

What are the roots of the EU democratic deficit?

A failed federation, but a successful prototype of a post-modern confederation – this is how Giandomenico Majone, who has been studying the issue of EU democratic deficit for two decades, summarises and evaluates European integration.[3] In his book *Dilemmas of European Integration*, Majone reaches the conclusion that the European Union never resolved a crucial dilemma: whether European policies should be initiated in order to solve specific problems in the best possible way, or to serve, first and foremost, integration objectives. He claims that, up till now, the deepening of European integration was usually triggered by ambitions of EU technocratic and political elite to artificially create a European federation, not a real internal demand to resolve economic, social or political problems at most efficient level.

---

[1] J. P. Bonde, 'From EU Constitution to Lisbon Treaty: The Revised EU Constitution Analysed by a Danish Member of the Two Constitutional Conventions', Foundation for EU Democracy and the EU Democrats in cooperation with Group for Independence and Democracy in the European Parliament, 2007, at pp. 21-29. Available at: <http://www.eudemocrats.org/eud/uploads/downloads/e-Lissabon_til_nettet.pdf>.

[2] Ibid., at pp. 78-81.

[3] G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (New York: Oxford University Press, 2005), at p. 1.

Majone argues that since the late 1980s the continuous growth of European competences, combined with an extension of majority voting in the Council, has given rise to complaints of a serious 'democratic deficit' in the EU. According to some other commentators, this democratic deficit is paradoxical – if the EU was a state it could not be a member of the Union. The analogy with national institutions leads to the claim that European Parliament (EP) should have an independent power of legislative initiative because national parliaments are so empowered. The EP is the only (or at least the principal) repository of democratic legitimacy in the EU. Hence increased powers to this institution, directly elected by universal suffrage, would reduce the democratic deficit and restore legitimacy to the Union.[4]

Another important factor is the veto power of each member state. This is the most legitimating element of European integration, since it excludes the possibility that the preferences expressed by a majority of voters in a member state may be overrun by decisions taken at the European level. Majority voting weakens national parliamentary control of the Council without increasing power of the EP.

Does the Lisbon Treaty envisage increasing powers of the EP? And if so, is that enough to eliminate democratic deficit? One of the 'merits', for which the Lisbon Treaty has constantly been praised, is solving problems of democratic deficit via empowering of the EP. The Lisbon Treaty increases the role of the EP in the fields of budget formation, legislature and political control. However, analysts argue that although the new treaty does formally reduce the technocratic mode of decision-making in the EU via formally granting the EP more power, such institutional reform is not yet a salvation from the democratic deficit. Will institutional reform make Europeans vote in elections for the EP more actively? Currently only approximately 30 percent of voters attend the EP elections and most analysts claim that this number is unlikely to increase organically. The problem lies at the incompatibility of national and European political parties: do the euro-parties represent any citizens? Since the creation of the EP there has been little or no evidence of voters in member states being able and willing to identify themselves with the European political parties. Furthermore, political parties in many member states experience a standoff of electorate during elections, which naturally spills over to the EP election. In addition to that, formally the EP does still not have the power to initiate legislation, thus its power will not become the same as the constitutional powers of a national parliament after Lisbon.

In conclusion, one may claim that the EU at least for now experiences serious problems of democratic deficit both at political and institutional levels. And no reasonable solution for that has been offered yet. Is it even possible to solve this problem altogether?

How to deal with the democratic deficit in the EU

One can understand the democratic deficit in two ways: (a) as an insufficient development of institutions and political process compared to representative democracy, and; (b) as a delegation of political power to politically unaccountable institutions. The EU exhibits both of these phenomena. One can also discern two theoretical models, which, if implemented, could reduce the democratic deficit in the EU: the scenario of a return to intergovernmentalism and the scenario of a federal EU.

1. The scenario of a return to intergovernmentalism. The presumption of this scenario is that it is only the nation state that can foster the type of trust and solidarity that is required to sustain a democratic polity.[5] According to this scenario, European institutions

[4] Ibid., at pp. 23-40.

[5] E. O. Eriksen, 'How to Reconstitute Democracy in Europe?', in id. (ed.), *How to Reconstitute Democracy in Europe? Proceedings from the RECON Opening Conference*, ARENA Report No 8/07, RECON Report No 3, Oslo: ARENA, at pp. 19-20.

should be accountable to national democratic systems. The only realistic way to ensure this accountability is through the intergovernmental method of decision-making, the veto power of different member states, etc. To comply with the democratic tenets of this model, the EU will have to be reformed in such a way as to ensure that its legitimacy is derived from the democratic character of the member states. The EU's structure must be set up in such a manner as to ensure that the member states retain core decision-making powers within the Union's institutional structure. In the case of this scenario the functioning of the EU would primarily be conditioned by the coexistence and competition of different social and economic models inside the EU. The competition of different models would lead to the strengthening of more effective models and the reformation of ineffective policies (say, the Common Agricultural Policy). It is exactly this competition, not the harmonisation or unification of the EU, that should be the EU's leading motive.

2. The scenario of a federal EU. To use the principle of analogy (to the standards of a nation state), it would only be possible to solve the problem of democratic deficit in the EU if the Community was transformed into a federal unit. The conventional shape of such a community should be a democratic constitutional state, based on direct legitimation.[6] Considering the principles of a representative democracy, it is obvious that the European Parliament is the only legitimate EU institution. Therefore, in order for the erosion of national vetoes (and thus the strengthening of supranationalism) not to exacerbate the problem of democratic deficit, it is essential that the directly elected EP would obtain the power of an independent legislature and thus the leverage to control the non-majoritarian EU institutions.[7] The increasing power of the EP would be inseparable from the EU turning into a federal-type political unit.

The problem of democratic deficit in the EU manifests itself also because the EU does not have the instruments to ensure equality and social justice (to conduct the policy of social redistribution, something that is a function of a nation state).[8] One might regard the inclusion of such policy areas as taxation or social policy into the agenda of the EU as the driving force towards federalism (not only in an institutional but also functional sense). It is paradoxical but according to this scenario the solution to the problem of democratic deficit lies in the initiatives to deepen European integration.

What kind of EU development model is best for Lithuania?

Lithuania was the first country that ratified the now 'bankrupt' EU Constitution. In the case of the Constitution, as well as the more recent Lisbon Treaty, there was no serious discussion about what kind of EU Lithuania needs. All this allows one to claim that Lithuania's 'Europe policy' is first of all the business of politicians and, partially, academics.

Probably the most thorough and consistent analysis of the priorities of Lithuania's Europe policy has been done by the Centre for Strategic Studies, which has prepared the Strategy of Lithuania's Europe Policy.[9] The study states that Lithuania's Europe policy is confronted by the dilemma of integration, which is directly related to the question of how to increase Lithuania's influence on the decision-making processes in the EU through deeper integration, without posing a risk to national sovereignty (or state's political autonomy).

This dilemma can only be solved if Lithuania succeeds in compensating the formal loss of formal political autonomy with an increase in its structural power in the decision-making

[6] Ibid., at p. 26.

[7] Majone, *supra* note 3, at pp. 28-30.

[8] Ibid.

[9] Center for Strategic Studies, 'Strategy of Lithuanian European policy', 2006. Available at: <http://www.ssc-lietuva.lt/picture/upload/ssc_leps_santrauka_20061119(1).pdf> .

processes of the EU, i.e. if Lithuania succeeds in transferring the political model that best suits its interests to certain sectors of EU public policy.

The study states that the principle of intergovernmentalism should dominate those areas of EU public policy, in which Lithuania has the most limited means to affect EU agenda. For example, opposing the harmonisation of taxes at the EU level can be motivated by the idea that this process would most likely impose higher adjustment costs in Lithuania than in wealthier EU member states, and this would undermine the competitiveness of Lithuania's economy.

On the other hand, it is possible to solve the dilemma through deeper EU integration only if it would serve as an instrument to weaken the external sensitivity of the state, i.e. to neutralise external threats and minimise internal vulnerabilities. That is why Lithuania is particularly interested in the creation of a common EU energy policy with a strong role for the Commission. In other words, it is in the interest of Lithuania to make sure that parallel to the decreasing autonomy of state's political decisions (this is an inevitable result of membership in the EU), the EU's external subjectivity increases in those areas in which Lithuania is particularly vulnerable to the pressure of third countries (first of all, Russia).

All this means that neither the federalisation, nor the dissolution (or the re-nationalisation) of the EU is in Lithuania's interest.

Chapter 4

Representation of national interests in the European Union

The case of the administration of the European Agricultural Fund for Rural Development in Lithuania

Živilė Šukytė
Vytautas Magnus University, Kaunas

Introduction

Due to the on-going European Union (EU) institutional reforms and the expansion of the Union's spheres of political competencies, the role played by national administrative bodies – and especially by their representatives in preparatory and consultative committees and working groups near the Council of the European Union, European Commission, European Parliament, where the main decision projects are approved – is becoming more and more important.

There are many discussions about the basic aspects, which are inherent in the concept of European integration processes and the strengthening or even reconstruction of unanimous European democracy. 'For' or 'against' the process of deepening integration? What is the European Union – is it a traditional international organisation or a United European State? Is there a need to have a single Constitution for Europe? Or maybe this document could be interpreted as the too comminatory attempt to regulate the national policy life of the member states? Are the member states ready to limit their sovereignty more strictly? Or maybe this opportunity allows for a better representation of national needs and interests in the central level of the EU system? These relevant questions show that the EU is a unique, hybrid element of the international relations system and its structure is one in which the intergovernmental and supranational managerial conceptions are interdependent. There are still many debates and discussions trying to find the best answer to the dilemma of whether it is possible to put the EU into the framework of the traditional theories of the international organisations? Or maybe it needs a more rigorous scientific method to analyse this organisation in the contest of federalism?

It is obvious that all these discussions are worthless without an analysis of the situation and specialised research. Of course, the new international wave, connected with the integration of the newest member states, is not the answer for these basic questions, mentioned above. These new processes are stimulating a demand to analyse the changing EU system more carefully. The impact of the new challenges, connected with the cultural, political and administrative differences between the old and new member states influences not only the process of the Europeanisation, but also promotes the reformation of the EU's central political level. In this context the representation of national interests on the EU level and their coordination in the institutional systems of the member states is an urgent, though not a thoroughly investigated, theme.

The aim of this chapter is to ascertain the impact of the processes of Europeanisation and the deepening of the integration for Lithuanian agricultural policy. Before further analysis of concrete examples, it is worthwhile to remember that the concept 'Europeanisation', like the term 'EU', is variegated. In reviewing the literature on Europeanisation, authors

have used different definitions of the term, highlighting different aspects. Particularly useful is Olsen's list, which defines five possible uses of the term: (1) changes in external boundaries; (2) developing institutions at the European level; (3) central penetration of national systems of governance; (4) exporting forms of political organisation; (5) political unification project (Olsen, 2004). The third part of the definition represents the 'top-down' process, whereby domestic political actors or institutions have adapted to the pressures of European integration, and has been particularly widespread and influential, especially in the field of comparative politics. Another point of view is that Europeanisation could be explained as institutionalisation of the European political system, in other words the Europeanisation also involves 'bottom-up' processes (Carter et al., 2007)

The content of this analysis is the national system of policy formation and implementation in the administration and coordination of the European Agricultural Fund for Rural Development (EAFRD) for Lithuanian rural areas. The main attention is concentrated on the interaction between the national governmental political authorities, institutions, other partners, and, in some cases, society, and their liaison with the other side of the processes – political institutions at the central EU level – when coordinating and bargaining over the main questions and aspects connected with the topic of rural development in Lithuania. There is one more dimension involved: the importance of a correct interpretation of the EU policy, like the national policy of each member state (where still some problems exist). When forming and organising the inner structure of the representation of the national interests of Lithuania to the EU and when coordinating its inner activity certain drawbacks could be pointed out. Undoubtedly there are some advantages too.

In this study, the main sources of information are: analysis of theoretical literature, analysis of the main specified documents and working papers of the Ministry of Agriculture of the Republic of Lithuania (MoA) and other institutions, statistical analysis, analysis of the inquests date, consultations and personal experience, working in Lithuanian civil service.

It is obvious that for reaching the improvement and reformation of united European democracy, there should be a sense of the unique identity of all EU member states at all political and administrative, even social and civic, levels. However, there still exists an uncertainty, connected to the cultural differences of the political and administrative systems between different member states (especially analysing the distinctions between the old and the new member states), which should also be taken into account.

Understanding democracy at the national and European Union levels

According to the model of the ideal democracy, the processes of state governance should be transferred to the people, to society. However, in reality the model of an ideal democratic system does not exist. The reason is that it is impossible to delegate the governing power to all citizens of the state. In democratic national states, the democratic *credo* posits that all political authority emanates from the law laid down in the name of the people, in other words it is obvious that the model of the representative democracy is established at the national level of the member states.

Recalling the origin of the EU, it should be mentioned that at the first stages of the discussions about the possibility of establishing a European regional organisation, the main actors and initiators of these processes were representatives of the political elites of the states that won the Second World War. It should also be mentioned that also the pan-European idea, suggested already between the First and the Second World Wars, was created by the representatives of the political elites (the movement of pan-Europe, established in 1923 by Richardo Nicolaus Coundenhove-Kalergio, united such famous politicians as Aristide Briand, Walter Rathenau and Gustav Stresemann; cf. Vitkus,

2008). Thereby, in practice, most attempts to instil democracy in the EU still start with the institutions characteristic of representative democracy – nation state institutions. The most obvious example is the European Parliament. Originally conceived as an assembly of national parliamentarians, the Parliament has step by step – by changing its name, introducing the system of direct elections, expanding its powers – become the institutional example of national parliaments (Crum, 2005). The nation state is the harbinger of democracy.

After the failure to create a United States of Europe based on a federalist approach, another way to seek European cohesion was chosen. The decision was to seek European regional organisation through the cohesion of small-scale, specified policies (trade organisation, industry, etc.). However the final decision in this question was made by the political and business elites of Europe; the civil societies of the founding states were excluded.

It was obvious from the very beginning that there was no space for the unique European public opinion to influence decisions concerning the EU's formation procedure. Jürgen Habermas affirmed that the ideal public space is an arena for the formation of rational discussion and debate, which are independent from the interests of business, nation state governors and political elites (Habermas, 2001; Wilde, 2007). The democratic structure of the EU, however, was formed by the interests of the member states' political and business agents – their elites.

European democracy is hence closely connected to the concept of the representation of national interests at the central level of the EU. The main aspect, which could impact the success of the re-constitution of the democracy at the unique EU level, is the attitude of the member states' political and administrative elite towards EU policy issues. This can be investigated through identifying the member states' liability and national attitude towards the EU policy as can be seen in the attitude and the disposition of the governing political delegates, the level and the impacts of the Europeanisation and euro-integration processes on the national legal and administrative systems and the level of traditional cooperation at the national, member state level.

For instance, the analysis of the practise of assimilating the EU's support for the Lithuanian agricultural sector and rural development could be noted as an example. The examples presented here will be connected to the experience of the creation of the legal acts designed for the implementation of EU requirements. The main changes in the political and administrative systems of national government as well as the main attitudes towards EU policy and initiatives will also be mentioned.

European Union's support for agriculture and rural development: The case of Lithuania

Rachel Brewster et al. (2002) considered that there will be some problems during the process of integration of new member states, for example with respect to the common currency, the euro, which is resisted both because of the danger of a worldwide financial crisis and current or potential differences in national monetary policy preferences of the member states. We can now see that these doubts were, to some extent, justified. And there are other issues and challenges caused by the process of widening and deepening Euro-integration. One of the most discussed and worrying issues are the constitutional and institutional implications of enlargement at central levels in Brussels and in national governments of the member states.

Another fear in the pre-accession period was the cost of enlargement, associated with the support from the structural funds and the Common Agricultural Policy (CAP). At the pre-accession period the member states were already spending 1,27 percent of their GDP on EU budgetary affairs. The EU's agricultural sector and its poorer regions currently

received about 80 percent of all EU spending. An unchanged CAP threatened to increase the EU's budget by nearly 40 billion euro. Heather Field (2002) predicated that the problems arise with the respect to agricultural and structural policies in the context of the EU's eastwards enlargement because of the relative poverty of the applicant countries and the situation that most of them have large, but relatively unproductive and labour-intensive, agricultural sectors.

Field emphasised that as a consequence of that, a change in the policy should be made in order to prevent the budgetary costs from becoming unacceptable from the point of view of the existing member states. These concerns had been enhanced by the application of exiting EU political arrangements. If these would be not changed, it would give the new members states a greater political influence than would be due to them on the basis of population size. Also the influence, which agricultural producers would be able to exert through political parties and governments in the most strongly agricultural applicant countries, would militate strongly against any post-enlargement reform of the CAP.

Accordingly to Field, the 'national interest' of member states in CAP and EU bargaining is important. However, this 'national interest' may be political or economic, in the sense of what would be more convenient and beneficial for the 'newcomers': to have an influence and represent political will through the CAP or other EU policies, which would benefit particular regions, sectors or groups, and win votes, even if at a net cost to the country concerned, or alternatively, the political interest is more connected with net budgetary or other economical benefits. Where this 'national interest' is defined in political terms, according to Field, it may change with the parties in power; whereas perceptions of what is in the national economic interest are much less likely to.

Until the beginning of the budgetary period 2007-2013, the EU's structural funds included a structural support section of the European Agricultural Guidance and Guarantee Fund (EAGGF), which provided funds to support changes in the agricultural sector, such as farm modernisation, farm amalgamation or conversion into activities other than farming, and the early retirement of farmers. It also covered regional and cohesion funding (Field, 2002). After the budgetary period 2000-2006, the support for the agriculture and rural development's affairs are allowanced under the European Agricultural Fund for Rural Development (EAFRD). Other spheres connected with the regional development, cohesion and etc., are supported under the structural funds (European Regional Development Fund (ERDF) and the European Social Fund (ESF)) and under the European Cohesion Fund (ECF).

Under the pre-accession period, the support for Lithuania's agriculture sector and rural development initiatives were placed under the SAPHARD programme – a specialised programme for candidate countries with the aim of preparing their managerial and administrative structures to have the capacities required under the EU's structural funds after accession to the EU. Lithuania and other candidates (except Bulgaria and Romania) became members of the EU in 2004, in the middle of the budgetary period 2000-2006. The first financial support for Lithuania's agriculture and rural development was under the structural funds and only in the period for 2004-2006. After this financial period and after the reform, as mentioned above, the specialised EAFRD was constructed, which was separated from the other structural funds. In 2007 the Rural Development Strategy for Lithuania 2007-2013 and the Rural Development Program for Lithuania 2007-2013 (RDP) were established. Lithuania was one of the member state leaders which adopted such national documents for the budgetary period 2007-2013. In September 2007 the European Commission confirmed the RDP.

In this chapter, the formal situation is briefly presented. Main attention should be paid to the political, legal, administrative and co-operational dimensions, interactions and their connections with central EU policies, conceptions and initiatives in the context of forming favourable conditions for the reformation of EU democracy.

National political agents and their attitudes towards European Union affairs: Representation of populist interests or liability to the supranational idea of the EU?

As mentioned by Erik Oddvar Eriksen and John Erik Fossum (2007), a deep diversity, which does not presuppose a unified people and unified democratic system, still exists.

> In contrast to a rights-based union, deep diversity does not presuppose that the entity is based on a full-fledged constitution, but rather on a *contract,* which amounts to a *treaty*. This is a trait of deep diversity that resonates with the EU's present constitutional structure. […] Deep diversity presumes that a group's sense of belonging to the overarching entity passes through its belonging to another smaller and more integrated community, which again is consistent with how most of Europe's citizens consider their relation to the EU.
>
> (Eriksen and Fossum, 2007: 6)

The supranational area of the decision-making processes is more and more influenced by the issues connected with the differentiation of political and administrative cultures among old and new member states and state-candidates.

It is recommended that, while doing research or analysing the specific situation connected with the processes of Europeanisation or euro-integration, one should look at the area of national political parties, party systems, elections and voters. Political parties provide an essential link between the government and electorates in the modern democracies (Carter et al., 2007).

The case of Lithuania shows that there is nothing new to say about party elites' attitudes towards EU issues. The case only confirms the generalised results of previous theoretical and empirical studies. Lithuanian farmers and rural residents do, nonetheless, have their own strong representation at the political elite level – the party of Lithuanian Peasant Popular Union. (The leader of the party was appointed Minister of Agriculture of the Republic of Lithuania under the past cadence.) The basic aim of its activities was to be active in the background of national policy and to represent the political interests, sometimes a little bit populist, of its voters in all areas of policy formation and implementation. (The latter comment is appropriate almost for all Lithuanian political parties and this is a result of the Soviet experience.) This study of the Lithuanian party system therefore re-confirms the findings of Robert Ladrech's analysis of the national political parties, that party elites separate the EU policy-making realm from domestic party politics (Ladrech, 2007).

There is still no sense of a common, unified EU identity, or European community, or of the national state's integration into this European system. It is obvious that in Lithuania the importance of EU issues and policy-making processes is quite dependent on the good will, subjective interests and positions of the national political parties in power in the national parliament, *Seimas*. An example is the situation in Lithuania after the election of a new *Seimas*. Firstly, all campaigns of the national political parties were exclusively concerned with national policy areas and conceptions. The experience of the administration and assimilation of support under the EU's structural funds, and in some cases of the EAFRD, which was the result of the implementation of EU requirements, in the pre-election campaigns were presented as examples of good practises and the positive influence of the ministers' work and, of course, the good practise of governance at the local level of the Lithuanian political system. In some cases, even the examples of positive results of the implementation of the EU requirements (projects, initiatives, financed by EU funds and financial instruments, etc.) were used by politicians for their personal political campaigns.

This is also reinforced by the findings of an analysis of the information given in the media. The analysis comprises the time period of five and a half months (from 3 June till

10 November 2008). The sources analysed were newspapers (national, designed for the citizens of the biggest cities of Lithuania, regional, local), radio and television programmes (public and commercial channels), dates from different information agencies (BNS, Elta, etc.) and information on internet websites, which were connected with agriculture and activities or initiatives of MoA. A suspicion of the politically tendentious introduction of neutral information about the EU's initiatives and the possibility to get support could be felt. For example, in a fair number of the informational announcements, especially those connected with the opportunities to apply for the support by the creation and implementation of the rural community, its activity and initiatives based projects, were connected with names and/or titles of the main heads of one or another ministry of Lithuania. Whereas another kinds of formal announcements which, according to the EU's requirements, should be published in the mass media, were not thematically related to Lithuanian politicians (for example, messages cautioning, that amounts gained by illegal procedures should be returned). In some cases, especially ahead of the parliamentary elections, in order to keep an attractive reputation, the EU and its requirements were depicted like an overseer unwilling to accord the needs of the Lithuanian people, farmers or rural residents (Šukytė, 2008).

Erik Oddvar Eriksen and John Erik Fossum notice that 'it is difficult to see the *democratic* integration process as driven solely by the interests and resources of the decision makers who are compelled to make choices under conditions of uncertainty and risk' (Eriksen and Fossum, 2007: 3). In some cases this idea also could be arguable. It depends on the case of the separate member state. As example of Lithuanian pre-accession period, the experience of bargaining for closure of the nuclear station of Ignalina could be mentioned. During the pre-accession period the first step was to reconcile the negotiating positions. At that period of negotiations the obligation to close the Ignalina nuclear station by 2009 was adopted (it was also included in the National Energetic Strategy of the Republic of Lithuania, which was adopted by the *Seimas* in 2002 (Vilpišauskas and Nakrošis, 2003). Only after the negotiation and closure of all sectors of the negotiations, the pre-accessional referendum was organised. Today the analysis of the situation shows that the requirement to close Ignalina nuclear station by 2009 was not fully implemented. Moreover it seams that the closing procedures would be prolonged also during the new budgetary perspective for the period of 2014-2020, if the negotiations with the EU would be successful.

However the one of the former Prime Ministers of the Republic of Lithuania, explaining and commenting the issue, emphasises that the main blame should be shifted onto Lithuanian citizens, who, while informed about the conditions and requirements for the Lithuania's accession into EU, voted for membership in this European organisation. The generalisation of this example could be that the obligation was agreed by Lithuanian negotiators seeking to become an EU member state at any price. If the obligation could not be reached by the expiration of the term, then there was always the possibility to remind the citizens that in democratic systems they also are a part of the power of the political formation processes. Admittedly such examples show that there is a shortage of a political negotiation culture in Lithuania. However, this situation confirms previous findings that in some cases EU policy and initiatives are used only because they are useful for the implementation and fulfilment of the requirements of national political representatives.

Eriksen and Fossum admitted that 'only public deliberation can get political results *right*, as it entails the act of justifying the norms to the people who are bound by them. While this basic democratic principle may not be controversial, it does not translate into a clear answer to the question of which institutional form democracy in Europe should take' (Eriksen and Fossum, 2007: 10-11). In this context problems still exist in Lithuania. Despite the fact that the euro-integration processes and accession into the EU were mostly favoured by national political elites, nonetheless the inadequacy at the Lithuanian political level could be felt. Still occasions could be recognised when the EU's policy and

initiatives are classified as foreign – instead of domestic – policy affairs by national politicians. The impact of this paradox is that incorrect and imprecise information about the EU is announced in the mass communication processes. This issue also strengthens the lack of a common identity, the democratic deficit and the absence of the possibility for a European public sphere to emerge. Like Ladrech observed: 'the continuing perception that the EU is a foreign policy matter further reinforces the lack of attention to it by rank-and-file party members and contributes to the party elites' autonomy' (Ladrech, 2007: 208). According to this finding, the reason why party systems seem to appear unaffected by more general examples of Europeanisation, could be explained (ibid.).

Changes in national legislation and administration systems

After the accession to the EU, all tasks of the first pillar of EU's initiatives and policies should be assumed, not as foreign policy items (as it was under the pre-accession period), but as domestic affairs. Policies under EU's supranational regulation are to a great extent interfering in the everyday life of national member states; EU membership is thus becoming a sphere of everyday obligation and common work of all 27 member states. It is not easy for new member states to reach this turning-point in their way of acting (as illustrated by the examples mentioned above). The perception of Europe and the obligations of EU membership should be changed. Peculiarities of formation of political and administrative culture in the old and new member states lead to differences, which is a stiff task (Mazylis et al., 2007).

New challenges for the organisation of legislation procedures

EU membership and the required changes in national political and administrative systems lead to a number of consequences. Together with challenges in governance and administration within state, these changes also correcting the organisation of political decisions. There is a need to assume that within the supranational EU competence, EU regulations and directives can regulate national legal acts. Especially, the latter are becoming guidelines for developing and correcting national law. National law is becoming regulated at the supranational level. Though it does not mean that this regulation is too detailed and descriptive (under the EU's directives the freedom for member states to decide how to incorporate them into national legal systems is allowed; Hix and Goetz, 2000), but the impact of these regulations for legal, administrative and political systems is evident. Another kind of impact, connected with the legislation changes, is that member states are responsible for the creation and adoption of the implementation laws, which should be designed at the national level, for the further adoption and implementation of primary EU legislation and requirements (the 'top-down' legislation process).

In Lithuania, and also in other member states, one of the most sensible spheres at the moment, in which European-national 'top-down' legislation processes are used, is the sphere of structural policy formation and implementation, and since the beginning of the financial perspective for the period 2007-2013, also the policy of EU support under EAFRD, committed for agriculture and rural development initiatives in member states. Briefly summarising the character of this 'top-down' legislation process, the main aspects are that all basic guidelines and aims in this CAP area, all basic requirements, regulations and rules for the national administrative, institutional, financial, auditing, monitoring, etc., systems, also the key axis and measures under which support may be allowed in each member state, are included in the EU regulations, directives and other official documents. These are superior to national laws when creating and implementing further documents on the level of the member states (when national strategies, programmes and implementation rules for the separate measures under a thematical axis are created).

On the other hand it seems straightforward that there are some mistakes originating in practise. In implementing legislation, national experts should exclusively follow the requirements of the EU's legislation or these national strategies or programmes, which were confirmed by European Commission. If these legal acts, created under the 'top-down' approach, are designated for the potential applicant, like the compendium of requirements for suitable projects, issues could emerge when talking about the harmonisation of EU and national law. For example if the requirement of maximum annual income of micro-enterprises in national and EU law is defined differently, there is a danger that there would be too little clarity for the potential applicant about possible support. As a consequence the measure would not be as popular as expected and finally the unsuccessful implementation of the Rural Development Program will be interpreted as the incapacity of the member states to identify and properly represent their needs and interests at the EU level (also it is possible that according to this result the amount of support for that member state in the following programming period would be reduced and, of course it would be interpreted as a member state's incapacity to predict their needs and appropriately represent them in the EU bargaining processes).

Mika Vidgren (2002) found that, for the most part, only very decentralised systems can guarantee the efficiency and optimality of the decision adopted and the actions taken. Decentralised decision-making is more efficient than centralised. That means that local agents should be provided with proper possibilities to amend agenda proposals (in this concrete case the proposal of the European Commission). This has some similarities with the concept of flexible integration in the EU and, indeed, flexibility may lead to efficient decision-making rules in cases where a lack of flexibility cannot.

The EU level, however, is constructed more on the basis of the theoretical and technocratic understandings and bargains of national experts. The main decisions are prepared and agreed upon at the lower levels of national experts, civil servants and EU administrative officials. The best example of how practical insights can form the position taken by national experts is the implementation of the Rural Development Programme for Lithuania 2007-2013 (RDP). Technocratic representatives of European Commission are, at the moment, coordinating the RDP, following discussions and a bargaining process over the possibility to amend some actual points of the RDP. These amendments came to light according to daily work, experience and identification of the drawbacks of the Programme's implementation in real life. The suggestions were formed and proposed together with civil servants and experts, who confront these issues in everyday work. Also in the future, many other legal procedures should still be pursued, which takes time and could even lose their relevance due to the economic crisis and the extremely volatile situation in agricultural and economic sectors.

The bargaining process shows that the more technocratic and theoretical position of the European Commission sometimes marginalises the importance of the practical point of view and the experience of the experts. The problems of harmonisation are also slowing the implementation processes of EU initiatives. For example, from the beginning of the financial period in 2007 till November 2008, 26 implementing rules for the measures under the main axis of the RDP were adopted. Accordingly, during this period there were 46 replacements of these rules already made (19 of 26 implementing rules were already revised) – all of which were drawbacks to the harmonisation of the law.

Another important aspect, related to governance by new political representatives, should be explored. At the moment it can be noticed that implementation rules, which were prepared before the new elections to the *Seimas* held in 2008, were strictly simplified, shortened and changed by the new government. Equally it should be mentioned that in most cases the initial background for these solutions, of course, was not concerned with the political institutions of the EU. According to these new initiatives, the perturbation concerning the possibility to assimilate the EU support effectively and in time persists.

Harmonisation of national law with European legal acts in Central East European countries was, and still is, quite complicated. Apart from the cultural, political and administrative differences, there are some additional difficulties. The main problems are still connected to the large amount of *acquis*, the permanent changes of European legal acts, the weakness of the national institutions responsible for implementing European Union law (also sectoralisation of their work organisation should be mentioned), and the linkages between *acquis* and the main legal and administrative fundamentals subsistent to the European Union system. However as mentioned above the half of the success depends on the willingness and initiatives of the governing political elites.

Administration and coordination of EU's policy requirements and representation of national interests

Here Europeanisation of domestic institutions, including central government and national administrations, local government and territorial institutions, national parliaments, national courts, and trade unions can be seen. There also the influence of the EU on policy-making in the member states (including specific policies) and the impact of European integration on national interest intermediation, political contention, business-government relations, domestic news coverage, and public understandings of citizenship and of nation state identities can be examined (Carter et al., 2007).

When trying to evaluate the preparation and coordination of the national position of the Republic of Lithuania, it becomes obvious that the regulation of it presented in the national legal acts is quite complicated from the point of view of the traditional national public administration system. For example, it is unclear which of the institutions at the governmental level plays the most important role in these processes. In the Resolutions of the Government of the Republic of Lithuania, it is confirmed that two main powers in this institutional infrastructure of the representation of the national interests and position are the Government of the Republic of Lithuania and the Ministry of Foreign Affairs. The results of interviewing several officials of the Permanent Representation of Lithuania to the European Union showed that the actual coordination power depends on the institution working in the specialised policy sphere; this becomes important in case of the necessity to deal with particular issues or problems.

This situation arises because the officials, delegated to the committees and working groups of the main institutions of the European Union, are sent from different ministries and most frequently have separate instructions prepared by their 'native' institutions. These instructions generally are quite 'narrow', sectionalised, and represent the interests of specific national policy spheres. Often these requirements are not coordinated with each other, neither vertically nor horizontally. According to the results from interviews with officials in the Permanent Representation of Lithuania to the European Union, there was one more remark made: representatives of national institutional system (especially specialised attachés, delegated from other ministries than the Ministry of Foreign Affairs) are not properly prepared to represent national interest at the European Union level. The problem is that they are not familiar with the main and common political aims of the Republic of Lithuania; therefore sometimes there is an absence of a common and coherent Lithuanian position at the central European Union level (Šukytė, 2007).

At the moment there are 630 committees and working groups at the EU institutions level (270 of them are established under the Council of Ministers and 315 under the European Commission). On the list of representatives of the Republic of Lithuania, designed to represent Lithuanian's national position, there are 93 governmental institutions and 942 officials involved. In comparison with similar information, selected in 2004 (in the beginning of EU's membership), 220 of these officials are engaged in these activities from the very beginning (it contains 23 percent of all Lithuanian representatives at the moment) (Final Report of the Research of the Impact of the Integration of Lithuania to the European Union, 2007).

The one of the most important factors when analysing the effectiveness of the representation of national position is the broadness of the workload and the responsibilities of the national representatives. The fact is that in most cases these institutional representatives are national civil servants, experts who are fully engaged in activities at the national governmental institutions. According to the Final Report of the Research of the Impact of the Integration of Lithuania to the European Union (2007), the current national tendency is to delegate one person as main representative only to one working institution or working group at the EU level. The reason is to guarantee the efficiency of Lithuanian interests' representation and appropriate expertise. At the moment, about 80 percent of Lithuanian representatives are designated as the sole representative to an EU working institution. 15 percent of them are acting as the main representative in two working groups. However the workload of 14 representatives (mostly from the MoA) is evaluated as an overload (some of them are designated to six or even 11 committees and/or working groups). According to the turnover of delegated officials, the MoA is one of the most stable institutions (its stability lies at around 80 percent).

In the working groups and committees under the Council of Ministers, there are, at the moment of writing, 75 active Lithuanian officials and total number of the delegated representatives of 392 (including the officials from The Permanent Representation of Lithuania to the European Union and non-official alternative representatives). Lithuanian officials' attendance in Council's working group meetings is 93 percent (the governmental officials from the capital attend 50 percent of the meetings and permanent representatives of Lithuania in the EU 68 percent). The most intensive working agenda was for the officials from the Ministry of Foreign Affairs, Ministry of Communication, Ministry of Finances, Ministry of Environment and Ministry of Economy. One of the most active national representatives, sent from the capital, were officials of MoA (the level of attendance in 2007 was 88 percent). However the indicator of the timely proposed reports is low – around 15 percent.

Lithuanian officials' attendance in working groups and meetings under the European Commission, the level is higher – 98 percent. The most active were the representatives sent from the capital (national governmental officials without their colleagues from the Permanent Representation of Lithuania to the European Union, who attended 93 percent of the meetings). These results show the need to change the proposition that the most important institution for the representation of member states' national interests (when trying to influence the formation and creation processes of the implementing legislation) is the Council of Europe and its working organs. The European Commission is the most important supranational policy actor in the EU when it is the first initiator of the political proposals, required for the successful implementation of the arrangements fixed in the main European Communities (EC) and EU agreements, i.e. in the policy implementation sphere (when talking about 'top-down' based legislation, as mentioned before). One of the most active committees under the period of 2007 was Permanent Committee on the Agricultural Researches (there were 14 meetings organised under responsibility of MoA).

In 2007, the MoA was the fourth most active government institution when it came to preparing and adjusting their positions in accordance with separate EU policy initiatives (it contained eight percent of all positions prepared by Lithuania's national institutions) (Final Report of the Research of the Impact of the Integration of Lithuania to the European Union, 2007).

According to the information about Lithuanian officials' involvement in the EU working activities, it is obvious that the situation is becoming better. However the main drawbacks are still the non-transparent procedure of the delegation of officials (in some cases the attendance at the meetings of the officials, not included in the official legal lists of the participants) and overloading the agenda of the national officials. This is especially important in the case of the attendance of the MoA experts. Of course it is not so easy to

shape thinking and understanding when the national civil servants, experts in some stages of the local decision-making processes, became semi-political actors and negotiators, who are attending the first of the EU's primary or implemental policy formation. Also the need for good expertise, knowledge and experience is all the time growing and in some cases could be a drawback for the effective representation process.

Rational cooperation or lobbying initiatives? Inclusion of social and other partners in local implementing policy formation procedures

At the EU level, it is obvious that political authority is likely to become even more diffused through the various bodies of the political, administrative and economic systems. This is evident in the pattern of lobbying, where the private actors are increasingly turning to the political EU institutions. Accordingly, the importance of the lobbying sector in the new member states becomes more evident, too. Of course it is difficult to become accustomed to the turnover of political formation procedures, especially for those member states which some years ago were members of the Soviet Union system.

Erik Oddvar Eriksen and John Erik Fossum mentioned that transnationalists, when talking about the possibility of identifying a unanimous EU democracy, present 'a model of direct participation and public deliberation in structures of governance wherein the decision-makers – through 'soft law', benchmarking, shaming, blaming, etc. – are connected to larger strata of civil society' (Eriksen and Fossum, 2007: 13). They predicate that transnational civil society, networks and committees, non-governmental organisations (NGOs) and public forums, all serve as arenas in which EU's actors and EU's citizens from different contexts – national, organisational and professional – come together in order to solve various types of issues and in which different points of access and open deliberation procedures ensure democratic legitimacy. According to them, the EU is seen as a multilevel, large-scaled and multi-perspective polity based on the notions of a disaggregated democratic subject and of diverse and dispersed democratic authority (Eriksen and Fossum, 2007). In the Lithuanian agricultural sector, because of its old and specific tradition of existing agricultural associations and NGOs, insistently representing their interests, such possibility to form a unique sphere of the debates exists.

In the Coordination Rules of EU Affairs, the responsibility for all governmental institutions to cooperate with social, and other, partners when preparing national positions, agreements, legislative and other documents, is confirmed. Institutions must organise these consultations with partners, which are appropriate according to the thematic sphere of the debates and the sphere of gained activities. However, in the Final Report of the Research of the Impact of the Integration of Lithuania to the European Union (2007) it was admitted that also the tradition of informal relations between the institutions and economical-social partners could be apparently seen. Of course it is not the worst practice, however in that case, the way for new social partners and other representatives of civic opinion to national, legal and governmental institutions is more complicated.

The main social partners in Lithuanian agricultural sector are associations: non-profit organisations, representing the interests of farmers and rural inhabitants, who are engaged in agricultural or alternative business activities in rural areas[1], agricultural business entrepreneurs, enterprises of the reproduction of agricultural products, and so on. Scholastic and social partners should also be mentioned, such as academic institutions, like universities and institutes, representatives of other institutions and

[1] E.g. the Chamber of the Agriculture, which is responsible for the implementation of a share of the functions, connected with the agricultural policy's initiatives, the Rural Farmers' Women's Association, which is a member of the Chamber of the Agriculture and which, under the sponsorship of MoA, implements the National Program for Women and Men Equal Opportunities for Lithuania, the Association of Rural Communities, which also is a member of the Chamber of the Agriculture, the Association of Rural Tourism of Lithuania, which is responsible for the assessment and qualification of the quality of the rural tourism's homesteads and their services, etc.

institutional partners - local municipalities or even other ministries. As it could be seen, these organisations could be interpreted as institutions which unite the specific interest groups at the agricultural policy sphere.

There are some examples of cooperation among civil communities in rural areas, the MoA and other institutions' officials. Under the accession into the EU the process of formatting the rural communities and Local Action Groups (LAGs) in rural areas of Lithuania started. The beginning of the formation of these structures was in the period 2004-2006 under the *LEADER+* initiative. The creation of LAGs, which should consist of 25 percent representatives of local governments, 25 percent local, rural entrepreneurs and other residents, which are engaged in business activities in concrete rural area, and 50 percent of the rural communities, was the main requirement in order to settle the amount of the support under EU's structural funds for rural development and initiation of common rural initiatives (for the creation of the pilot Local Development Strategies). However this initiative did not come naturally: in the first stages it was rigorously implemented (according to the EU's requirements).

It should be noticed that the opportunity to develop such initiatives, connected with the strengthening of the community sense and traditions in rural areas, are especially valuable when talking about the betterment of the relations between politicians, administrators, business representatives and community members. It is the first step towards further development of a united European community and society. However for Lithuania it is not an easy task due to the non-existence of a culture of cooperation at almost all levels of social life.

Three models for the reconstitution of European democracy

Erik Oddvar Eriksen and John Erik Fossum (2007) proposed three models for the reconstitution of European democracy. All these models could without doubt be adopted. However, the capability to effectively adopt these models depends on a variety of factors, which could be evaluated. One factor is the member state's political power, other actors' and the society's attitudes to the EU's policy and politics, and the impact of the national legislation and administrative system changes. The attempt to analyse the adaptability of the models, according to the Lithuanian and European sectors of the agricultural policy and to the attitude of national politicians and other actors in the EU policy issues, will be presented next.

Reconstitution through audit democracy

According to the first model, presented by Eriksen and Fossum, democracy is envisaged as directly associated with the nation state. The assumption is that only the nation state can foster the type of trust and solidarity that is required to sustain a democratic polity. On the basis of a well-developed collective identity, the citizens can participate in opinion-forming processes and hold the decision makers accountable at regular intervals, as well as through continuous public debate. The model posits that the Union is mandated to act within a delimited range of fields. According to them, the model presumes that the member states delegate competences to the Union, competences that in principle can be revoked. Democratic authorisation by member states today, however, takes the form of a supranational Union-wide representative body. In order to account for this in an intergovernmental perspective, its democratic purpose would have to be delimited to serve as an agent of *audit democracy*, not representative democracy.

The main principles under this model are: the nation state, which is favourable and willing (or not) to form a unified civic institution for auditing democracy at the EU level and in national policies; disinterested candidates to become members of such an institution, which represents only rational public opinion and civic interests; and the EU's institutions, which also are willing (or not) to initiate a kind of reform and to resign part of their functions.

First of all, ideally, the national political power and legal institutions should favour this idea. In Lithuania, as mentioned above, EU policy at the local level mostly depends on the interests of the governing elite. If such an institution would be connected with some of the questions and issues under, for example, the sector of agricultural policy, or if there could be a possibility to send as a member one of the social, economical partners or one of the ministerial officials, of course a positive attitude would be deserved. In another case, as demonstrated by the practical experience, the success of such initiative could be reached by designating the concrete requirements to do that. However an initiative that is implemented by request is more likely to fail. There could be danger that the official government of the member state in some cases would try to bypass this institution because it is not beneficial to their legal political initiatives. Of course, this is only a possible situation.

For the implementation of this model a bilateral trust between the national government and society should exist. The representatives of the civil society should have a real possibility to attend the processes of local, national and EU policy formation. In Lithuania, as mentioned before, such relations are both formally and legally possible. However in reality there is a gap between the NGOs and national government. On one hand there is no real NGO in the Lithuanian agricultural sector. As mentioned above, the main social partners are associations: non-profit organisations, which represent the interests of the farmers, rural inhabitants, who are engaged in agricultural or alternative business activities in rural areas, agricultural business entrepreneurs, enterprises for the reproduction of agricultural products, etc. Other partners are academic institutions, universities, institutes, representatives of other institutions, local municipalities, and so on. There are very few (if any) non-profit NGOs which are included in the processes of consultation and discussion. Admittedly there is no properly prepared law in the Lithuanian legal system on how to include the NGOs. On the other hand, the above-mentioned example of the requirement to close the nuclear station of Ignalina by 2009 shows that the trust between Lithuanian politicians and citizens in most situations does not exists. According to that, the government's formal encouragement to form a rational European public space and to participate in the activity of the institution for the auditing of democracy could be evaluated and accepted by society in opposite ways.

For the adoption of this model political elites both at the national and European levels should be more politically and democratically open-minded.

Reconstitution through federal multinational democracy

Representing the second model for the possibility to reconstitute democracy, Eriksen and Fossum notice that the democratic *credo* posits that all political authority emanates from the law laid down in the name of the people. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. The conventional shape of such a community is the democratic constitutional state, based on direct legitimation and in possession of its own coercive means. For this model to work properly within the complex European setting, which has traits of deep diversity, Eriksen and Fossum take into account the existence of *multiple nation-building/sustaining projects*. According to them this model can then also be modified to accommodate the fact that nation-building at the EU level would be taking place *together with* nation-building at the member state (and partly *even regional*) level. The modified version would be a *multinational federal European state*. In constitutional terms, a multinational federation presupposes that the principle of formal equality be supplemented with particular constitutional principles. These are intended to provide some form of 'recognition parity', for national communities at different levels of governance (in the EU at Union and member state levels). According to the model, the multinational federal state requires the allegiance of all citizens' in the form of a *constitutional patriotism*, which is embedded in contextualised basic rights that ensure

both an individual sense of 'self' and a collective sense of membership (Eriksen and Fossum, 2007).
In the implementation of this model, the naturally settled culture and traditions of cooperation on local, regional and national levels are needed first of all. It could be stated that in Lithuanian the practise of cooperation is not strongly developed.

An example of that could be the formation processes of rural communities and LAGs in Lithuanian rural areas. The beginning of the formation of these structures was in the period of 2004-2006 under the *LEADER*+ initiative. The creation of LAGs, which should consist of 25 percent of local governments' representatives, 25 percent of local rural entrepreneurs and other residents, which are engaged in business activities in concrete rural area, and 50 percent of the rural communities, was the main requirement in order to settle the amount of the support under EU's structural funds for rural development and initiation of common rural initiatives (for the creation of the pilot Local Development Strategies). The process still is on the run-out stage.

Another aspect is that the acceptance of the model based on federal democracy is more likely in those states which are organised as federations or have strong, traditionally formed regions. Ten Lithuanian regions were formally formed, mostly with the intention of joining the EU. All main political initiatives in Lithuania are formed at local and national levels. The counties (regions of Lithuania) were functioning like the eyes and ears of the government in the separate territories, located near the ten biggest cities of Lithuania. There were discussions and debates about the effectiveness of such regional institutions and the Conservative party, which won the Parliamentary elections in 2008, accordingly initiated the liquidation them. The counties were liquidated on 1 July 2010. Another example, strengthening the argument for the decisions made, is that the project, implemented under the measures of the RDP, is organised mostly for local implementation purposes. Thus the functions of the counties were really miscellaneous and quite often synchronised with the functions delegated to local municipalities. Generally speaking, the regional level in Lithuania is very weakly developed and has no strong political and administrative tradition.

It was mentioned above that between Lithuanian political actors there are still politicians who tend to construe EU policy as a part of the foreign policy and the EU's issues are the issues of the Lithuanian foreign policy. Thus this type of interpretation of Lithuanian's membership in the EU, along with the dispersion of such opinion, diminishes the possibility for Lithuanian civil society to be patient enough for the reconstitution of European democracy according to the model of a European federal state.

Reconstitution through regional-European democracy

The third model presented by Eriksen and Fossum envisages democracy *beyond* the template of the nation state and the state system. According to them, this model posits the EU at the trans- and supranational level of government in Europe, and as one of the regional subsets of a larger cosmopolitan order. This implies that the Union will be a post-national government, a system whose internal standards are projected onto its external affairs, and further, that it will be a system of government that subjects its actions to higher-ranking principles – to 'the cosmopolitan law of the people. [...] The idea is that since "government" is not equivalent to "state", it is possible to conceive of a non-state, democratic polity with explicit government functions' (Eriksen and Fossum, 2007: 16).

The main difficulties for implementing this model could be problems in the harmonisation of national and EU laws (as mentioned above). Another aspect is that there is a very small possibility that the member states would agree to restrict their sovereignty to such a high degree. In Lithuania, as mentioned above, the national understanding of the policy formation processes is in most cases more comparable with the procedure of supranational or intergovernmental consultations and bargaining at the EU level.

In conclusion it could be predicted that the most realistic analysis seems to be the second model, which proposes that democracy in the EU could be reconstituted through a model of federal multinational democracy. It is not so easy to change the way of thinking and to establish a kind of supranational institution at the central EU level. There is no confidence between national politicians and national societies; also there is no willingness of the central EU institutions to limit their power and to become absolutely 'transparent'. When talking about the third model there are some doubts if member states would agree to further restrict their sovereignty. However there is a possibility to create some level of closer co-operation between member state actors (politicians, administrators, business representatives and the society's members), and to continue regional and rural development and strengthening initiatives, also by initiating transnational cooperation projects among the member states (especially when the first steps are already taken).

Conclusion

It is obvious that some issues in EU democracy, connected with technocracy, still exist, most importantly: a lack of popular participation, a sense of community and a common identity. There is no way to talk about absolute democratic reinforcement when there are such deficits at the EU's central political and administrative level.

The widening and deepening of integration under the impact of different political, administrative and ethnical cultures, along with the new, more global challenges for the organisation, the debates and discussions about the EU's nature, the failure of the adoption of the Constitution for Europe, the fluster of the EU representatives and member state elites leading this process, the rush to decrease the deficit of the democracy, all in fact show that the EU is more like a traditional international organisation than a federal European state. The prerequisite for proposing this is the style and outcome of the bargaining for coordination of different positions in the supranational level. The example could be the bargaining for the adoption of the amendment of some points of the RDPs for Lithuania. The EU's position, formulated through a 'top-down' process, is more rigid and formed under the theoretical and technical interpretation of the EU's regulations and directives without the sensibility according to the features of national policy. Admittedly the result of such bargaining process could be more abstract and similar to those, which generally are reached in the expert working groups and meetings under the international organisations.

Maybe there is a need to stop for a while with the widening, and maybe also with the deepening, of the European integration processes and to try to find a more relevant status. The fluster of the European elites when talking about the EU's position and the aims of its activities shows that there is the need to stop and to try to solve the problems and issues of today.

The case of Lithuania showed that there are some observable drawbacks when talking about the national attitude towards EU policy, initiatives and the importance of properly representing national interests at the central EU level. Obviously these processes are mostly connected with the creation of the possibilities to reconstitute the understanding of the uniquely European democracy.

The governing politic parties are often initiated by the populist self-interests of party leaders and are mostly oriented towards national policy formation. Still there are some problems, connected with the harmonisation of EU and national laws; the administrators of EU initiatives between its central level and the capital are still in some cases dealing with an overload of work and responsibilities, and in some cases with a lack of experience. There is still no possibility to talk about an adequate level of society's knowledge about the EU's policies and issues. At the moment the citizens do not have a possibility to impact the processes of forming a national position for the EU central level

and there are no possibilities without the help of NGOs and different associations to be included in the formation of EU policy and initiatives. In this case two variables are important: the national government's position concerning the inclusion of the NGOs and associations from different backgrounds into to the policy-formation processes and the interest and willingness of the citizens themselves to directly interact in the EU policy-formation processes. However, the analysis presented in this chapter is susceptible to the predicate that the reconstitution of the understanding of European democracy could be possible. It would also be necessary for a better understanding of the role and importance of different actors, acting in the EU political arena (especially those, representing NGOs and public interest).

References

Brewster, R., Munger, M., and Oatley, T. (2002) 'Widening versus Deepening the European Union: An Institutional Analysis', in M. O. Hosli, A. van Deemen and M. Widgren (eds), *Institutional Challenges in the European Union*, London: Routledge.

Carter, E., Luther, K. R. and Poguntke, T. (2007) 'European Integration and Internal Party Dynamics', in T. Poguntke, N. Aylott, E. Carter, R. Ladrech and K. R. Luther (eds), *The Europeanization of National Political Parties: Power and Organizational Adaptation*, London: Routledge.

Crum, B. (2005) 'Tailoring Representative Democracy to the European Union: Does the European Constitution Reduce the Democratic Deficit?', *European Law Journal*, 11(4): 452-67.

Eriksen, E. O. and Fossum, J. E. (2007) 'A Done Deal? The EU's Legitimacy Conundrum Revisited', *RECON Online Working Paper* 2007/16, Oslo: ARENA. Available at: <http://www.reconproject.eu/main.php/RECON_wp_0716.pdf?fileitem=16662534>.

Field, H. (2002) 'Reforming the Common Agricultural Policy and the EU's Structural Funds in the Face of Eastwards Enlargement', in M. O. Hosli, A. van Deemen and M. Widgren (eds) *Institutional Challenges in the European Union*, London: Routledge.

Final Report of the Research of the Impact of the Integration of Lithuania to the European Union (2007) *Lietuvos atstovavimo gebėjimai ES Tarybos darbo grupėse ir komitetuose pasirengimo Lietuvos pirmininkavimui ES kontekste, Europos socialiniai, teisiniai ir ekonominiai projektai*, V, 20 December 2007.

Hix, S. and Goetz, K. (2000) 'Introduction: European Integration and National Political Systems', *West European Politics*, 23(4): 1-26.

Ladrech, R. (2007) 'Europeanization and National Party Organization: Limited but Appropriate Adaptation?', in T. Poguntke, N. Aylott, E. Carter, R. Ladrech and K. R. Luther (eds) *The Europeanization of National Political Parties: Power and Organizational Adaptation*, London: Routledge.

Mazylis, L., Šukytė, Ž. and Tirviene, J. (2007) 'Europeanization and Euro-Integration: Lithuania's Case', in *Leadership and Management in the Public Sector: Values, Standards and Competencies in Central and Eastern Europe. Presented papers from the 15th NISPAcee Annual Conference*, Kiev.

Olsen, J. P. (2004) 'The Many Faces of Europeanization', *Journal of Common Market Studies*, 40(5): 921-52.

Šukytė, Ž. (2007) 'Processes of the Europeanization and Euro-Integration and Their Influence on the Organizational Infrastructure of the Coordination of National Interests: The Case of Lithuania', in L. Matei (ed.) *Proceedings: International Conference 'The Impact of Europeanization on the Public Administration'*, Bucharest: Economica Publishing House.

— (2008) *The Overview of Lithuanian Mass-Media in the Period from 3rd of June till 10th of November, 2008*, selections by the Ministry of Agriculture of the Republic of Lithuania.

Vidgren, M. (2002) 'Agenda-Setting, Amendments, Information and Optimal Level of Integration', in M. O. Hosli, A. van Deemen and M. Widgren (ed.) *Institutional Challenges in the European Union*, London: Routledge.

Vilpišauskas, R. and Nakrošis, V. (2003) *Politikos įgyvendinimas Lietuvoje ir Europos Sąjungos įtaka*, Vilnius: Eugrimas.

Vitkus, G. (2008) *Europos Sąjunga: Enciklopedinid žinynas*, Vilnius: Eugrimas.

Wilde, L. (2007) 'Europe and the "re-regulation of world society": A Critique of Habermas', *Capital & Class*, 31(3): 47-66.

Chapter 5

Possibilities for Baltic cooperation in legal matters in the EU

Christoph Schewe
University of Tartu

Introduction: Baltic cooperation in legal matters in the EU

Discussing the topic of Baltic cooperation[1] in legal matters in the European Union (EU), one will have to address the question of why the three states should be interested in enhanced cooperation. Indeed some critically object to the idea and argue that Baltic strategies somehow would resemble 're-inventing the wheel' as there are a number of countries that have long experience with EU law and politics which they are willing to share with their Baltic friends.[2] Even though this objection has its merits, the argument is not fully convincing. Cooperation in EU matters does not only focus on 'reinventing wheels', nor would it exclude the assistance of other member states. When it comes to finding strategies one might also have to consider whether, for instance, the considerations made for 80 million Germans, with one of the most successful economies in the world, are valid for Estonia with a population of 1,3 million. Obviously, there are differences that speak in favour of cooperation among more homogeneous states with similar conditions and interests. Furthermore – still referring to the comparison of the invention of the wheel in EU issues – the Baltic States have already 'introduced the wheel' after five years of EU membership. Today it is rather the question of developing a Baltic way that meets the particular needs and requirements of the three countries.

The topic will be discussed on three levels. First, the chapter will give a very brief overview of the institutionalised framework of Baltic cooperation. The Baltic Assembly and the Baltic Council of Ministers are the main institutions that aim at enhancing Baltic cooperation. However, these institutions have no particular focus on EU issues. The second part then aims at categorising Baltic cooperation, structuring the different dimensions related to EU law. It starts with the making of EU law and deals with the application, observation and implementation of EU law and the relevance of the jurisprudence of the European Court of Justice (ECJ). Here it is worth mentioning that the dogma of the ECJ may have important implications for EU law that go far beyond a single case. The following considerations take the results of this categorisation into account as, in reality, the three Baltic States do not cooperate systematically but rather in accordance with their relevant sectoral interests. In fact, there are several fields of politics in which there exists a more active Baltic cooperation than in others, which are dominated by national interests. Since cooperation so far does not focus on legal issues, the third part points out possibilities and interests of a Baltic cooperation in legal matters in the EU.

Levels of Baltic cooperation

There are three institutions that coordinate the Baltic States' interests: the Baltic Assembly, the Baltic Council of Ministers and the Baltic Council. The parliamentary cooperation takes place within the Baltic Assembly while the Baltic Council of Ministers

[1] Dealing with 'Baltic cooperation' this chapter only refers to the three Baltic States, Estonia, Latvia and Lithuania, and – if not explicitly mentioned - does not imply other states that sometimes are also considered to be 'Baltic States', as for instance by the 'Baltic Sea Strategy'.

[2] As there is not much literature about this topic, most parts of this chapter are based on interviews with officials from the Baltic countries – who preferred not to be quoted.

deals with all matters related to the practical cooperation. The Baltic Council is a joint body for governments and parliaments.

The Baltic Assembly

The Baltic Assembly[3] is an international organisation for cooperation between the parliaments of the Republic of Estonia, the Republic of Latvia and the Republic of Lithuania. It is a consultative and coordinating body consisting of 12 to 20 parliamentarians who discuss joint projects and issues of common interest in sessions that are held once per year. The main value of the Baltic Assembly is considered to be the opportunity for parliamentarians of the Baltic States to come together and to discuss problems and issues of mutual interest. Decisions made by the Baltic Assembly are only advisory but might recommend to national parliaments and the Baltic Council of Ministers coordinating actions and solving problems on parliamentary and governmental levels.

The Baltic Council of Ministers

The Baltic Council of Ministers[4] is an institution for intergovernmental cooperation between Estonia, Latvia and Lithuania. At least once a year, the heads of states meet in the 'Council of Ministers' – the highest decision-making body. The Baltic Council of Ministers makes decisions regarding the implementation of recommendations of the Baltic Assembly and promotes cooperation. Decisions can only be taken by consensus and if representatives of all three Baltic States are present.

Since 2005, there are five committees that act at the level of the ministries of defence, energy, home affairs, transport and communication and environment. The presidency of the Baltic Council of Ministers changes every year.

The Baltic Council

Since 1995, the Baltic Assembly and the Baltic Council of Ministers hold annual joint meetings, called the 'Baltic Council'. This Baltic Council aims at exchanging and discussing problems and sets priorities[5] for the forthcoming years. The main task of the Baltic Council is to monitor cooperation of the Baltic States on the legislative and executive level and to ensure the implementation of the adopted decisions. Since 2003, the presidency is held by the country holding the presidency for the Baltic Council of Ministers for one year.

Interim résumé

Given the range of topics and the non-committal forms of organisation, the Baltic institutions dealing with cooperation rather appear to be fora for discussing neighbouring issues than elaborating common strategies in the European Union.

Levels of cooperation in legal matters in the European Union

Analysing the cooperation of the three Baltic States in legal matters in the European Union one can distinguish different levels. They acceded to the EU in 2004 so that a real participation only started with their accession. However, as the accession process was

[3] Website of the Baltic Assembly is available at: <http://www.baltasam.org>.

[4] The Baltic Council of Ministers was established on 13 June 1994; for further information see: <http://www.baltasam.org/?CatID=88>.

[5] The cooperation priorities set for 2009 are Security policy: cooperation on defence, environmental security and information security issues; Energy policy: cooperation on developing a common electricity and gas market, cooperation on ensuring reliable energy supply to the Baltic States; Eastern policy: cooperation with partners on the basis of the European Neighbourhood Policy (cooperation aimed to promote the enhancement of the democratic processes in Belarus, Ukraine, Moldova and Georgia), see the website: <http://www.baltasam.org/images/front/_pdf/Priorities percent20of percent20the percent20Baltic percent20Assembly percent20for percent202009.pdf>.

connected with substantial legal reforms, this process constituted a first possibility for an exchange of opinions and cooperation in EU matters between the three states. After the accession the new member states held the full member states rights with all possibilities for cooperation and alliances.

Cooperation in the accession process

The three Baltic States all acceded in 2004, even though the negotiations were held in two groups. Estonia was among the so called Luxemburg-Candidates[6], that started negotiations in 1997, Latvia and Lithuania were among the candidates of the Helsinki group[7] that started in 1999. This accession process can be seen as the beginning of the legal interaction among the Baltic States and the European Union.[8] In reality of course, this first step of 'interaction' was rather one-sided since the accession states in fact had no other option than to adopt the *acquis communautaire.*[9] The accession also meant the obligation to translate and implement the accumulated EU legislation, including the jurisprudence/case law of the European Court of Justice – a considerable working load consisting of approximately 80.000 pages or, an eight-metre pile of paper. When it came to the translation of the relevant texts, the Baltic aspirants depended on their own human resources since the particular national languages limited external assistance. When it came to the adoption and transposition of the *acquis*, they were given assistance through the Taiex[10] and Twinning[11] programmes, which were organised and provided by the EU. Cooperation and exchange of experiences among the Baltic legal experts remained at low level.[12]

Cooperation in law-making in the European Union

The most far-reaching role when it comes to the impact of legal work is probably the contribution in the legislative process. On the EU level there are mainly three institutions involved, namely the European Commission, the European Parliament and the Council of the European Union.[13] When it comes to the representation of national interests, the Council is the main institution for the member states to bring in their political priorities. In regard to the representation of national interests the Parliament and the Commission

---

[6] Named after the Luxembourg European Council of December 1997: M. Maresceau, 'Pre-accession, in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press 2003), at p. 26.

[7] Named after the Helsinki European Council of 1999: Maresceau, *supra* note 6, at p. 27.

[8] On the Political Dialogue in the accession process, see F. Hoffmeister, 'Nature and Objectives of the Europe Agreements', in A. Ott and K. Inglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague: TMC Asser Press, 2002), at p. 354.

[9] For the accession criteria in general see Articles 49 and 1 (1) TEU; on the obligation to approximate the legal system to the acquis communautaire, see A. Lazowski, 'Approximation of Laws', in A. Ott and K. Inglis (eds), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague: TMC Asser Press, 2002), at p. 633. Concerning the preparation for the accession, see P. Nicolaides, 'Preparing for Accession to the European Union: How to Establish Capacity for Effective and Credible Application of EU Rules', in M. Cremona (ed.), *The Enlargements of the European Union*, (Oxford: Oxford University Press, 2003), at p. 43.

[10] See the website of the European Commission at: <http://taiex.ec.europa.eu/>.

[11] See the website of the European Commission at: <http://ec.europa.eu/enlargement/how-does-it-work/financial-assistance/institution_building/twinning_en.htm>.

[12] In the pre-accession phase there were mainly eight states that have cooperated in the Baltic region: the so-called NB 5+3 meaning five Nordic Countries (Island, Finland, Sweden, Denmark and Norway) and the three Baltic States. Among several agreements on cooperation there was also a cooperation agreement between the Baltic States concerning the transposition of EU law into national law. This cooperation however was limited to several working group meetings or informal exchange on international conferences.

[13] Furthermore, the European Council plays a role in setting the political agenda which is relevant for the later legislation. However, this is a rather political process which is not dominated by legal techniques.

are only of a subordinated concern. The functions of the three institutions can be illustrated with their role in the decision-making process. The most important instrument for law making in today's European Communities (EC) is the co-decision procedure.[14] In accordance with the political agenda set by the European Council, the Commission proposes a legal act on which the Council of the EU and the European Parliament debate.[15] For being adopted the proposals require the qualified majority in the Council and the simple majority of the Parliament.[16] As the European Parliamentarians represent the voters' interests they are regrouped in political parties and usually vote in accordance with their political programme rather than with particular national or regional interests.

Consequently, as this contribution aims at analysing the interest of the three Baltic States in cooperation in the EU, it will focus on the Council.

The Council of the European Union

The Council is the institution in which the member states represent and defend their national interests in the legislation process of the European Union. In this process, the Council decisions are decisive for the shape and success of the legal acts of the European Communities.[17] The influence of each member state depends on the number of votes they hold. Votes are attributed in a weighted system, i.e. a compromise between democratic voting, considering the number of inhabitants and the 'one country – one vote'–principle. As the number of votes determines to a large extent a member state's influence they were repeatedly subject to tough negotiations in the various intergovernmental conferences.[18] Being the largest countries in terms of population, Germany, France, the UK and Italy each hold 29 votes whereas the smallest states hold four. Belonging to the latter Estonia and Latvia each have four votes, while Lithuania holds seven. In total, the Baltic votes amount to 15 votes of 345. For passing a legal act it is necessary to obtain a majority of 230 votes. This means that all member states – including the big four – depend on succeeding in finding coalitions for a proposal.[19]

Given the very limited influence of each of the Baltic States alone, one might assume that they follow common strategies and a close cooperation in order to give their interests more weight in Council. This assumption is based on the fact that these states have several interests or experiences in common as for instance a similar (recent) history and comparable priorities being small countries situated at the Baltic Sea in the north-eastern region of Europe.[20] However, as has already been pointed out, there is no

[14] Concerning the number of Qualified Majority Voting (QMV) articles introduced, or of unanimity articles moved to QMV by the different European treaties, see K. Heeger, 'Comparison of the 2007 Reform Treaty with the Earlier EU Constitution', *EUwatch*, Nr. 8, October/November 2007, 18-32.

[15] For more details, visit the website of the European Commission on the Co-decision procedure. Available at: <http://ec.europa.eu/codecision/procedure/index_en.htm>.

[16] Note that there are several ways of decision-making that can vary; this presentation only aims at illustrating the basic functions of the institutions.

[17] The following comments refer to the co-decision procedure according to the Treaty establishing the European Communities.

[18] One example is the position of Poland on the voting system in the Lisbon treaty, requesting the so-called 'square root' principle.

[19] On the debates concerning the votes and the system, see U. Haltern, *Europarecht: Dogmatik im Kontext,* 2nd ed. (Tübingen: Mohr Siebeck, 2008), at p. 101, paragraph 198. Concerning the number of votes, see the website of the Council at: <http://consilium.europa.eu/council?lang=en>.

[20] Concerning the priorities of the three states, for Estonia, see The Government of the Republic of Estonia, 'Estonia's European Union Policy 2007-2011'. Available at: <http://www.riigikantselei.ee/failid/ELPOL_2007_2011_EN.pdf>; for Latvia, see Ministry of Foreign Affairs of the Republic of Latvia, 'External Relations Priorities for Latvia during the Czech EU Presidency'. Available at: <http://www.am.gov.lv/en/eu/Presidencies/Czech/>; for Lithuania, see Government of the Republic of Lithuania, 'Strategic Guidelines of Lithuania's European Union Policy

institutionalised cooperation of the three states that deals specifically with EU matters. On the highest political level, heads of state informally exchange strategies but on lower levels, there is only sporadic cooperation, usually depending on the matter and personal relations.[21]

The European Parliament

Given the function of the Parliament as the institution for the representation of the European citizens, it is not the relevant forum for defending national interests. However, there are examples of parliamentarians that have voted in accordance with the particular national position of their member state. Since these examples are few and remain the exception one may resume that the European Parliament is not the relevant institution for an institutionalised cooperation of Baltic interests.

The European Commission

The function of the Commission is of high importance for EU politics and legislation. As it is primarily committed to defending the interests of the European Union, the possibilities for a strategic cooperation of Baltic States are very limited. In practice, however, it is assumed that Commissioners – even though they are independent of their member state – to a certain extend consider national interests. Furthermore, the Commission is subject to massive frequently coordinated strategic lobbying. Since this influence by private and public stakeholders usually takes place in informal unofficial meetings and negotiations, the impact is difficult to measure.[22]

---

for 2008-2013: "More Europe in Lithuania and More Lithuania in Europe!"'. Available at: <http://www.lrv.lt/bylos/ES/2013_ES_politika_en.pdf>.

[21] A concrete example of cooperation between Estonia and Latvia in the Council concerns the proposal on the law applicable to non-contractual obligations (see Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), *Official Journal*, L 199, 31 July 2007, 0040–49. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:01:EN:HTML>) and its present Article 9 on industrial action. The article in question appeared to the text of the draft at a late stage of the proceedings in the Council. Both countries recognised that industrial action is one of the essential rights of a worker, an employer or the organisations representing their professional interests. Thus the principle provided in Article 9 should apply only to the cases, which arise directly from exercise of those essential rights. Application of Article 9 should not constitute any further restrictions to the freedom to provide services within the Community (see Joint declaration by the delegations of Latvia and Estonia to the Council on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), 9143/06 ADD 1, 30 May 2006. Available at: <http://register.consilium.europa.eu/pdf/en/06/st09/st09143-ad01.en06.pdf>). Although Estonia and Latvia proposed to revise the industrial action under the review clause, they did not succeed. This can partially be explained with the more influential position of the Scandinavian countries and the inactivity of other countries with shipping background that only reacted when the proposal had reached the Council and the period for member states to raise new issues had expired (see the Council draft minutes, 10142/1/06 REV 1, 31 July 2006. Available at: <http://register.consilium.europa.eu/pdf/en/06/st10/st10142-re01.en06.pdf>). Even though Latvia and Estonia did not have a decisive impact in the qualified majority decision-making in the Council the example illustrates the possibilities of cooperation between the Baltic States in the legislative process in the EU. Parallel to these negotiations Latvia also had a relevant case pending in the ECJ, the Laval-case, (C-341/05) which might have been an additional argument, if the judgement had not been made after the adoption of the Rome II proposal.

[22] C. Schewe, *Die Beteiligung nichtstaatlicher Akteure in Streitschlichtungssystemen des internationalen Handels* (Baden-Baden: Nomos, 2008), at p. 89; R. van Schendelen, 'Brüssel, die Champions League des Lobbying', in T. Leif and R. Speth (eds), *Die fünfte Gewalt: Lobbyismus in Deutschland (*Bonn: Bundeszentrale für politische Bildung, 2006), at pp. 132, 139.

Other

Apart from the three institutions mentioned, there exist other institutions and actors that are to a certain extent relevant in the process of the EC legislation. To mention for instance there are the Committee of the Regions and a few matters and a Baltic cooperation in these bodies is not of high relevance for the legal act.

In general, one can assume that the acts of legislation are constantly subject to lobbying on all levels, i.e. that informally private and governmental actors alike seek to convince the relevant authority of their point of view. A coordinated strategy promises at least a more efficient lobbying and multiplies contacts and other means of influence.

Cooperation in observing, implementing and applying European law

It has already been mentioned that the law of the European Union directly influences about 50-80 percent[23] of the member states' laws. This number illustrates that legislative power has to a large extent shifted from the member states to the supranational union. In connection with the persisting problem of a democratic deficit in the EU, this is a delicate and highly debated issue. Without entering into this discussion it is obvious that member states consider the advantages of the EU to be higher than the negative consequences of the democratic deficit. Nevertheless, democratic constitutional principles of all member states impose on their governments and representatives the obligation to effectively represent the national voters' will when creating national law – this also applies to the EU level. Apart from the possibilities indicated in the legislative process this can be achieved on several levels.

Monitoring EU legislation

Firstly, member states have to thoroughly observe the legislative process in Brussels in order to anticipate the possible impact of EU legislation. Only under this condition, a member state can efficiently react to a proposal and request amendments.

Given the growing activities of the EU in fields of high complexity, observation and analysis of EU legislation demand considerable financial and human resources of the member states. Especially the smaller countries with limited resources face a demanding challenge for effectively representing their national interests.

Implementing EU law

Depending on the nature of the legal act, the member states, i.e. national courts and public authorities (to some extent also private entities) have to apply it. This fact – to respect the primacy of EU law - is a result of the principle of the rule of law. At first glance it might appear self evident that state authorities respect laws, including EU law. However, the complexity of EU law in general, and the particularities of directives can make it difficult to understand the European legislative act and thus to comply. The structure of the legal acts of the European Communities, starting with 'considerations' lead to extremely long provisions in which it is difficult to grasp the main meaning and impact. Frequently, even the main objective of the directive is hidden in these considerations. Furthermore, the practice of repetitively publishing only the amendments to directives requires intense research to find the valid (consolidated) version.[24] These two aspects lead to a lack of transparency and contribute to the complexity of EU law.

Subsequently the national legislators will have to meet the obligations laid down in the directive and transpose them correctly within a certain time frame. Directives frequently

[23] The German Ministry of Justice estimated that approximately 80 percent of German laws between 1998 and 2004 had their origin in EU law: cited in A. Coughlan, 'Why the EU Cannot Go on Like This', *EUobserver,* 14 May 2007. Available at: <http://euobserver.com/9/24052>.

[24] P. Schäfer, *Studienbuch Europarecht*, 3rd ed. (Stuttgart: Boorberg, 2006), at p. 117.

give member states flexibility with their transposition into national law which bears the advantage for the legislator to respect national particularities. Even though this aspect can be seen as a respect to national sovereignty, it creates a tension that might require intense work with the directive: firstly, one has to identify the result to be achieved by a directive; secondly, one has to analyse the extent of flexibility the directive leaves to the national legislator; and thirdly, identify what national particularities might need consideration and how they fit in. Since directives are a frequent instrument of EC legislation, this implementation might imply a considerable amount of work.[25] In particular here, smaller member states face different challenges than bigger ones with a large number of specialists. Given certain homogeneities among the Baltic States it might thus be recommendable to divide this labour or regularly exchange relevant information in order to enhance the outcomes.[26]

Applying EU law

While one might consider the implementation of directives as a first step of application of EU law, there are several levels on which national institutions directly apply EU law. Here, one can distinguish between the application by administration and courts.[27]

All types of public administration have to consider diverse rules and standards as for instance mutual recognition requirements. Subsequently the authority needs a general understanding of EU law and detailed knowledge of the relevant provisions. Especially for smaller countries with a limited number of staff, a regular exchange with colleagues working on the same issues might be fruitful and timesaving.

While national authorities daily apply the European law of the relevant field and may soon develop a routine,[28] courts mainly deal with situations in which the correct understanding and interpretation of a norm is decisive for the outcome of a dispute. Besides its complexity EU law is a highly dynamic field that involves frequent amendments and reforms that are not easy to follow. In particular judges who have already practiced law since long before the EU-era might have vast experience with court practice. On the other hand they might lack the particular EU law knowledge and thus benefit from the experience of younger colleagues who, by studying abroad or working in the institutions, might be specialists in EU matters. This might for instance be relevant when it comes to a conflict of national law with EU law and the possible request for a preliminary ruling.

The advantages of cooperation in these fields are not that obvious as in the case of cooperation in the Council. Still one has to bear in mind that all state institutions are bound to correctly apply EU law and that under certain conditions even court practice can result in the liability of the member state.[29]

Cooperation in disputes

On a fourth level there is the possibility of cooperation in legal disputes at the European courts. While the primary interest of legal disputes obviously is winning a particular dispute there may also be an interest in further developing the jurisprudence of the ECJ. There are several cases that had an important influence on the shape of today's system

[25] In 2005, 155 directives were adopted or amended, see: <http://eur-lex.europa.eu/>.

[26] See the example in the last paragraph of II.3.

[27] Under certain circumstances, secondary law may even have an effect on private entities: Laval, C-341/05; Viking, C-438/05; Angonese, C-281/98; Bosman, C-415/93; Walrave & Koch, case 36/74.

[28] Still one has to bear in mind that most of the jurisprudence of the European Courts deals with doubts or the incorrect application of EC law by national authorities.

[29] Köbler v. Austria, case C-224/01.

of the EU.[30] It is needless to say that it is difficult to influence the decision of the ECJ. Still a well-founded argumentation and legal strategies can matter in disputes. Consequently, there is a chance that parties of a dispute can have an influence on the outcome. Baltic cooperation might be relevant, firstly, insofar as national laws and practice can be concerned and, secondly, when ministries assist private parties in order to support national trade interests.

Besides developing the ECJ's jurisprudence with new cases, coordination of criticism of member states might contribute to altering it. The evolution of the European Communities' legal system depends to a certain extent on the cooperation of national courts to request preliminary rulings. Consequently the ECJ has to respect the concerns of national judges.[31] A prominent example can for instance be found in the judgements of the German *Bundesverfassungsgericht* (federal constitutional court) on the protection of human rights in the European Communities.[32] Eventually, the criticism of several member states' constitutional courts seemed to have lead to a change of the ECJ's jurisprudence.[33]

Possibilities and chances through enhanced Baltic cooperation

The foregoing considerations have shown that cooperation between the three Baltic States is limited. Still, the voting system of the EU makes it necessary for member states to form alliances in order to obtain the necessary qualified majority. A study has shown that there are frequent constellations in which member states have coordinated interests with decisive influence for the outcome of legal acts. This study implies that, in reality, there has been at least a limited cooperation among the Baltic States.[34] According to the study, there are the following five combinations of member states in the Council, which played a decisive role for the outcome of legal acts (indicated in percent):

1. Germany and France: 25 percent;
2. The Benelux countries: 15 percent;
3. The 'Cohesion bloc' (Spain, Portugal and Ireland): 20 percent;
4. The 'Nordic bloc' (the Scandinavian Countries and Finland): 11 percent; and
5. The 'Eastern Alliance' including the three Baltic States: 29 percent.[35]

The study shows that states obviously coordinate their interests, which leads to positive results for them.

---

[30] See for instance the collection of ECJ decisions that had a major impact on European integration on the website of Thomas Schmitz, (Diagram I). Available at: <http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration-1.htm>.

[31] Haltern, *supra* note 19, at p. 195, paragraph 353.

[32] See for instance: Solange I, BVerfGE 37, 271 (277 ff.), HV, 45; Solange II, BVerfGE 73, 339 (366 ff.) HV, 52; Maastricht judgement, BVerfGE 89, 155, HV, 64; all available at: <http://www.servat.unibe.ch/law/dfr/bv037271.html>.

[33] See for instance the collection of decisions of national constitutional courts on European integration on the website of Thomas Schmitz, (Diagram II), <http://home.lanet.lv/~tschmit1/Downloads/BDHK-Symposium_28-11-2008_Rechtsprechungsuebersicht.pdf>; Haltern, *supra* note 19, at p. 503 , paragraph 1045.

[34] F. Hayes-Renshaw, W. van Aken and H. Wallace, 'When and Why the EU Council of Ministers Votes Explicitly', *Journal of Commn Market Studies*, Vol. 44, No. 1, 2006, 161-94, at p. 161; M. Mattila, 'Contested Decisions: Empirical Analysis of Voting in the EU Council of Ministers', *European Journal of Political Research*, Vol. 43, No. 1, 2004, 29-50, at p. 29; Haltern, *supra* note 19, at p. 104, paragraph 202.

[35] Haltern, *supra* note 19, at p. 104, paragraph 204.

After five years of EU membership that have brought considerable developments and changes to accession states one may question whether the participation of three Baltic States in the 'Eastern Alliance' still is the best option. Estonia and Latvia for instance show strong affinities to the interests of the 'Nordic bloc'. Furthermore, the states forming the 'Eastern bloc' also have members with a comparatively high population, as for instance Poland, Hungary and Romania, that will thus have a different economic structure and different interests in a variety of issues. This heterogeneity of national interests becomes even more apparent if one considers the location of the states and the geographic and strategic interests involved. Slovenia for instance also forms part of the 'Eastern Alliance' and has a similar size as the Baltic States but is located in the south of the EU, not neighbouring the Baltic Sea, and has a very distinct history which may lead to different political and economic interests.

In opposition to these factors, one notes that the objective interests of the Baltic States are quite similar even though the 'Balts' tend to emphasise the differences among themselves, as for instance concerning history, language and mentality. Notwithstanding, all three are small EU member states, bordering the Baltic Sea and all have been in the Soviet Union. All three were considered to be 'Baltic Tigers', i.e. successfully emerging economies that today are facing serious challenges with the economic crisis. Observing the low grade of Baltic cooperation, one might guess that this is a result of these similarities – because they might have considered each other rather as competitors rather than as strategic partners. While for some small domestic economies and purely local trade this might be true. On a larger, European scale, however, this lack of cooperation does not seem to make sense, neither economically (as the local actors will not improve their competitively) nor on the level of legal cooperation. With only seven or four votes in the Council, alone, none of the three states plays even a minor role. However, together they amount to 15 votes, which give the seven million *Balts* more political influence than for instance the 21 million Romanians have.

This influence is even more important if one considers the practice of the European Commission in the co-decision procedure (Article 250 paragraph 5 TEC). While member states have to obtain unanimity in order to amend a Commission proposal, the Commission only needs to find a qualified majority. One can assume that, strategically, the Commission departs from its initial proposal only as long as there is no qualified majority.[36] In these negotiations with the Commission the three Baltic States would have a far better leverage with coordinated interests.

Similar considerations apply for other areas. While member states like Germany or France have large human and financial resources at their disposal, this is strikingly different in the three Baltic States. Considering the variety of political areas and the complexity of these issues, it is obvious that the staffs of small states cannot dedicate themselves to matters to the same extent as their colleagues from larger countries. One field for practical application concerns the transposition of EU directives into national law which the following example might illustrate: one can for instance assume that on the implementation of the services directive[37] in Germany, approximately 60 persons have been working for over a year, whereas Estonia would at most have one person[38] on the same issue.

---

[36] Haltern, *supra* note 19, at p. 105, paragraph 206.

[37] This directive, 2006/123/EC (available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0123:EN:NOT>), is highly complicated and has far-reaching implications for national legal and social systems. The fact that the Commission has published a 60-page 'handbook on implementation of the Services Directive' illustrates the difficulties involved. The handbook is available at: <http://ec.europa.eu/internal_market/services/services-dir/proposal_en.htm#handbook>.

[38] So far it appears that the Baltic States rather tend to translate the directive than to use the flexibility granted to them by Article 249 TEC.

From a strategic point of view it appears recommendable to form an alliance with each other and divide labour in order to get better results. Possibly the Baltic Sea Programme 2007-2013[39] can bring the Baltic States to a closer cooperation as it might underline the homogeneity of national interests.

Conclusion

Today, after five years of EU membership, the Baltic States have successfully undertaken various reforms. Actively participating in the legislative process has already become normality. Still, there are various areas where there is room for improvement, in particular when it comes to strategic cooperation between the Baltic neighbours. In this respect it is astonishing that the overall idea of European integration has led to the succeeding of the Baltic States' in the EU without triggering a deeper Baltic integration. While enlargements make the EU increasingly heterogeneous it becomes more and more important for member states with similar interests to form alliances. The chances exist on various levels of legal cooperation from the making of EU law over application, observation and implementation of EU law to activities at the European Court of Justice.

Even though interests might not match completely, it is highly likely that all three states would largely benefit from a closer cooperation. Common sense and the theories on international division of labour recommend a closer teamwork. *A priori* this means that the most homogeneous members work together, a strategy the three Baltic States might take into consideration in their own interest and on their own initiative.[40] Even though citizens of all Baltic States frequently utter the differences in history and mentality, it might be wiser to think back on probably the most important event in their history, which was achieved by Baltic cooperation and unity: the singing revolution!

[39] Available at: <http://eu.baltic.net/>.

[40] So far most of the few existing projects in which there is cooperation among the three states were initiated by the EU, in particular regional funds. See for instance the Baltic Sea Region strategy, available at: <http://www.baltic-course.com/eng/eu_baltics/> or the Estonia–Latvia Programme, available at: <http://www.estlat.eu>, financed to a large extent by the European Regional Development Fund (ERDF).

Chapter 6

Baltic interests before the European Court of Justice

Uladzislau Belavusau
Vrije Universiteit Amsterdam

Introduction

The eastward enlargement of the European Union (EU) provoked an intense legal discussion on the difference in wages between the two parts of Europe; in particular, this was with regard to the influx of workers from the Baltic countries to Scandinavia, the tremendous differences in the perception of labour rights, dangers for the Scandinavian social model, the role of solidarity and conditionality in the context of European integration, concepts of EU citizenship, and the threat of social dumping.

Consequently, Latvia and Estonia found themselves in the centre of a legal battle at the European Court of Justice (ECJ); in the Latvian-Swedish context of the *Laval* case[1] and the Estonian-Finnish context of *Viking.*[2] In *Laval*, a Latvian construction company, Laval, accused a Swedish trade union of forcing it out of business after the industrial action aimed at forcing Laval to conclude a collective agreement. Sweden did not set a national minimum wage, relying instead on the collective pay agreements arranged by the country's powerful trade unions. By paying the Latvian workers almost twice less than for similar construction jobs done by Swedish workers, the Latvian company was arguably capable of undermining Swedish social standards. Similar facts were raised with regard to the Estonian crew at the Finnish vessel and the subsequent boycott maintained by the Finnish trade unions in *Viking*.

In 2007, the European Court of Justice produced a judicial feedback on these cases, the results of which are of extreme importance for the whole Baltic region. Therefore, in this piece I try to place *Laval* in the framework of legal relations between the Baltic countries and the old EU member states.

---

[*] This contribution was written in 2008. The substantially extended and amended version of the paper was published in the same year, by *German Law Journal* (See U. Belavusau, 'The Case of Laval in the Context of the Post-Enlargement EC Development'*, German Law Journal*, Vol. 9, No. 12, 2008, 1279-1308). Since the current version in the present report had been drafted before the Treaty of Lisbon took force, the nomenclature of the articles addresses the old numbering of the EC Treaty instead of the current Treaty on the Functioning of the European Union. Likewise, the paradigm of fundamental rights protection has essentially evolved. *Inter alia*, the Charter of Fundamental Rights became a part of primary law, the EU undertook to accede the European Convention of Human Rights, the three pillars system was abolished, and a number of other aspects became outdated.

[1] Case 341/05, Laval un Partneri Ptd v. Svenska Byggnadsarbetareförbundet et al., [2007]. The case is often referred to as the 'Vaxholm case' because the industrial action was undertaken on a building site in Vaxholm, a town not far from Stockholm (see K. Ahlberg, N. Bruun and J. Malberg, 'The Vaxholm Case from a Swedish and European Perspective', *Transfer: European Review of Labour and Research*, Vol. 12, No. 2, 2006, **155-66**).

[2] Case 438/05, International Transport Workers' Union Federation et al. v. Vikingline ABP et al., [2007].

The scope of the problem

One of the most delicate issues, which the eastward enlargement brought to the EU agenda, is the discussion on the modifications in the regulation of the labour market in the *EU-25* (or *EU-27* after 1 January 2007). The majority of pre-accession commentators (including economists, political scientists, journalists and lawyers) focused on the quantitative analysis of the enlargement implications, i.e. on the potential influx of workers from Central and Eastern European Countries (CEEC) (referred to below as *EU-10*). This approach echoes a particular concern of certain old member states (referred to below as *EU-15*) about the protection of national labour markets vis-à-vis the newcomers.

Michael Dougan named three 'potentially adverse consequences' for the existing member states in his remarkable 'pre-accession' article,[3] namely:

1) That the enlargement might lead to large-scale benefit migration towards western countries which have established generous welfare systems;
2) That a massive influx of workers from the CEEC would seriously disrupt labour markets in the EU-15;
3) That difference between wages and other compliances costs might lead to social dumping in favour of undertakings from the CEEC.[4]

Since, on the one hand, initially only three countries from the EU-15 opened their labour markets to the newcomers, and, on the other hand, the post-accession reality in those three countries demonstrates that the first two fears did not check out[5], the increasing concern is *social dumping.*[6] The latter is proved by the discussion around the long-awaited judgements of the ECJ in *Laval* and *Viking*, and acquires a deep resonance both in media[7] and legal literature.[8] The decision in *Laval* is acute precisely due to the popular expectation (realistic or not) that it sheds light on whether social standards in Scandinavia could serve as appropriate derogations under the internal marked against the influx of the cheap labour from Baltic, analogous to the derogations developed by the ECJ to safeguard fundamental rights.

---

[3] M. Dougan, 'A Spectre is Haunting Europe… Free movement of Persons and the Eastern Enlargement', in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart Publishing, 2004).

[4] Ibid., at p. 112.

[5] N. Doyle, G. Hughes and E. Wadensjö, *Freedom of Movement for Workers from Central and Eastern Europe: Experiences in Ireland and Sweden* (Stockholm: Swedish Institute for European Policy Studies, 2006).

[6] The notion of 'social dumping' will be analysed with regard to the EU Social Law. It is a theoretical construction which is described neither in primary/secondary EU law, nor sufficiently defined in the case law. In the enlargement context the term 'dumping' is traditionally referred to describe the influx of cheap goods on EU-15 market. E.g., P. Brenton, *Anti-dumping, Diversion and the Next Enlargement of the EU* (Brussels: CEPS, 1999). In Laval, both the Advocate General in her opinion and the Court in its decision address the notion of social dumping on several occasions without setting a general definition (cf. paragraphs 103, 113 in the decision; see also numerous references to the 'combat of social dumping' in the Opinion of Mengozzi AG: paragraphs 246, 249, 251, 273, 280, 307, 309). The anti-dumping measure is interpreted strictly in the context of the Swedish Law on Workers' Participation in Decisions (*Medbestämmandelagen*). Further the paper will attempt to find an adequate description of social dumping in the post-enlargement context.

[7] M. Herman and Agencies, 'ECJ Hears Landmark Labor Case', *Times On-line,* 9 January 2007. Available at: <http://business.timesonline.co.uk/tol/business/law/corporate/article1291012.ece>; N. Tait, 'A Viking Sea Battle to Rock the EU Boat', *The Financial Times,* 2 January 2007.

[8] Cf. G. Gaetan*, L'Union européenne face aux risques de dumping social* (Paris: Assemblé nationale, 2000), at p. 7; R. Eklund, 'The Laval Case, Swedish Labour Court Decision 2005 No. 49', *Industrial Law Journal*, Vol. 35, No. 2, 2006, 202-08, at p. 203.

One should bear in mind that for the purposes of this chapter, '*economic freedoms*' shall not be read in conjunction with '*social freedoms*' in a way to establish a legal fiction of '*economic and social rights*' traditionally referred to in juridical literature with an accent on the rights of workers.[9] Hereby '*economic freedoms*'[10] are used to describe the provisions of the European Communities (EC) internal market covering free movement of workers (Article 39 EC), freedom of establishment (Article 43 EC), and freedom to provide services (Article 49 EC). The terms 'human rights' and 'fundamental rights' are used interchangeably.[11]

The first part will address the issue of the internal market with an added value of the EU citizenship. The attention will be focused on the pre-enlargement debate and labour safeguards negotiated before the enlargement. The second part will put *Laval* into the realm of fundamental rights in the Union. The conclusions will try to identify the role of the outcome of *Laval* for the Baltic region.

Laval in the context of the internal market

Baltic nationals as EU citizens

The very project of *European citizenship* is rather young though the discussion traces back to the early 1970s.[12] The notion of 'EU citizenship' was introduced in the *acquis communautaire* only in 1992 by the Maastricht Treaty and provoked a hearty debate in the *milieu* of European lawyers on the different perceptions of this ambiguous term. The debate analysed whether European citizenship is supplementary to a national one. Whether introduction of 'citizenship', towards the basic instruments of the EU as a supranational organisation, leads to the creation of European *demos* and what its effects are for national *folks*?[13] Whether that legal model should be perceived as a market citizenship (focusing on the rights of economic actors), social citizenship (emphasising the social-welfare elements of citizenship), or a republican citizenship (based on an active citizen participation) model?[14]

---

[9] E.g. T. Hervey and J. Kenner, *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Oxford: Hart Publishing, 2003); M. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (Oxford: Clarendon Press, 1995).

[10] When these rights referred to in the literature as 'fundamental rights' (*les droits fondamentaux*), it is usually done in order to distinguish them from the 'fundamental freedoms' (*les libertés fondamentales*). Under this approach the former are treated synonymously with human rights. And the latter are those which come under the scope of internal market. See in particular, A. Alemanno, 'A la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: quelques réflections à propos des arrêts " Schmidberger" et "Omega"', *Revue du Droit de l'Union Européenne,* No. 4, 2004, 709-51.

[11] This interchangeable approach has become traditional for the EU law doctrine; in particular, see A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union', *Common Market Law Review*, Vol. 37, 2000, 1307-38. It should be noted that sometimes the terminology of 'fundamental rights' is used to embrace even a wider scope of rights and freedoms, including civil, cultural, economic, social and political rights (e.g., J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution', *European Law Journal*, Vol. 12, No. 1, 2006, 15-40, which is inadmissible in the light of the present paper, since it distinguishes 'fundamental' (human) and 'social' freedoms in order to answer the question whether the latter has acquired (or might acquire) a similar 'derogation' status which human rights do now enjoy in EU law.

[12] This notion was first introduced in the German legal doctrine in the 1960s. For an analysis of the evolutions of the term see D. Hanf, 'Le développement de la citoyenneté de l'Union européenne', in D. Hanf and R. Muñoz (eds), *La libre circulation des personnes: Etats des lieux et perspectives*, Cahiers du Collège d'Europe (Brussels: P.I.E. Peter Lang, 2007), at pp. 16-17.

[13] Cf. J. H. H. Weiler, 'Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision', *European Law Journal*, Vol. 1, No. 3, 1995, 219-58.

[14] C. Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford: Oxford University Press, 2006), at pp. 402-03.

Finding an answer to that range of questions is an on-going task for the ECJ. Thus, in a series of 'students' cases'[15] the Court makes statements claiming that European citizenship is 'destined to be the fundamental status'.[16] In fact, the Court projects into the future disregarding the reality at the moment. This is a remarkable statement since the Court did not put it into a context like 'supplemental to fundamental'. The way the Court phrases it reveals certain evolutional and even constitutional implications, setting a road map (*indication de voies*) for the future of European integration. In this respect, the 'Baltic-Scandinavian' conflict in *Laval* (which brings the jury into the new reality of the EU-27) fitted the case-line with a quasi-constitutional potential.

What is even more interesting in the context of transition and recent enlargements is whether '*social citizenship*' is an appropriate construction to describe the legal phenomenon of a supranational EU citizenship. If so, does this approach have consequences for the internal market of the EU-27? Moreover, does this 'European citizenship' approach have implications for the freedom of establishment and services, i.e. whether it embraces a new perception of legal entities in EU law? There is a danger that companies could perceive this legal incentive in a way to simplify their conduct of business through evading local company law and tax law requirement. The latter would provoke an overflow of capital to member states with a less onerous regime.[17] The judgement in *Kaba*[18] with regard to individuals demonstrates limitations of Community law on citizen's right to free movement and residence though, so far, no clear criteria are established to limit the influx of non-economic actors to generous welfare states.[19] Solidarity is another notion which is to be interpreted in conjunction with citizenship.[20]

When analysing *Laval*, one should bear in mind that the decision is taken in the specific post-enlargement context, where the Court is expected to rule not just on the legitimacy of the way some country is transposing the EU legislation (the question of the 'minimum wages' avoidance in Sweden, stemming from the Posted Workers Directive, PWD), but to shed light onto the status of the internal market for the ever bigger *EU citizenship*, which already embraces the nationals of Estonia, Latvia, and Lithuania. Interestingly enough, the vocabulary of the Luxembourg judges carefully avoids any references to the enlargement context in this case. The sanctuary of the internal market cannot afford those *enlargement* connotations. In its decision, the Court avoids the risk of bringing a political debate to the necessary affirmative support for the (Baltic) newcomers. The leitmotif of the pure case-law-sufficient-derogations-test (which Swedish legislature fails to pass) declines the incentives to discuss the fragmentation of European citizenship resulting from the danger of social dumping. Such delicate wording is particularly important taking into account the safeguard restrictions on the working markets negotiated before the enlargement (see *infra*).

---

[15] Case 293/83, Gravier, [1985] ECR I-00593; Case 184/99, Grzelczyk, [2001] ECR I-07091; Case 209/03, Bidar, [2005] ECR I-02119. Cf. M. Dougan, 'The Constitutional Dimension to the Caselaw on Union Citizenship', *European Law Review*, Vol. 31, No. 5, 2006, 613-41.

[16] Grzelczyk, *supra* note 15, at paragraph 31. See also an unusual (in terms of legal rhetoric) recent Opinion of AG Colomer in Joint Cases 11/06 and 12/06, Rhiannon Morgan v Bezirksregierung Koln and Iris Bucher v Landrat des Kreises Duren, [2007] (cf. paragraphs 37-68), where he refers to historical aspects of this particular destiny of European citizenship.

[17] Barnard, *supra* note 14, at pp. 402-03.

[18] Case 356/98, Kaba I, [2000] ECR I-2623 and Case 466/00, Kaba II, [2003] ECR I-2219.

[19] Dougan, *supra* note 3, at p. 114.

[20] The question of 'European solidarity' has been profoundly treated in a series of European Law Review editorials; see 'The Unbearable Heaviness of European Citizenship', *European Law Review*, Vol. 31, No. 6, 2006, 777-78. Cf. also, O. Golynker, 'Jobseekers' Rights in the EU: Challenges of Changing the Paradigm of Social Solidarity', *European Law Review*, Vol. 30, No. 1, 2005, 111-23.

Social dumping

The question to be posed is whether the exercise of labour competition is fraught with a temptation for the enterprises and individual workers to seek better employment opportunities abroad[21] and, thus, is able to provoke *social dumping* through indirect lowering of wages and labour standards in the countries with traditionally more generous wages. Thus, *social dumping* with regard to workers and services could be an equivalent to 'welfare tourism' in the context of free movement of persons. Three factors which need to be taken into consideration when speaking about the risks of social dumping are as follows: the price of work, the regulation of work and the role of social partners.[22]

Legal implications of the pre-accession period

Economic concerns and diverging practice of legal approximation

In particular, it was argued that the enlargement is capable of diverting foreign direct investment from the EU-15 to the acceding states.[23] Naturally enough, the popular expectation was a so-called 'displacement effect' for national workers based on the mistaken belief that the number of jobs in the economy is fixed.[24] Another widespread fear was that a massive influx of workers from the EU-10 would lead to a dumping of wages (that rhetoric was especially efficient in the volatile days of Jean-Marie Le Pen, Pim Fortuyn and Jörg Haider).[25]

'Wage effect' expectations were perhaps the most sound since wages in the CEEC (EU-8, i.e. with the exception of Malta and Cyprus) amounted only to nine percent of the EU-15 average and the situation seemed to be especially vulnerable for particular industries (such as textiles and footwear) as well as particular countries neighbouring with EU-10 (Germany, Austria).[26]

The economists used to analyse regional income differentials as the key variable in determining the probable scale of international labour migration.[27] This approach showed that income differentials between EU-15 and EU-10 (and especially between EU-15 and EU-8) were, by no means, higher than those between Portugal and Greece, on the one hand, and the then member states, on the other hand.[28] Nonetheless, the experience of previous enlargements was rather a positive example since it demonstrated that

---

[21] Dougan, *supra* note 3, at p. 7.

[22] Ibid., at p. 17.

[23] Ibid., at p. 133.

[24] Doyle et al., *supra* note 5, at p. 10.

[25] Dougan, *supra* note 3, at p. 121.

[26] H. Grabbe, *Profiting from EU Enlargement* (London: Centre for European Reform, 2001), at p. 43.

[27] Another trend is to concert wage levels at PPP (purchasing power parity). This approach shows that for some countries (especially Baltic States) the absolute gap in per capita incomes to the EU-15 is still capable of provoking large labour migration potential. For other countries (Slovenia and Czech Republic) PPP was quite comparative to the countries of previous enlargement. For a thorough economic analysis see F. F. Heinz and M. Ward-Warmedinger, 'Cross-Border Labour Mobility within an Enlarged EU', *European Central Bank Occasional Paper Series*, No. 52/ October 2006, at pp. 16-17. For a more politics-oriented study see M. Kengerlinsky, 'Restrictions in EU Immigration Policies towards New Member States', *Journal of European Affairs,* Vol. 2, No. 4, 2004, 12-17. For detailed analysis of legal implications dating back to the economic fears, see O. Farkas and O. Rymkevitch, 'Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices', *International Journal of Comparative Labour Law and Industrial Relations,* Vol. 20, No. 3, 2004, 369-97; A. Adinolfi, 'Free Movement and Access to Work of Citizens of the New Member State: The Transitional Measures', *Common Market Law Review*, Vol. 42, No. 2, 2005, 469-98.

[28] Doyle, *supra* note 5, at pp. 121-22.

enlargement itself did not provoke significant disruptions in the labour market and social standards of old member states.

Another debate, which needs a brief overview with regard to its legal implications, is the distinction between the aggregate and the regional impact of enlargement, since it was evident that neighbouring countries are by far more likely to be flooded with migrants.[29] Economic and statistic analyses revealed, in particular, that migrants often tend to choose a neighbouring country (being influenced by linguistic, cultural and transport fees consideration). The pattern may be exemplified with the popularity of Finland among the Estonian workers. On the other hand, old member states with English as the official language are more popular among migrants with a high level of education (*inter alia*, the impressive number of Lithuanian and Latvian workers in Ireland and the UK).[30] One more contradiction to the common stereotype is that European migrants, in fact, tend to be young, well educated and single.[31]

Moreover, linguistic, cultural and social barriers, as well as high transaction costs of migration itself are usually capable of preventing the flood of migration.[32] The economic analysis also focused on the so-called 'welfare magnets', i.e. on researching the hypothesis that migrants tend to pick up the countries with more sound welfare traditions.[33] Perhaps, it was a rather sensitive issue for countries such as Sweden or Ireland affecting their motivation to open their labour markets, but finally research found that 'welfare tourism' could hardly be a serious pull factor. In general, the social aspect was of particular importance due to another hypothesis, namely that organised crime and unscrupulous employees would be able to use the social security systems in order to keep wage costs down. The studies also demonstrated that an increased supply of labour may also induce new investments.[34] The latter is capable of counteracting a wage decline, thus proving that 'benefit tourism' could only have limited consequences. In general, one could observe a spill-over effect[35] in countries' motivation to open the markets with regard to social policy (especially in case of Ireland) since the enlargement debate often was much more concentrated on protecting the welfare system than on labour market issues.[36]

Economic analysis revealed that a small number of workers tend to migrate to old member states which should not cause a long-term disruption of the labour markets.[37] One of the most interesting economic arguments put forward for why not to postpone the enlargement was that business is already exposed to global competition and EU business can maintain profitability by using the acceding countries as a 'low-cost production site'.[38]

Thus, one could conclude that the pre-enlargement fears provoked a specific socio-economic debate, which has proven that enlargement in itself is not capable of disrupting Western European labour markets as such but, on the other hand, it could have much more serious consequences for the neighbouring countries, in particular, the Scandinavian countries vis-à-vis the Baltic States. This line of argumentation led to the

[29] Dougan, *supra* note 3, at p. 122.

[30] Doyle, *supra* note 5, at p. 10.

[31] Ibid., at pp. 20-21.

[32] Dougan, *supra* note 3, at pp. 121-22.

[33] Doyle, *supra* note 4, at p. 10.

[34] Ibid., at p. 19.

[35] In other literature described as 'domino effect', see in particular S. Curie, '"Free" Movers? The Post-Accession Experience of Accession: 8 Migrant Workers in the United Kingdom', *European Law Review*, Vol. 31, No. 2, 2006, 207-29, at p. 211.

[36] Doyle, *supra* note 5, at p. 23.

[37] Grabbe*, supra* note 26, at pp. 43, 4.

[38] Ibid.

legal consequences of imposing a restriction period in the majority of EU states, with particularly strong derogations for Austria and Germany. On the other hand, EU-15 also accepted certain concessions permitting the acceding states to introduce seven-year restrictions for foreigners to acquire land in those countries.[39]

Transitional arrangements and other safe-guard measures: Implications for the accession treaty

The economic considerations demonstrated in the previous sub-chapter were echoed in the Act of Accession 2003 (Athens) by way of transitional arrangements.[40] Interestingly enough, those arrangements dealt only with eight acceding states (Poland, Hungary, the Czech Republic, the Slovak Republic, Slovenia, Estonia, Latvia and Lithuania) since Malta and Cyprus did not pose an evident problem for the labour market of EU-15. Old member states were permitted to derogate from Articles 1-6 of Regulation 1612/68,[41] thus restricting in time the access to their labour market. This derogation was shaped in the so-called '2+3+2' formula, i.e. old member states were permitted to restrict the principles of internal market with regard to labour vis-à-vis EU-8 following three-stage pattern: (1) from 1 May 2004 until 30 April 2006; (2) from 1 May 2006 until 30 April 2009 and, finally; (3) from 1 May 2009 until 30 April 2011. The third derogation is the most serious one since in order to justify itself it requires evidence of 'serious disturbances' or a 'threat of serious disturbances' for labour market (the so-called '*standstill clause*'). Moreover, those states within EU-15 which already opened their markets could still invoke another provision (the so-called '*safeguard clause*') which permits them to impose restrictions up until the ultimate terms if there is an evident threat of serious disturbances in their labour markets. This provision is especially interesting in the light of *Laval* since the proof could be based on the threat for the standard of living or the level of employment in a given region or occupation. That was the argumentation leitmotif of the Swedish government. Hence, theoretically social dumping could constitute a legal basis for this back-manoeuvre.

During the already completed first stage only three countries opened their labour market for EU-8, namely Sweden, Ireland and the United Kingdom. Upon the accomplishment of the first phase the Commission presented a Report on the Functioning of the transitional arrangements in the first phase which made some other countries follow open-labour model (Spain, Finland, Greece, Portugal and Italy) and yet more countries open their labour market only partially (Belgium, Denmark, France, Luxembourg and the Netherlands).[42] Austria and Germany still keep on restricting their market.[43] With the accession of Bulgaria and Romania the model of graduality has now shifted to '1+2+1' formula, i.e. the stages in opening labour market are now as follows: (1) 1 January 2007 until 31 December 2008; (2) 1 January 2009 until 31 December 2001, and finally, (3) 1 January 2012 until 31 December 2013.

---

[39] Ibid., at p. 14.

[40] K. Inglis, 'Treading the Tightrope between Flexibility and Legal Certainty: The Temporary Derogations from the Acquis on the Freedom of Movement of Workers and Safeguard Measures under the Accession Treaty', in D. Hanf and R. Muñoz (eds), *La libre circulation des personnes: Etats des lieux et perspectives*, Cahiers du Collège d'Europe (Brussels: P.I.E. Peter Lang, 2007).

[41] Council Regulation No 1612/68 of 15 October 1968 on the freedom of movement for workers within the Community, OJL 257, 2-12.

[42] In Denmark labour market is fully covered, in Belgium, France, Luxembourg and the Netherlands flexible provisions cover only certain sectors or certain professions.

[43] Initially German and Austrian governments insisted on transitional derogations for certain sensitive sectors (e.g., construction, industrial cleaning, home-nursing and security activities). This logic certainly dates back to consequences of the previous enlargements. Michael Dougan expressed an interesting opinion that the better alternative for Germany and Austria would be to require payment of their national minimum wage for posted workers from EU-8, despite the judgement in Mazzoleni. See Dougan, *supra* note 3, at pp. 138-39.

As far as the recent enlargement from EU-25 to EU-27 is concerned, of the former EU-15 only Finland and Sweden fully opened their labour markets, which made, respectively, *Viking* and *Laval* pioneer case-law in the field. France and Italy agreed to open their markets partially, while the other countries (Austria, Belgium, Denmark, Germany, Ireland, Greece, Luxembourg, the Netherlands, Spain, Portugal and the United Kingdom) imposed restrictions. Among EU-10, only Malta restricted its labour market while Hungary imposed partial restrictions (getting a work permit depends on the work sector). These cautions explain why so many governments submitted their observations before the Court in *Laval*.[44] One could hardly stay impartial when the most essential issue of European integration (free movement of the economically active population) is at stake.

It should be underlined that the transitional arrangements concern only migrant workers from the newly acceded states. They do not allow old members to limit the free movement of other categories of EU citizens (students or persons with independent means).[45] Moreover, no derogation is possible once the worker has been legally employed for the first time in an old member state.

Hence, the key elements with regard to the labour market protection after the enlargement are flexibility and graduality.[46] The pre-enlargement debate embodied the joint venture of solidarity and conditionality[47] in a legal *telos* of accession *acquis*.

Laval: A clear statement of the new tendency?

The approach of the Court is that neither economic nor social arguments are excluded but the crucial question is the one of balancing. The Court follows its traditional sufficient-derogation-test-analysis and recognises the existence of the conflict without any reference to the affirmative support of the [Baltic] new-comers for the unity of the internal market (Paragraphs 95, 108). Nevertheless, the Court emphasises that the European integration is indeed not exclusively about providing efficiency of the economic freedoms. (Paragraph 104). The due respect should be paid to social rights. The question behind the judicial vocabulary is to what extend the decision is informed by social factors and a broader social context of the Community legal order.

Horizontal effect is made applicable towards the trade unions but the particular benefits of this stance are vague. It is unclear whether the Court will keep on its iron logic of the internal market body-guarding. Or in the future (where there is no conflict with the imposition of the EU norms on the national level) the horizontal effect has a potential to set up an actual derogation for the internal market, shaped into the social rights protection. Otherwise, it is not a big step for the recognition of the direct horizontal application since in judicial reasoning the trade unions could be easily substituted with the state authorities who do not produce any efficient measures to stop the trade unions (the reasoning pattern of '*Angry Farmers*'[48]).

The notion of *solidarity* behind the lines acquires an extra value. Being traditionally regarded as a labour and social value, it encompasses a non-discrimination logic not only before (at the stage of the enlargement negotiation) but also after the enlargements. The

[44] Austria, Belgium, Czech Republic, Denmark, Germany, Estonia, Finland, Ireland, Spain, France, Lithuania, Poland, UK. Even Norway and Iceland did not stay apathetic.

[45] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 – 30 April 2006), COM/2006/0048 final, 8 February 2006.

[46] Curie, *supra* note 35, at p. 210.

[47] M. Cremona, 'EU Enlargement: Solidarity and Conditionality', *European Law Review*, Vol. 30, No. 1, 2005, 3-22.

[48] Case 265/95 Commission v. France, [1997] ECR I-443.

implicit message from the Court could be formulated as follows: 'The fear of social dumping is not an excuse to discriminate the eastward workers!' The position of the Baltic workers on the internal market, thus, obtains an additional reinforcement in the context of the EU-27.

Laval in the context of fundamental rights

Despite the facts that: firstly, it is evident that collective bargaining is a trendy direction of activity coordination at the EU level;[49] and secondly, the Charter of Fundamental Rights is arguably enjoying a potential to break a new ground by incorporating social and economic rights (including the collective labour rights[50] affecting the laws of member states on trade unions[51]) into the realm of fundamental rights.

Notwithstanding these arguments, in *Laval* the Court sets out a traditional internal market test, where the social rights motivation of Swedish trade unions does not pass the proportionality assessment. The Community enjoys a limited competence to pursue harmonisation in the social sphere since Article 137 EC specifically excludes harmonisation of national wages from the Community's competence over social policy and Article 95 EC does not apply to employment matters.[52] Thus, the field for fundamentalising manoeuvres is restricted. Another way to interpret this ambiguity is to claim that precisely because the harmonisation in the field is impossible, the member states are free to safeguard their social policy traditions, thus limiting the potential for the intervention both from Brussels and Luxembourg. The Court does not seem to approve of such stance. In Paragraph 88 it explicitly states that:

> the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services.

Although the Advocate General thoroughly analyses the current stance of the European Court of Human Rights (ECtHR) with regard to industrial actions (*Gustafsson v. Sweden* and *Sorensen v. Rasmussen*),[53] the Court is not inclined to go into a detailed comparative study of Strasbourg case load. Nevertheless, the decision in *Laval* can be implicitly informed by the latter, considering that both main ECtHR cases originate from Scandinavia with its particular trade union status. Moreover, in those two cases Strasbourg took a manifest support of the negative right to association, i.e. the right of an employer not to be forced into a collective bargaining agreement. Thus, ECJ contributes to the 'fight' against the Nordic model of industrial relations, characterised by features such as self-regulation, non-intervention and a wide autonomy of social partners.

Another ambiguous question arises from the hypothesis that if Sweden transposed the Posted Workers Directive (PWD) with the acceptance of the minimum wages model, then the outcome of *Laval* could have been different. In this sense, *Laval* is not the hardest nut for the ECJ who managed both to proclaim that the EU integration is not only about

---

[49] A. C. L. Davies, 'Should the EU Have the Power to Set Minimum Standards for Collective Labor Rights in the Member States?', in P. Alston (ed.), *Labour Rights as Human Rights*, Collected Courses of the Academy of European Law Vol. XIV/1, (New York: Oxford University Press, 2006), see in particular p. 316.

[50] Cf. Davies, *supra* note 49. Cf. also E. Kovacs, 'The Right to Strike in the European Social Charters', *Comparative Labour Law & Policy Journal*, Vol. 26, 2005, 445-75.

[51] Davies, *supra* note 49, at p. 321.

[52] Ibid.

[53] Paragraphs 275, 303 in the Opinion of AG Mengozzi (Gustafsson). In paragraph 302 Mengozzi discusses another Strasbourg case in the context of the overpowered Swedish trade unions, Evaldsson and Others v. Sweden.

economic efficiency[54] and simultaneously to safeguard the sanctuary of economic freedoms.[55] The argumentation of the court is based on wage calculations and not on balancing social rights versus fundamental freedoms *stricto sensu*.

Nonetheless, even if presuming that such hypothetical a situation checks out, I doubt that the decision would be different. In order to bring the social rights (in particular, the right to industrial action) into the realm of fundamental rights derogations, the Court will need either to establish a sound link with Strasbourg (as has been demonstrated *supra*, such a manoeuvre is hardly possible) or to address the constitutional traditions of 27 member states where the recognition of social rights differs tremendously. Article 13 EC will rather suggest a non-discrimination logic against Swedish trade unions that block the pursuit of the economic freedoms for the foreigners. The right to collective action is, above all, not boundless. To give an example, it is hardly legitimate to raise it, for instance, to prevent racial minorities or women to work at a certain enterprise. The established case law will suggest the path of *Schmidberger* to which Scandinavian commentators implicitly tended to compare *Laval* when awaiting the decision.[56] However, the pattern of aggressive protest (with the total blockage towards the exercise of fundamental freedoms) rather fits the logic of 'angry farmers' in France. Similarly to the French case, the police are asked to intervene but they refuse on the ground of the constitutional protection for the collective action.

However, one could arguably state that the constitutional safeguard of the bargaining model in Scandinavia is a part of the constitutional tradition comparable to the status of human dignity in the German *Grundgesetz* (basic law), thus linking the case to *Omega.*[57] This line is the most controversial since the differentiation of what constitutes a constitutional tradition, i.e. what *deserves* the Community protection, is highly problematic. The comparison here lacks explicit legal grounds.

The Court does not swim deep to those numerous cavities, avoiding the fundamentalisation of social rights complexity. The ECJ produced a judgement with the main rational of confirming the sanctuary of the inviolability of the economic freedoms, thus, protecting the rights of the workers from the newly acceded (in particular, Baltic) states against discrimination. As it has been demonstrated previously, the opening of the internal market(s) is a gradual process where the EU-15 enjoys quite a few benefits. The Court does not seem willing to broaden those privileges, which has already put the newcomers into not exactly equal positions.

The position of the Court is definitely not accidental. The case of *Dirk Rüffert v. Land Niedersachsen*[58] in the German-Polish context confirmed the logic of non-admissibility of the wage imposition (through 'contractual' legislation at the case of Lower Saxony) which

[54] Paragraphs 104, 105 (social purpose of the Community), paragraph 91 (the right to take a collection action is indeed a fundamental right as a general principle of EU law).

[55] Paragraph 108 (the obstacle at stake cannot be justified by the social purpose), paragraph 95 (collective action should be balanced against the internal market).

[56] Cf. Ahlberg et al., *supra* note 1, in particular pp. 163-64 (the reasoning pattern is to frame the right to strike into a public policy derogation to free movement of services, strong enough to pass the proportionality assessment). Thus, the authors hastily predicted that the Swedish model will not be endangered. Further the juxtaposition is done to Commission v. France [1997], *supra* note 48.

[57] Case 36/02 Omega, [2004] ECR I-9609. The Court refers to Omega briefly in paragraphs 93, 94 of Laval.

[58] Case 346/06 Dirk Rüffert v. Land Niedersachsen, [2008]. In paragraph 42 the Court states: 'it does not appear from the case file submitted to the Court that a measure such as that at issue in the main proceedings is necessary in order to avoid the risk of seriously undermining the financial balance of the social security system, an objective which the Court has recognised cannot be ruled out as a potential overriding reason in the general interest'.

could impede or render less attractive the provision of services by workers from the new member states.

Conclusions: The sermon of the Baltic-Scandinavian saga

The enlargement created a unique moment for the Baltic countries, whose nationals finally obtained the right to a working migration within the EU.

The pre-accession economic fears made the majority of the EU-15 adopt limitations for the access of labour from the Baltic states. The key word in that system of limitations is *graduality*. The old member states negotiated a plan of a gradual opening of their markets to avoid serious disturbances. Sweden became one of the countries which fully opened their labour markets to the service providers from the EU-10, in particular Estonia, Latvia and Lithuania. As time has shown, the potential disturbance for the labour markets of EU-15 lays not in the danger of a massive influx of workers from the newly acceded states, but rather in the differences in labour costs and social standards. This problem has acquired a wider recognition under the term of *'social dumping'*, virtually recognised by the ECJ. In *Laval* the Court weighed in the industrial action as a possible derogation which was seen to be disproportional when balanced against the purposes of the internal market. Nevertheless, the ECJ was explicit on the potential of social rights to be perceived as fundamental rights under the general principles in the EU law.

Hence, *Laval* is indeed a victory for the Baltic workers. However, I could hardly share the opinion that *Laval* significantly undermined the position of social rights in Europe. Careful analysis of the 'blockage' situation reveals that the ECJ is actually consistent with the reasoning of the ECtHR. Implicitly following Strasbourg, the ECJ sets a lesson for the modification of the Nordic industrial model and limits the tyranny of trade unions. 'Good manners' are imposed through the non-discrimination logic of the European integration. The arbitrariness of the wage calculation by social partners is an aspect which does not enjoy the cover of fundamental social rights.

The Court delicately avoids the rhetoric of the *post-enlargement solidarity*; however a deeper insight into the pre-enlargement negotiation reveals an implicit motivation of the Court. The sanctuary of economic freedoms as the foundation of European integration is reinforced in the context of the EU-27. Old member states have negotiated the graduation system as a hinder for social dumping. The Court does not permit a further fragmentation of the internal market by using social provisions as a charlatan charter for the back-manoeuvre against EU citizens from Baltic countries.[59]

The decision in *Laval* has significant legal, financial and demographic implications both for old and new member states. As far as a *graduality* system of market opening is concerned, the decision could either give an impetus to final liberalisation vis-à-vis the CEEC or slow down the process, especially in Germany and Austria. The Nordic model of salary bargaining is proclaimed contradictory to the EU law as far as it applies to the service providers from other member states. Thus, the interests of Baltic workers were protected.

However, the decision contributes to a further-migration-encouragement effect. The populist claim will be to suggest that this stance shapes a 'second sort of *EU citizenship*' – ready to work for indecently minimum salaries. Around 70.000 people have already left

[59] Similarly Marie-Ange Moreau induces the progress of 'fundamental social rights' from the perspective of 'citizen-workers'. She demonstrates that the internal market is actually structured by social rights, including the right to collective bargaining. Cf. M.-A. Moreau, 'European Fundamental Social Rights in the Context of Economic Globalization', in G. de Burca and B. de Witte (eds), *Social Rights in Europe* (Oxford: Oxford University Press, 2005), especially pp. 370-71. In *Laval* the Court tackles the abuses of such structuring.

a population of approximately two million in Latvia.[60] Thousands of people have been leaving the one million country of Estonia as labour migrants – not to mention the huge labour migration from Lithuania, and the 1,5 million Polish workers in the EU-15.

Despite all the contradictions, one aspect is certain: *Laval* (as well as its twin brother *Viking*) will remain an overwhelmingly important ECJ decision(s) for the whole Baltic region.

[60] There are symptoms that Latvia itself experiences the lack of the construction workers due to the mass influx of the population to the EU-15. Cf. E. Hugh, 'Migration and the Latvian Labor Market', *Latvia Economy Watch* blog entry, 28 August 2007. Available at: <http://latviaeconomy.blogspot.com/2007/08/migration-and-latvian-labour-market.html>.

Chapter 7

Reporting on Europe in new markets

Restrictions, challenges and opportunities for Baltic journalism

Auksė Balčytienė and Aušra Vinciūnienė
Vytautas Magnus University Kaunas

Introduction: Shifting attention in European political communication

In European political communication a shift of attention is indicated: a new kind of communication – a so-called trans-border political communication – is emerging which modifies the ways in which political life in Europe is constructed. According to this view, public engagement in European affairs, also its reorientation from national interests to priorities significant for a large numbers of European citizens, is most necessary – in short, a shift from domestic to European Union (EU) decision-making is needed, which requires informed and knowledgeable citizenship (Schlesinger, 1999; Calhoun, 2004; Eriksen, 2005).

The everyday reality, however, is different. From the ordinary citizens' perspective, the EU is perceived as a complex supranational polity which is distant from domestic political realities. National politicians, too, tend to concentrate on the national interests and to deal with Brussels' politics behind the closed doors.

Previous national and cross-national studies investigating media coverage of the European Union confirm that EU politics lacks visibility, clear framing and focus (Peter and de Vreese, 2004; Meyer, 2005; Machill et al., 2006; Negrine et al., 2008). Moreover, EU politics becomes a number one issue only during certain periods of time (for example, during special events such as Summits, elections or referendum campaigns) or in times of conflicts and crisis. In addition, contemporary studies disclose that there is a lack of analytical reporting in the mainstream media Europe wide – only elite media cover issues of European integration, EU Constitution or the Treaty of Lisbon with a certain degree of attention while the mainstream media provides only incidental picture of the EU (AIM Research Consortium, 2007).

Another group of research studies shows that the way journalists interact with EU political institutions is dependent on practicalities (learned communication practices and traditions) in the national settings (Semetko et al., 2000; Adam, 2007; Heikkilä and Kunelius, 2007; Koopmans, 2007; Pfetsch et al., 2008; Statham, 2008; Tjernström, 2008). This kind of national communication culture becomes even more apparent when practices of foreign correspondents are studied in an international setting in Brussels (Morgan, 1995; Baisneé, 2002; Gavin, 2001; Lecheler, 2008): it appears that the highest probability for EU news to enter the national agenda is to nationalise (i.e. 'to domesticate') European issues by giving them a national reference.

Briefly, all these results confirm that EU reporting, as a matter of fact, is strongly influenced by the cultural factor, namely the traditions and customs that determine media performance (its editorial policies and professional routines) in different countries (Hallin and Mancini, 2004; Ruusunoksa, 2006; Negrine, 2007).

How does Baltic journalism look in this respect: Where do incentives in European reporting come from in the Baltic States (how Baltic journalists perceive their role in this

and what do they think about their audience and its needs)? Moreover, what do Baltic journalists think about the role of the media in development of a European public sphere? The following sections are organised to give an overview of results obtained from more than 30 semi-structured qualitative interviews conducted during two field studies in 2005 and 2006 with journalists and editors in Lithuania and Estonia.[1] At the time of the study, all respondents held middle management positions – they were duty/deputy editors, directors of political or economic news departments or foreign correspondents in Brussels. All interviewed journalists came from conventional (print, broadcast) and online media, as well as news agencies.

Baltic journalists and EU reporting

The discussion here is organised to understand how journalists perceive their audience and its information needs in relation to EU news coverage. It will also cover what kind of drawbacks, difficulties and restrictions they experience in EU reporting, what kind of role the media has in the provision and mediation of EU-related information, and how journalists assess their professional role in the Europeanisation of the national public sphere.

Is there an audience for European news?

As new members of the European Union, Lithuania and Estonia have little experience in EU reporting when compared to older and larger member states. According to the interviewed journalists, only some media companies have explicit editorial policies on what is considered to be EU news and how to report on these. For instance, the political news editor of one of the biggest regional dailies in Lithuania said that this policy exists because EU politics has become Lithuanian politics as well. Political decisions accepted at the EU level have a direct bearing on Lithuania, therefore newspaper readers have to know what decisions were taken and how they impact on their daily lives (Balčytienė and Vinciūnienė, 2006: 102).

It seems like audience demand is the most prevailing factor shaping the news agenda of the media. Each media outlet targets different audiences, but the most important criterion in news selection is the same for all: relevance to the everyday lives of media consumers. As Estonian journalists tended to repeat, the media is expected to report on EU issues that matter to Estonia and Estonians (Tammpuu and Pullerits, 2006: 23). 'The fact that news comes from Brussels does not make news important', said the editor-in-chief of the one Lithuanian news agency; the strongest factor determining whether news is published and how it is done is its news value, and the news is valuable if it is interesting to the audience (Balčytienė and Vinciūnienė, 2006: 102). In other words, EU news must go through the same selection process as news from, say, Lithuania, Estonia, Russia, or China.

An important observation emerging from the interviews with media professionals is the 'economisation' of the mass media, i.e. the increasing impact of calculated (economic) considerations of news making. All media apply economic performance criteria: EU news has to be relevant and interesting to the audience, otherwise it will not be reported. Therefore, the media contextualises EU news, i.e. they present it from a local angle. The domestic focus affects the thematic spectrum of EU news, which is not so wide after all: business and politics are core issues in the news, and the logic of the media for EU news selection is mainly driven by audience demand. Estonian journalists favoured news topics were related to, among others, consumer protection issues (quotas and agricultural

[1] Eleven countries took part in the 6th Framework Program project Adequate Information Management in Europe (AIM) in the period of 2004-2007. Its aim was to disclose specific news production routines and processes (EU information selection, analysis, editing, and presentation) resulting in EU coverage in mass media. Information about the project is available online at: <http://www.aim-project.net> (accessed February 2009).

subsidies), employment or study opportunities within the EU. By contrast, political issues, such as reforming the EU, and other macro-level issues meet with indifference (Tammpuu and Pullerits, 2006: 26).

News presentation is determined by the logic of media outlet. For a news agency, for example, it is important to report breaking news. This applies to the Internet, too. For online media, in addition, online news items need headlines that are attractive and catchy. For newspapers, the presentation of EU news depends on other factors such as the type of information, its consistency and availability to journalists, and information relevance to their readers. As one of the reporters further explained:

> If a given topic is relevant and broad and information is available, there is a high probability that it will be presented as a news analysis article. If there is very little information, only brief facts will be given. The news genre depends on the type of news.
>
> (Balčytienė and Vinciūnienė, 2006: 104)

According to journalists, whether EU news is treated as national or foreign depends on its type. According to the editor-in-chief of one news agency in Lithuania, EU news can be everything: it includes EU policy-making, all events and meetings, national and international conflicts and disagreements, scandals, the EU constitution, news from Iraq, etc. In addition, EU news can come in all forms of reports and statements. However, political EU news stories go into the hard news section and thus are mainly treated as foreign news. Moreover, there is also 'Lithuanian European news' (Balčytienė and Vinciūnienė, 2006: 110). This type of news can be about the financial support that Lithuania receives from the EU. It also includes news about official visits of Lithuanian politicians to other EU countries and the EU's relationship with Russia. In other words, EU news is 'Lithuanianised' when political action (as opposed to abstract decisions) involving Lithuania takes place at the European level.

The notion of EU news has changed in the course of EU integration. In the early stages, citizens from the Baltic countries saw Brussels as a partner in the integration process. Nowadays, Brussels stands for political institutions in which it is necessary to work and to represent Estonia or Lithuania. In this respect, EU news has become national news to some degree. In addition, EU matters have lost their purely political character since accession has been completed. For Lithuanians, the EU now functions according to an economic rather than a political logic, and it is mainly economic matters that EU information conveys. In the case of Estonia, journalists do not attribute great importance to the EU as a 'separate' issue anymore, but rather see it as an 'inseparable' aspect of many other issues (Tammpuu and Pullerits, 2006: 22).

The shift in the treatment of EU news, going from foreign to national news, corroborates the assumption that journalism and the perceptions of journalists change along with reality. However, interviewed journalists acknowledge that audience demand for European affairs in the Baltic countries is rather scarce. This affects journalists' motivation in EU reporting in a negative way. Estonian journalists, for instance, claimed that although journalists recognise the existence of a small, interested elite, they generally set the news agenda according to the preferences of the wider audience with limited knowledge and interest (Tammpuu and Pullerits, 2006: 24). An editor of a news agency in Lithuania said: 'The media in Lithuania is provincial: news is presented according to the Lithuanian view and the public is interested only in the issues that consider them in particular' (Balčytienė and Vinciūnienė, 2006: 111).

Briefly, it seems that Baltic journalists provide as much EU information as their audience requires. Moreover, the media is not expected to invest more resources into EU reporting or expand its current scope; if there is no demand why should the media offer more news? However, a different type of logic applies here as well: the public may judge an

issue and its relevance only if it is confronted with that particular issue. From this logic of reasoning it follows that media should play a much more active role in bringing new topics to the national news agenda.

Covering EU affairs from a distance is complicated

Lack of the audience interest for EU political affairs seems to be not the only factor affecting the quantity and quality of the European reporting in the Baltic media. According to all interviewed journalists, EU politics as such and the general organisation of institutional information provision is a very complex matter. Furthermore, other restrictions to EU journalism are related to media internal organisation: competence of journalists, lack of time and resources for investigative reporting, other practicalities such as functioning and constrains of the media.

One of the major problem areas is based not on the quantity but on the quality of EU information-processing. If assessed from the point of view of national perspective, the political communication culture in Brussels is very different – it has its rules, channels and certain hierarchies (Balčytienė and Vinciūnienė, 2008). As pointed out, the information communicated is complex thus it becomes rather difficult for journalists to understand what would be the impact of a particular decision for an ordinary citizen. At the moment EU is seen as too much institutionally-focused and too little individual-focused (Tammpuu and Pullerits, 2006: 26). From here follows the proposal that journalists, in their work, are most comfortable describing the impact that the EU has on the everyday lives of people and explaining the implications of EU decisions for the viewpoint of a common citizen.

Estonian and Lithuanian journalists acknowledged that they indeed face many challenges when reporting on the EU. Sometimes journalists lack language skills and knowledge of EU politics, other times they are under time pressure or cannot find the needed information. At the same time, it is important to remember that communication with political actors is a two-way process. As the online news editor of a Lithuanian business daily said: each journalist must know how to ask for information. But he also acknowledged that the abundance of information creates the impression that 'even a devil might break its leg while looking for important facts' (Balčytienė and Vinciūnienė, 2006: 102).

The journalists requested that EU communication patterns need to be tailored to the media logic. Most journalists in the newsrooms are not EU experts. Consequently, much information slips past their eyes, said an editor of one online news portal in Lithuania (ibid.: 116). EU policies are often so abstract and formal that it is difficult to interpret what they would mean at the level of everyday life. For journalists to understand the impact of EU events on a particular country's public life, their occurrence and meaning in national context must be clear. According to the journalists from the Estonian press, the time pressures that they face make it extremely difficult to monitor the whole news flow without having skills and knowledge to select what is important and what's not. 'It is a challenge for journalists to keep themselves constantly and systematically informed about EU issues' (Tammpuu and Pullerits, 2006: 25).

Also, the information provided by various EU institutions is presented in such a format and jargon that is difficult to understand and edit for journalists. For example, Estonian journalists and editors criticised official EU information and press releases for their bureaucratic jargon and style, including the excessive use of abbreviations and specific terminology: adoption of EU jargon involves a risk of the 'bureaucratisation of one's language' (ibid.: 24).

In this respect, EU reporting is also considered to be quite time consuming. Respondents have mentioned that EU information is complex and often there is no time and enough resources to follow everything what comes on EU. Complexity and high abstraction levels

are mentioned as serious problems by journalists. As one Estonian journalist pointed out, it is usually difficult to understand the context of a particular decision or statement (ibid.). From the point of view of journalists, one needs special skills and resources, such as professionalism, motivation, contacts, and knowledge of the EU institutions and politics, to report on the EU.

All media provide EU information on the basis of their audience composition, i.e. what kind of knowledge the audience has and which EU topics it is interested in. Appearances of the national politicians in the news are one way (among many others) for the audience to receive information about the EU. For instance, the interviewees indicated that journalists are very often invited to join official delegations to accompany political actors (e.g. the president, the prime minister, etc.) to EU institutions in Brussels. Considerably less often, there is also a chance for a politician to appear directly in the news, for example, when a politician from Lithuania says something important in the European Parliament, according to one news agency journalist (Balčytienė and Vinciūnienė, 2006: 104).

In EU reporting, journalists strongly rely on information provided by local and international news agencies. 'Their main advantage is that they already come in a journalistic format – in the form of 'human adaptation' – that requires little additional editing, unlike official EU press releases and original documents', Estonian journalists pointed out (Tammpuu and Pullerits, 2006: 24). However, a problem arises which gives an impression of a vicious circle. News agencies are important providers of information: more than a half of space in newspapers is covered by reports from news agencies. Sometimes the best solution for a newspaper, because a lack of economic and other resources, is simply to publish information from news agencies. In this way the newspaper is first on the market with news; yet this type of news has very little additional information (background information and supporting news), so readers skip it (they do not write feedback). The other problem is raised by the journalists themselves: 'International news agencies usually report EU news from the viewpoint of larger member states' (ibid.).

Summing up, even though the media employ various strategies and tactics to report on the EU and use a large variety of news sources (news agencies, EU representations, press releases), it is difficult to understand EU events simply by consuming the media. Only few media companies in the Baltic States have correspondents in Brussels. It is agreed that having more human resources in Brussels would make a qualitative difference in European reporting, however a lack of financial resources does not make this possible. At least not yet.

Being a newcomer in Brussels: Merits and struggles

All interviewees acknowledged that there is a special role for Brussels correspondents. Despite a general agreement among journalists that there has been a slight increase in EU news reporting in the Baltic media in recent years, many of them are not happy with the outcome. They complained that there was little information tailored to specialised audience needs, e.g. regarding how a particular business sector is regulated and what rules apply there. Certainly, this type of information could be produced by special correspondents who know both the subject matter and the structures of the EU.

Brussels news site has its own information organisation features and characteristics which determine and shape the political communication culture there. This is detected in the information collection practices, routines and the wide spectrum of channels and sources used. For most Brussels correspondents, this communication culture differs dramatically from what journalists are used to at home and getting to know it requires time, resources and a professional attitude. As one Estonian Brussels correspondent pointed out: 'It took me three months even to become acquainted with the basic rules in the pressrooms, to get to know people' (Tammpuu and Pullerits, 2007: 16).

While working in Brussels, journalists have to be flexible and switch between different frames of reporting, such as transnational and national, global and local. According to Lithuanian journalists working in Brussels, the communication culture there and at home is different: at home, journalists are accustomed to speaking to primary sources, while, for instance, at the Commission, everything has to be planned far in advance. Lithuanian journalists said that, in contrast to communication at the EU level, it is easier to receive information just by telephone from the Lithuanian government institutions. Politicians, also the heads of state and government, are easily accessible as a first source, while in the EU institutions all the work is done by press representatives (Balčytienė et al., 2007: 105-6).

It appears that the many drawbacks observed in the professional practices of journalists are based on tensions between transnational and national frameworks when reporting news from Brussels. While far away from their home news desks, journalists in Brussels have to cover issues and events of supranational importance while at the same time trying to 'domesticate' these by finding aspects of national relevance or by interviewing national political actors. This contradiction emerges in connection to the hierarchies of news values and news worthiness criteria guiding professional practices. 'The EU is not a first priority for the home news desk, especially as regards the institutional part and the development of the EU as such, including the Constitutional Treaty', explained one Estonian journalist (Tammpuu and Pullerits, 2007: 16).

On the other side journalists reveal that in many cases, working in Brussels is more comfortable and gives more opportunities than working at home: their editors-in-chief and media directors are far away, which gives them more freedom regarding news planning and presentation. In addition, newsroom politics (political and business impacts on the media) does not influence how the correspondents work in Brussels, thus foreign correspondents feel that they can report about the 'real' news and not the local political scandals, which tend to be the number one topic in the Lithuanian or Estonian press.

The Brussels correspondents unanimously agreed that European news is no longer simply international news in the national media. Basically, the news from the EU is news about Lithuania or Estonia. This is one of the reasons why journalists in Brussels are looking for issues related to their countries or trying to find an angle to make it interesting for the home audience. As one Lithuanian Brussels correspondent explains:

> The editors usually ask me: so what is happening, is there anything about Lithuania? In the news, the link to Lithuania can be direct (e.g. European support to the farmers) or indirect (e.g. dumping of Chinese shoes in the market – this message translates that shoe prices in Lithuania are affected).
>
> (Balčytienė et al., 2007: 107).

Older journalists, especially those who had been specialising in EU reporting while in Lithuania, see their job as a verification of their professional ambitions. They know how to reach the main information sources, like the EU President or the Commissioners. The topics they prepare for the newscast usually have an international focus. When working from Brussels, the journalist needs to provide analysis as well as reporting (ibid.). In many cases in the Baltic countries, Brussels correspondents are considered and valued as EU information experts. Nevertheless, one Estonian journalist acknowledges: 'I personally think that there are so few people here (in Brussels) from Estonia. I have a unique position, but this is not deserved, the situation is simply like that' (Tammpuu and Pullerits, 2007: 17).

In spite of positive aspects, the interviewed journalists in Brussels also mentioned some serious problems associated with working in Brussels. The difficulty in understanding the language (the 'Brussels jargon') is frequently mentioned as the main drawback in EU reporting, in addition to the inherent complexity of economic issues. According to the

Lithuanian correspondents, these drawbacks can seriously affect the EU news agenda: for the editors to accept the news story the journalist has to work hard to prepare an article in an appealing and easy to understand language (Balčytienė et al., 2007: 107). Another problem noted by the Lithuanian correspondents is a lack of visual material which in turn usually effects how the EU is reported by the audio-visual media.

Being rather small groups of journalists from new EU member states, Lithuanians as well as Estonians do not have very close informal relations with the spokespersons of the Commission, nor are they in very close cooperation with other foreign colleagues. Despite the fact that informal relations can be very useful for their work, they receive information mainly via formal channels: the Internet, press releases, midday briefings and press conferences. As information source journalists also use the Internet pages of EU institutions, reports by news agencies, information from national representatives, all of which can be considered as formal sources.

However, informal channels of information are by no means unimportant: 'Gossip, rumours, other colleagues – here we are not competitors; therefore it is good to share information. Also local media as well as the media from other countries, the Internet' (Balčytienė et al., 2007: 108). Informal relations can be observed also in daily routines, especially during the midday briefings. Just by starting a conversation with another journalist one can learn something that was not announced at the official media event. Brussels correspondents tend to receive a good deal of information from colleagues in other countries; information is easily shared in Brussels where they are not competitors. They communicate with each other during the midday briefing – about the latest news, about the topics they are preparing for the newscast. In this way they can learn what has happened and what they have missed. Still, as mentioned above, Estonian and Lithuanian journalists do not have close professional relations with foreign journalists.

To conclude, even though Brussels correspondents from various EU countries have common interests, common sources and even common practices, they remain national journalists working for domestic media organisations operating in different political, economic and cultural conditions. As one Estonian correspondent pointed out: 'It is paradoxical that you come to the European capital and what you start noticing is differences. That which should unite, differentiates instead and also separates' (Tammpuu and Pullerits, 2007: 21). Since the national political, economic and cultural contexts differ significantly from one another, foreign correspondents working in Brussels, while covering common current affairs and often using the same sources, have to deal with different expectations from their home editorial offices. This is a strong indicator towards divergence among journalistic working procedures in trying to domesticate EU news to fit national political agenda.

Prospects for European journalism and European public sphere

Baltic media journalists do not recognise the existence of a common 'European journalism' – they are unanimous in stressing that newsworthiness and relevance of an EU issue depends mostly on the presence of similar issues in the national political debate. For journalists, audiences are still seen as nationally located and rooted. For example for the Estonian journalists, the potential audience for EU news is seen to be limited mainly to the elites, such as politicians, officials and experts. Since there is no broader interested public, the interviewees consider it unlikely that EU journalism as such would extend outside a narrow elitist circle (Tammpuu and Pullerits, 2007: 21).

Few interesting observations follow from the point of view of values or motives that drive journalists' actions. For instance, when asked about what duty a journalist has, many journalists said that it is all about explaining how the EU works, what the decisions are and what their consequences are for the public. 'It is not a newspaper's function to provide EU news; it rather has a function to make these things clearer and understandable for the readers', one Lithuanian journalist pointed out (Balčytienė and

Vinciūnienė, 2006: 114). In other words, one of the roles of a journalist is that of a teacher, because the public has not got much pre-knowledge.

From the point of view of Lithuanian journalists, one needs special skills and resources to report on the EU, such as professionalism, motivation, contacts, and knowledge of EU institutions and politics (Balčytienė and Vinciūnienė, 2006: 112). In the words of an Estonian interviewee, a journalist in Estonia is like an ignorant reader who does not have a relevant knowledge and whose ignorance is reflected in his reporting. However, the incompetence of journalists is a broader problem which does not exclusively apply to EU reporting. He thought that Estonian journalists in general did not meet high professional standards (Tammpuu and Pullerits, 2006: 25).

There seems to be a change in the self-perception of the role of a journalist: when asked about whether a journalist has a role of a watchdog, many of them said that a journalist certainly has, but it is not predominant. In short, journalists see themselves as mediators with an educative role. In other words, citizens not only need to be informed about decisions, but also about what these decisions mean and how they will affect citizens' lives. Brussels correspondents feel that their audience should have more interests than only a pragmatic concern with the EU. As one Estonian correspondent argued:

> There is an old approach that news should be human biased, i.e. based on the ideas which could bring benefits or problems to people. I think it is rather simplified – they are also able to digest more philosophical issues – like what is Europe, where are the boarders of Europe, and also problems concerning working conditions, and general problems with labour.
>
> (Tammpuu and Pullerits, 2007: 19)

Despite the obstacles to EU reporting, the media are intent on creating a forum for the public: different views and opinions are included in the news. One example could be a national broadcaster that, in accordance with its role as a public service, wants to facilitate public discussion through its news programs by providing background news analyses, e.g. through studio guests or by discussing social problems from many different angles. Another means of providing a plurality of views is to diversify content. For example, one of the news agencies in Lithuania, aside from providing only hard news, produces press reviews of the Lithuanian and foreign press and also makes entertaining news. 'Without depth, it would be only a mechanic news production process', said the editor-in-chief (Balčytienė and Vinciūnienė, 2006: 105). Through the diversity of news and information, the company seeks to become a strong player in the media market.

'News is business' seems to be a commonly agreed description among Baltic media journalists, particularly at news agencies. This understanding also shapes their views on the media's role in constructing a European public sphere (EPS). Most interviewees believed the emergence of a common European public sphere was unlikely. Some of them have observed that such a sphere probably only exists in Brussels, where correspondents from different countries and EU officials actively communicate, but not at the level of ordinary citizens in national countries. Political decisions are made at the national level, one Lithuanian journalist noted, so these issues will dominate even if EU reporting is getting stronger (ibid.: 115).

The situation, however, is not a dead-end. In the course of globalisation, things change and such change is already affecting the Baltic countries: people are not interested in abstract matters, but in new opportunities, e.g. working and studying abroad. On the other hand, people are first of all interested in their own environment, and only later in things that are happening in neighbouring countries and in the world, whether or not they have the same currency or constitution, the news editor of one commercial TV channels in Lithuania felt (Balčytienė and Vinciūnienė, 2006: 115). Political decisions are

made at the national level, he noted, so these issues will dominate even if EU reporting is getting stronger.

Summing up, in a situation where audience demand is strongly emphasised by media professionals, the question arises whether the public should be treated differently. Today, the media decide what is relevant for people. But if people do not hear about a particular issue in the mass media, it is virtually impossible for them to decide whether the news is interesting or not. Even though the media claim that their main concern is to generate profit and that they do not have a role in creating an EPS, there will always remain a possibility for the media to become a much more active player in EU agenda-setting by bringing more issues to public attention. As the media are struggling to meet so-called audience demand by producing limited, mainly economic EU topics, it becomes more difficult to understand what is really happening at the EU level.

Discussion: Baltic media cultures and European reporting

Indeed, there are more channels, chances and incentives to tailor political communication to particular identities, conditions and tastes than ever before; the mass audience declines and this facilitates the diversification of political communication forms. In spite of this, the mainstream media still play a very important role in communicating Europe. Two aspects are of particular importance here – the national audience relies on information provided by the media; and the mass media transmit attitudes and convey major values, national societies have agreed on. From here it follows that media should play a (direct or indirect) role in the emergence of a European public sphere.

There are some certain drawbacks which have direct impact on the professionalisation of European reporting in the Baltic States. The Baltic journalists talk about a number of challenges in EU news reporting: the European political discourse is quite complex because of both – the issues debated as well as the language used; moreover, journalists, very often, lack specific understanding of issues involved; in addition, they face many pressures such as information overflow as well as time constraints. The Baltic media, having only very few foreign correspondents, also face a challenge of covering a wide range of issues by same few persons located in Brussels.

Another characteristic of the Baltic media that emerged during the interviews with journalists is that media professionals talk about their audience as if about consumers rather than European citizens: audiences in Lithuania and Estonia are mostly interested in news that is relevant to their lives. This finding is strongly affected by the national context. The Baltic States – former planned economies – have indeed introduced a very liberal approach to media regulation (Lauk, 2008; Balčytienė, 2009). This approach, however, was implemented in a unique political and cultural context where political and legal culture as well as civil society structures are weaker compared to the 'older members' of the EU. Indeed, the journalistic culture in the Baltic States is affected by the Liberal model, however, weaker historical journalistic traditions and weaker self-regulation has caused significant drawbacks from normative requirements of media democratic performance (Balčytienė, 2008a; 2008b).

The Baltic media declares itself as being free and independent, but it is carefully monitoring the national political scene while adjusting its agenda accordingly. At the same time, media discourse lacks significant elements of analysis (facts and data, opinions and views, and background information) essential for informed opinion-forming. Briefly, the Baltic media is characterised by a number of features, such as very liberal economies, little regulated media, masculine competition and a consumerist approach. Indeed, media commercialisation and marketisation of journalism are phenomena reported in many countries around the world. But media commercialisation produces different results in different contexts: in the Baltic States, where news markets are very small (both in population and economic terms) and traditions of professional journalism

are weak, independent professional journalism is gradually disappearing from the public sphere.

Such media culture (its characterising features also emerging in the explanations provided by the respondents of the AIM study) is a comfortable context for the emergence of a so called 'secular media discourse'. Secularisation, as such, is defined as a decline of political order based on collective political actors and identities, and their replacement by a more fragmented and individualised society (Hallin and Mancini, 2004). In the media field, with increasing secularisation the locus of news is clearly seeking a more immediate connection to the everyday life of individual – news reported by journalists must be relevant and have tangible consequences for ordinary citizens. As appeared in the interviews, in European communication, Lithuanian and Estonian journalists also tend to think of their audiences in terms of lifestyles and consumption habits. Such a commercialised approach is based on openly market-driven media which is flexible to pressures of public opinions and audience demand.

Thus in (European) political communication one of the major problems to be solved by Baltic journalists is certainly not one of availability of EU information but rather that of finding, selecting and interpreting relevant information. Therefore, one of the policy proposals that the AIM project brings to political communication studies is that the contribution of journalism in enhancing transparency and openness of political reporting could be remarkably built up if journalists would gain access to better insight into the very mechanisms and procedures of political decision-making at the institutional level. For journalists, especially for those coming from the new EU member states, another type of background material is needed which could provide alternatives to the overload of so-called pre-cooked stories that are being distributed via all kinds of well-developed and official channels (web pages, e-mail, press releases, midday briefings at the European Commission, etc.). By offering access to the decision-making process, journalists could easily be motivated to invest more in investigative stories and analytical approaches – something still an exception in the daily affairs of the reporting of European news (AIM Research Consortium, 2007).

To conclude, the critical element within the on-going changes in the political communication process is that, on the one hand, the national market – with increasing commercialisation – affects media's performance: by translating social and political issues into personal experience and organising them around the individuals' emotional state, by trivialising political matters, etc.; it stratifies information provision and does not provide all citizens with the same quality of political information and opinion. In this respect, media looses one of its fundamental democratic functions – to create a space for informed public debate on political and social (also EU) matters. In this way, media can be seen not only as a cornerstone of democracy, but also as an important argument against it – media can easily manipulate individual needs, desires, and choices. On the other hand, media themselves are forced to change and adapt to new working conditions, such as establishing new kinds of relationships with political news sources. Thus there are old (media as provider of broadest possible range of views, also a critical watchdog) and new (media as dealing with structural and organisation changes in political communication process) functions that professional political journalism in the Baltic States needs to address.

References

AIM Research Consortium (ed.) (2007) *Reporting and Managing European News: Final Report of the Project 'Adequate Information Management in Europe', 2004-2007*, Bochum and Freiburg: Projekt Verlag.

Adam, S. (2007) 'Domestic Adaptations of Europe: A Comparative Study of the Debates on EU Enlargement and a Common Constitution in the German and French Quality Press', *International Journal of Public Opinion Research*, 19(4): 409-33.

Baisnée, O. (2002) 'Can Political Journalism Exist on EU Level?', in R. Kuhn and E. Neveu (eds) *Political Journalism: New Challenges, New Practices,* London and New York: Routledge.

Balčytienė, A. (2008a) 'Changing Journalistic Discourses in the Baltic States: How to Deal with Cheap Journalism?', in K. Jakubowicz and M. Sükösd (eds) *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective*, Bristol and Chicago: Intellect.

— (2008b) 'Challenges for Professional Journalism: On Tripartite Identity of the Baltic Media and Its Impact on Media Performance', *Informacijos mokslai*, 47: 44-58.

— (2009) 'Market-Led Reforms as Incentives for Media Change, Development and Diversification in the Baltic States', *International Communication Gazette*, 71(1-2): 39-49.

Balčytienė, A. and Vinciūnienė, A. (2006) 'The Case of Lithuania', in AIM Research Consortium (ed.) *Understanding the Logic of EU Reporting in Mass Media: Analysis of EU Media Coverage and Interviews in Editorial Offices in Europe.* Adequate Information Management in Europe (AIM) – Working Papers, 2006/1, Bochum and Freiburg: Projekt Verlag.

— (2008) 'Political Communication Culture with a European Touch: A View from Brussels', *Sociologija: Mintis ir veiksmas,* 3: 71-85.

Balčytienė, A., Vinciūnienė, A. and Janušaitė, K. (2007) 'The Case of Lithuania', in AIM Research Consortium (ed.) *Understanding the Logic of EU Reporting from Brussels: Analysis of Interviews with EU Correspondents and Spokespersons,* Adequate Information Management in Europe (AIM) – Working Papers, 2007/3. Bochum and Freiburg: Projekt Verlag: 103-10.

Calhoun, C. (2004) 'The Democratic Integration of Europe', in *Eurozine,* 24 April. Available at: <http://eurozine.com/pdf/2004-06-21-calhoun-en.pdf.> (last accessed November 2008).

Eriksen, E. O. (2005) 'An Emerging European Public Sphere', *European Journal of Social Theory*, 8(3): 341-63.

Gavin, N. T. (2001) 'British Journalists in the Spotlight: Europe and Media Research', *Journalism*, 2(3): 299-314.

Hallin, D. and Mancini, P. (2004) *Comparing Media Systems: Three Models of Media and Politics*, New York: Cambridge University Press.

Heikkilä, H. and Kunelius, R. (2007) 'Journalists Imagining the European Public Sphere', *Javnost: The Public*, 14(4): 63-80.

Koopmans, R. (2007) 'Who Inhabits the European Public Sphere? Winners and Losers, Supporters and Opponents in Europeanised Public Debates', *European Journal of Political Research*, 46(2): 183-210.

Lauk, E. (2008) 'How It Will All Unfold? Media Systems and Journalism Cultures in Post-Communist Countries', in K. Jakubowicz and M. Sükösd (eds) *Finding the Right Place on the Map: Central and Eastern European Media Change in a Global Perspective,* Bristol and Chicago: Intellect.

Lecheler, S. (2008) 'EU Membership and the Press: An Analysis of the Brussels Correspondents from the New Member States', *Journalism*, 9(4): 443-64.

Machill, M., Beiler, M. and Fischer, C. (2006) 'Europe-topics in Europe's Media: The Debate about the European Public Sphere: A Meta-Analysis of Media Content Analyses', *European Journal of Communication*, 21(1): 57-88.

Meyer, C. O. (2005) 'The Europeanization of Media Discourse: A Study of Quality Press Coverage of Economic Policy Co–ordination since Amsterdam', *Journal of Common Market Studies*, 43(1): 121-48.

Morgan, D. (1995) 'British Media and European Union News: The Brussels News Beat and its Problems', *European Journal of Communication*, 10(3): 321-43.

Negrine, R. (2007) 'The Professionalisation of Political Communication in Europe', in R. Negrine, P. Mancini, C. Holtz–Bacha and S. Papathanassopoulos (eds), *The Professionalisation of Political Communication*, Changing Media, Changing Europe, Vol. 3, Bristol: Cromwell Press.

Negrine, R., Kejanlioglu, B., Aissaoui, R. and Papathanassopoulos, S. (2008) 'Turkey and the European Union: An Analysis of How the Press in Four Countries Covered Turkey's Bid for Accession in 2004', *European Journal of Communication*, 23(1): 47-68.

Peter, J. and de Vreese, C. H. (2004) 'In search of Europe: A Cross-National Comparative Study of the European Union in National Television News', *The Harvard International Journal of Press and Politics*, 9(4): 3-24.

Pfetsch, B., Adam, S. and Eschner, B. (2008) 'The Contribution of the Press to Europeanization of Public Debates: A Comparative Study of Issue Salience and Conflict Lines of European Integration', *Journalism*, 9(4): 465-92.

Ruusunoksa, L. (2006) 'Public Journalism and Professional Culture: Local, Regional and National Public Spheres as Contexts of Professionalism', *Javnost: The Public*, 13(4): 81–98.

Semetko, H. A., de Vreese, C. H. and Peter, J. (2000) 'Europeanised Politics – Europeanised Media? European Integration and Political Communication', *West European* Politics, 23(4): 121-41.

Schlesinger, P. (1999) 'Changing Spaces of Political Communication: The Case of European Union', *Political Communication*, 16: 263-79.

Statham, P. (2008) 'Making Europe News: How Journalists View Their Role and Media Performance', *Journalism*, 9(4): 399-421.

Tjernström, V. (2008) 'Nordic Newspapers on the EU: European Political Journalism after "Non" and "Nee"', *Journalism*, 9(4): 516-36.

Tammpuu, P. and Pullerits, E. (2006) 'The Case of Estonia', in AIM Research Consortium (ed.) *Understanding the Logic of EU Reporting in Mass Media: Analysis of EU Media Coverage and Interviews in Editorial Offices in Europe,* Adequate Information Management in Europe (AIM) – Working Papers, 2006/1, Bochum and Freiburg: Projekt Verlag: 21–32.

— (2007) 'The Case of Estonia', in AIM Research Consortium (ed.) *Understanding the Logic of EU Reporting from Brussels: Analysis of Interviews with EU Correspondents and Spokespersons,* Adequate Information Management in Europe (AIM) – Working Papers, 2007/3, Bochum and Freiburg: Projekt Verlag: 15-22.

Part II

Neighbourhood policy, Eastern enlargement and relationships with Eastern neighbours

Chapter 8

The Eastern Partnership initiative and interests of EU member states

Toms Rostoks
University of Latvia

Introduction

There has been a proliferation of various regional approaches on the part of the European Union (EU) in the past 15 years or so. First, there was the Barcelona process that was started in 1995. Then there was the Northern Dimension (ND) initiative in 1999. The European Neighbourhood Policy (ENP) was launched in 2004, and it was aimed at facilitating democracy, rule of law and human rights in the EU's vicinity. More recently, there has been preparatory work aiming at establishing two other regional initiatives – the Mediterranean Union (MU) and the Baltic Sea Strategy (BSS). Last, but not least, the joint Polish-Swedish proposal on Eastern Partnership (EP) was put forward in order to increase interaction between the EU and six of its eastern neighbours: Belarus, Moldova, Ukraine, Georgia, Armenia and Azerbaijan. The latter three initiatives are still in the process of being developed, and it is too early to discuss their impact and effectiveness; therefore this chapter aims to analyse the reasons that led to the Eastern Partnership and the states' interests that are behind this initiative.

The chapter is divided in three parts. The first part takes the ENP as the starting point and then discusses reasons behind the Eastern Partnership proposal. The second part discusses the ideas that constitute the core of the Eastern Partnership, and in the third part the possible interests of Latvia, other EU member states and Eastern neighbours with regard to this initiative are discussed. It is argued that, in general, the Eastern Partnership initiative is not divisive, but some of its core components, such as more liberal migration and visa regime and the possibility of redistribution of financial resources between the eastern and southern components of the ENP, may turn out to be contentious.

Why is the ENP not enough?

The idea behind the ENP in 2003-2004 was to avoid creating new dividing lines in Europe after the 2004 enlargement. The EU's actions and policies periodically evoke fears in its neighbouring countries that the EU is turning into a 'fortress Europe'. It was feared in 2004 that after intake of 10 countries – and expecting to grant the EU membership to two more countries – the EU would become too preoccupied with its own internal problems. After all, the enlargement was not the only issue to be dealt with at the time, as the institutional reform was also on the agenda. There was a risk that with such an enormous internal agenda the EU would pay less attention to its neighbours: old and new.

In this context the ENP was aimed at reassuring the EU's neighbours that they will not be forgotten and that the EU was still ready to promote democratic reform in its neighbouring countries and provide assistance where needed and permitted. But overall, as Ulrich Sedelmeier argued, enlargement was not at the centre of the newly developed

[*] This article is based on the paper presented at the RECON workshop at the Riga Graduate School of Law in fall 2008. The paper was finished during the summer of 2009 and does not reflect the subsequent progress of the Eastern Partnership policy, as well as the important changes that have taken place in the EU itself and countries included in the Eastern Partnership policy.

ENP.[1] Ian Barnes and Pamela Barnes have argued that Moldova, Ukraine and Georgia can be considered for EU membership at some point in the future because they have democratised and moved away from Russia's influence. However, these states are not among the immediate candidates for membership because of their 'impact on the EU's budget, the poor state of their economies and the need to consolidate the political reforms that have taken place'.[2] So, it was clear that none of the EU's neighbours could be considered a suitable candidate for immediate enlargement, but the enlargement perspective was not excluded altogether.

It has been frequently argued that ENP countries form a very diverse group of countries, and even with such countries as Russia (which turned down the EU's offer to be included in the ENP), Turkey (which has started accession negotiations with the EU) and the whole Balkan region (with few exceptions), the ENP still covers a group of countries that have tremendous differences among themselves. Some of the countries are European and, thus, they have a prospect of becoming EU member states, but most of the countries are not European and therefore do not have any prospects for membership. The failure to draw a clear distinction between European and 'other' ENP countries has frequently been stated as one of this policy's major flaws. Possibly, it could have been a good idea to foresee a membership perspective for the ENP countries that are European, thus dividing the whole group of ENP countries in those that can become EU members and those that cannot. However, as Desmond Dinan argues, 'Europeanness' of some countries and participation in the ENP does not qualify any of the European non-member states for eventual EU membership.[3]

In fact, most of the criticisms with regard to the exclusion of the membership possibility have been voiced in recent years, while at the point when the ENP was launched, there was little reason to include the possibility of membership in the ENP, as Georgia and Ukraine were making only the first steps towards the EU. But, on the other hand, Eberhard Rhein writes that 'it will be next to impossible for the EU to prevent a European country from applying for membership and – after successfully passing the Copenhagen criteria test – from ultimately joining the EU'.[4] Thus, the ENP qualifies as a compromise between the EU's short-term unwillingness to put enlargement on the table with regard to Belarus, Ukraine, Moldova and Georgia and the half-hearted commitment to integrating a number of Balkan countries and Turkey in the EU in the medium-term. It certainly makes sense. Why discuss further enlargement while there has been considerable enlargement fatigue and while the enlargement process has lost its steam?

It is not the aim of this chapter to immerse in a detailed discussion about practicalities of the ENP's implementation therefore only the main underlying principles on which this policy is based will be discussed, as this will provide sufficient ground for the argument that this policy was insufficient and that, as a consequence, it was necessary to develop a stronger policy aimed at the eastern neighbours.

The *first* principle on which the ENP is based is that neighbourhood countries need to be transformed and developed in order to make the EU more secure, although the EU already faces few substantial threats from its neighbours. Issues of development are of primary importance, while the prospects of enlargement are of secondary importance. The transformationist impulse constitutes the core of the ENP, and this policy aims at

[1] U. Sedelmeier, 'Eastern Enlargement', in H. Wallace, W. Wallace and M. A. Pollack (eds), *Policy-Making in the European Union*, 5th ed. (Oxford: Oxford University Press, 2005), at p. 425.

[2] I. Barnes and P. Barnes, 'Enlargement', in M. Cini (ed.), *European Union Politics*, 2nd ed. (Oxford : Oxford University Press, 2007), at p. 437.

[3] D. Dinan, *Ever Closer Union* (London: Palgrave Macmillan, 2005), at p. 534.

[4] E. Rhein, 'The European Neighbourhood Policy: A Critical Assessment', in J. Varwick and K. L. Lang (eds), *European Neighbourhood Policy: Challenges for the EU-Policy Towards the New Neighbours* (Opladen: Barbara Budrich Publishers, 2007), at p. 43.

facilitating respect for human rights, democracy, economic liberalism, rule of law and good governance. The EU has already been successful in transforming the central and eastern European countries, and now the transformationist impulse has been applied to countries in the wider neighbourhood. Basically, the approach that the EU has adopted in relations with its neighbours is one of developmentalism. ENP countries are somewhat undeveloped, and the EU has capacity and knowledge to help its neighbours. Although some of the countries, such as Israel, do not need (and do not qualify for) external assistance, most of the countries, in fact, are developing countries. Their GDP per capita indicators are different, but the overall idea behind the ENP is that these countries have to transform in order to become developed; therefore it is quite natural that financial and technical assistance and good practices are offered. No wonder that most of the financial assistance provided for the ENP countries counts as development aid.

The *second* principle refers to the mutual interest in cooperation among the EU and its neighbours. It was stressed that the EU's relationship with the ENP countries should be based on common values, but it was also acknowledged that not all neighbours would be willing to commit to implementing good governance and democratic practices. In the latter case, the partnership would be based on common interests rather than common values. The EU would be interested in promoting stability and prosperity in its neighbourhood. Also, the ENP would be used as an instrument to fight terrorism, prevent nuclear proliferation and deal with regional conflicts in the EU's vicinity.[5] The ENP countries, in turn, would be interested in enhanced trade relations and EU's financial assistance, but it was assumed that in the long run the EU's positive influence would lead to cooperation based on common values. This element of pragmatism can be easily overlooked, but nevertheless it has been there from the very beginning.

The *third* principle reflects the promise that the ENP countries would have a privileged partnership with the EU. It is assumed that countries in the vicinity would benefit from the fact that they are EU's neighbours. Such advantages as being close to prosperous and democratic countries would have an impact on ENP countries. However, the ENP also aimed at compensating the new neighbours for the possibility of weakening trade relations with those countries that became EU member states in 2004 and 2007. It was assumed that the new member states would re-orient their trade relations and that the new neighbours would suffer the consequences. Cooperation in the fields of security, economic, culture, education, etc. would ensure that there is more interaction between the EU and its neighbours. Interaction with the EU was seen as an important transformative force that would benefit the neighbouring countries.

The *fourth* principle is the promise that EU member states have made that the neighbouring countries' efforts will be matched by an equal increase in commitment by the EU. The promise of 'more for more' is crucial for those neighbouring countries that have embarked on the difficult path to democracy, good governance and market economy. This also means that, although all EU neighbours were put in the same basket, each of the neighbouring countries had a slightly different relationship with the EU.[6] This principle was most eloquently formulated by the EU Commissioner for External Relations and European Neighbourhood Policy, Benita Ferrero-Waldner:

> The ENP offers every neighbour country the chance to choose its own path. Those who want to advance relations through the ENP are already seeing their commitment matched with new opportunities.[7]

---

[5] 'European Neighbourhood Policy: Strategy Paper', communication from the Commission, COM(2004) 373 final, Brussels, 12 May 2004, at p. 3.

[6] 'A Strong European Neighbourhood Policy', communication from the Commission, COM(2007) 774 final, Brussels, 5 December 2007, at p. 3.

[7] B. Ferrero-Waldner, 'European Neighbourhood Policy', European Commission website. Available at:

The EU's promise to match neighbouring countries' efforts with an equal commitment is an important one. It contains an explicit promise to remunerate the 'good' neighbours for embarking on a value-based partnership, which means that ENP countries are differentiated despite the fact that they are all part of the same policy framework. It was suggested by Heather Grabbe and Henning Tewes that the EU's strategy towards its neighbours should be the one of 'tough love' – meaning that the EU should offer 'greater inclusion for neighbouring countries but also tougher conditionality, in requiring countries to uphold democratic standards before the EU grants benefits to them'.[8] Such a strategy would ask more from the neighbouring countries and would not give a membership perspective, but it could work if the EU would manage to respond in an adequate manner to the needs of those neighbours who would be most successful in implementing democratic reforms. However, this is also the trickiest part of the EU's commitment because it was one of the few promises the EU made in the context of this policy. If it turned out that the EU fails to match efforts of its neighbouring states, then EU's credibility and goodwill would be questioned. In fact, this is something that has happened with an increasing frequency over the past years.

The EU's approach in eastern ENP countries has been one of limited, but increasing, involvement. It means that EU's involvement has become greater, but for several reasons it has not been paired with a membership commitment. First, eastern ENP countries had to demonstrate practical commitment in carrying out crucial reforms that would make them fit to submit a membership application. It is apparent that from time to time ENP countries have failed to deliver reforms that would make them eligible candidates for membership. Second, the EU public was wary after the intake of 10 new member states in 2004. This was reflected in the failed French and Dutch referenda on the Constitutional Treaty in spring 2005. Some member states (France and Austria) made moves that would require holding referendums on each consecutive enlargement. Third, it would be especially difficult to accept Ukraine as a candidate country because in the case of Ukraine's membership the EU's internal 'balance of power' would have to be re-shuffled, and the current large EU member states would not be happy about it. So, there are both external and internal factors at work that have prevented, on the one hand, the eastern ENP countries' ability to move closer to the EU and, on the other hand, the EU's ability to respond adequately on those occasions when countries such as Moldova, Ukraine and Georgia have showed genuine willingness to become candidate countries. It is hardly a surprise that criticisms have been aimed at the EU's seeming unwillingness to follow up with adequate 'carrots' as rewards for successful implementation of democratic and market-oriented reforms.

Numerous studies have indicated that the EU has failed to follow its own principle of 'more for more'. Antonio Missiroli and Rosa Balfour have argued that 'the ENP is still affected by a quintessential gap between the goals it sets and the expectations it raises, on the one hand, and the results and outcomes it can deliver, on the other'.[9] Both authors argue that the ENP's impact with regard to human rights and democracy promotion has been very modest and that ENP's instruments have proved to be inadequate. Sergiu Buscaneanu writes that in the case of Moldova the EU has failed to adhere to the principle of differentiation, as Moldova had to wait for the approval of the EU-Moldova Action plan in 2004 because the EU was in favour of approving similar documents with a group of neighbouring states rather than with each individual

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1263&format=HTML&aged=1&language=EN&guiLanguage=en> (accessed 12 November 2011).

[8] H. Grabbe and H. Tewes, 'Tough love for the Eastern neighbours', *CER bulletin*, No. 31, August/September 2003, London: Centre for European Reform.

[9] A. Missiroli and R. Balfour, 'Reassessing the European Neighbourhood Policy', *EPC Issue Paper,* No. 54., 2007, Brussels: European Policy Centre, at p. 35.

country.[10] Also, the EU has proved unable to settle the frozen conflicts in its neighbourhood. Nicu Popescu writes that the EU cannot achieve ENP objectives without dealing with the secessionist conflicts in its eastern neighbourhood.[11] The EU has done little to resist Russia's attempts to re-establish a sphere of privileged interests in its neighbourhood. The fact that a membership perspective is not in the cards may encourage Russian hardliners. Seen in this light, the Eastern Partnership initiative, according to Michael Emerson, is to be interpreted as an act of solidarity with eastern ENP countries.[12]

It has also been pointed out that strategic and security needs of the EU and its neighbours can be served by a cooperative partnership approach, while normative objectives can only be reached by conditionality mechanisms (membership perspective).[13] It means that normative and value-oriented objectives are unlikely to be reached unless eastern ENP countries are offered a clear (although distant) membership perspective. Katarzyna Pelczynska-Nalecz argues that the main shortcoming of the ENP is the discrepancy between commitments and tasks on the part of the ENP countries that they have to carry out and the benefits that the EU has promised to provide.[14] The EU has set grand goals with its neighbourhood policy, but the instruments for the attainment of those goals are rather limited. Besides, there has been a growing awareness within the EU that its member states are not ready to subordinate particular national interests to the common goals, and the ENP has not been an exception in this respect. All these arguments have led to an increasing awareness that the EU's policy towards its eastern neighbours had to be revised. Twofold changes were anticipated. First, it was expected that eastern neighbours would increasingly be recognised as different from the southern neighbours, facing distinctive set of problems and having a membership perspective. Second, it was recognised that the ENP's instruments did not match its grand objectives therefore the EU should increase its commitment towards eastern neighbours. As Kai-Olaf Lang has argued, the ENP has become increasingly politicised.[15] The low level technocratic approach that was probably well-suited for dealing with Southern neighbours, became politicised both by eastern neighbours, by the group of new member states and Russia.

Towards the Eastern Partnership

European countries have become increasingly aware that there is a need to work more closely with the eastern neighbours of the EU. This was first recognised in the run-up to the 2004 EU enlargement, and importance of Eastern neighbours has not diminished since then. The joint Polish-Swedish initiative to establish the Eastern partnership is another step towards having a more coherent approach towards the EU's Eastern

[10] S. Buscaneanu, *How Far is the European Neighbourhood Policy a Substantial Offer for Moldova?*, Leeds, 2006. Available at: <http://www.e-democracy.md/files/enp-moldova.pdf> (last accessed 12 November 2011), at p. 45.

[11] N. Popescu, 'Europe's Unrecognised Neighbours: The EU in Abkhazia and South Ossetia', *CEPS Working Document,* No. 260, Brussels: Centre for European Policy Studies, 2007.

[12] M. Emerson, 'Probing the Wider European Order', *CEPS Neighbourhood Watch*, No. 39, 2008, at p. 1.

[13] M. Cremona and G. Meloni (eds), 'The European Neighbourhood Policy: A Framework for Modernization?', *EUI Working Paper* LAW No. 2007/21, Florence: European University Institute, 2007.

[14] K. Pelczynska-Nalecz, 'The ENP in Practice: The European Union's Policy towards Russia, Ukraine, Belarus and Moldova One Year after the Publication of the Strategy Paper', *Centre for Eastern Studies Policy Briefs*, Warsaw: Centre for Eastern Studies, June 2005, at p. 27.

[15] K. O. Lang, 'European Neighbourhood Policy: Where Do We Stand – Where Are We Heading?', in J. Varwick and K. L. Lang (eds), *European Neighbourhood Policy: Challenges for the EU-Policy Towards the New Neighbours* (Opladen: Barbara Budrich Publishers, 2007), at p. 43.

neighbours. This initiative aims at enhancing the ENP and reflects the necessity to develop a closer partnership with Eastern neighbours.

The Eastern Partnership initiative was first presented by Poland and Sweden at the General Affairs and External Relations Council meeting that took place at the end of May 2008. The initiative received support, and it was decided to discuss this issue further during the European Council meeting in June 2008.[16] The European Council endorsed the proposal to develop further the eastern dimension of the ENP and invited the Commission to take on this initiative and present a proposal to the European Council in June 2009. It should be noted though that the Eastern Partnership initiative is very likely to enhance not only the EU's bilateral relations with Eastern ENP countries, but also function as a platform for multilateral regional cooperation in the EU's vicinity and between the EU and the region.[17] This approach draws from the lessons and experience of the Visegrad and the Baltic states who were encouraged by the EU to look at regional cooperation as a stepping stone on their way to EU membership. A somewhat similar approach is adopted in the Eastern Partnership initiative. There are indications that both – bilateral and multilateral – perspectives are likely to be strengthened with the help of Eastern Partnership.[18] However, it remains to be seen how the regional approach endorsed by the EU is taken by the target countries.

The Eastern Partnership initiative adds a new dimension to the EU's external relations, and it is supported by the 'right' EU member states. Angela Stent writes that Poland and Germany are the two countries that for various reasons have a particular interest in the Eastern neighbours.[19] If Germany's support for the Eastern Partnership initiative is genuine, then there are good reasons to believe that this initiative would be a success. In addition to the Northern Dimension, which partly covers the EU's relations with Russia, Norway and Iceland, and the Mediterranean Union, which covers the Union's relations with the countries of the Mediterranean region, the new EP initiative would cover six eastern neighbours: Armenia, Azerbaijan, Belarus, Ukraine, Georgia and Moldova. On the surface the EP can be viewed as an initiative aimed at counterbalancing the Mediterranean Union, but its scope, in fact, is much broader.

First, this initiative is a joint proposal by an old and a new EU member state.[20] This is the first such an initiative in an enlarged EU, and there is an intention to complement the current bilateral focus with a more multilateral approach that has already been used in Balkans. The new policy would retain the bilateral approach that was established within the ENP, but it would be supplemented by a regular political dialogue between the 27 member states and five (or six) Eastern neighbours.[21]

Second, it is the first Polish initiative that has a chance to succeed. Poland has a reputation of an awkward partner in the EU, therefore the EP can be seen as an attempt to couple Poland's national interest with the collective interest of all EU member states.

---

[16] 'Press Release', General Affairs and External Relations Council, 2870th Council meeting, Brussels, 26-27 May 2008, 9868/08 (Presse 141), at p. 24.

[17] 'Presidency Conclusions', Brussels European Council, 19-20 June 2008, 11018/1/08 REV 1, at p. 19.

[18] 'Eastern Partnership', Communication from the Commission to the European Parliament and the Council, Brussels, 03 December 2008, COM(2008) 823/4.

[19] A. Stent,'The Lands In Between: The New Eastern Europe in the Twenty-First Century', in D. Hamilton and G. Mangott (eds), *The New Eastern Europe: Ukraine, Belarus & Moldova* (Washington and Vienna: Center for Transatlantic Relations and Austrian Institute for International Affairs, 2007), at p. 16.

[20] Although Sweden joined the EU only in 1995 and thus can hardly be described as an old EU member state, the author here refers to Sweden as an old member state.

[21] V. Pop, 'Balkans Model to Underpin EU's "Eastern Partnership"', *EU Observer*, 18 September 2008. Available at: <http://euobserver.com/9/26766?print=1>.

The Eastern Partnership initiative was seen in Poland as a possibility to take on a leading role in EU external relations after having been politically isolated as a result of the rule by the Kaczyński twins.[22]

Third, the EP initiative aims at switching the EU's attention from the southern to the eastern neighbours. In fact, Poland and Sweden chose the right timing for tabling the initiative because France was eager to secure other member states' support for its own Mediterranean Union and therefore it was easier for Poland to convince France to view the Eastern Partnership favourably.[23] It should be noted that Poland has gone to great lengths to convince France and other southern member states that the Eastern Partnership would complement the Mediterranean Union rather than compete with it.[24] Poland and Sweden have also managed to receive Germany's approval of the Eastern Partnership.[25]

One could expect that the strengthening of ENP's eastern dimension would receive cheerful reception in Ukraine and other eastern neighbouring countries. However, this is true only to a certain extent. Although the Eastern Partnership initiative has been given a warm welcome in other EU capitals, Poland and Sweden would have to convince Ukraine that becoming a part of a larger and internally diverse group of countries (including such countries as Armenia, Azerbaijan and, potentially, Belarus) would not harm its membership aspirations. Ukraine has acknowledged that the EU needs to develop a more effective eastern dimension of its neighbourhood policy, but Ukraine has also voiced its opinion that this initiative should envisage a clear membership perspective for those countries who have demonstrated that their European ambitions are serious enough.[26] In fact, Ukrainian officials have argued that neighbourhood policy without membership perspective cannot be of any interest to Ukraine. Moreover, Ukraine can become slightly confused if the EU keeps on offering new initiatives without membership perspective.[27] Being put in the same basket with Belarus, which has been coined as the last dictatorship of Europe, does not particularly impress the Ukrainian leadership. Georgian participation may also be problematic because if Belarus decides to recognise South Ossetia and Abkhazia as sovereign states then relations between Georgia and Belarus are very likely to sour. However, this may also lead to the expulsion of Belarus from the Eastern Partnership. In any case, the effect of the relations between the EU's eastern neighbours may have an impact on the EP beyond mere collective welcome to this initiative.

Fourth, the future of the EP initiative depends to a large extent on Poland's and Sweden's ability to secure support from several EU member states, most notably, Bulgaria and Romania who have been fervent supporters of the Black Sea Synergy, and such eastern ENP countries as Ukraine who have voiced their concern over the initiative as a potential substitute for a full-fledged EU membership. Ukraine would also have to be convinced that there is more for it in the Eastern Partnership package than Ukraine would receive

---

[22] H. de Quetteville, 'Poland Takes on Russia with "Eastern Partnership Proposal"', *Daily Telegraph*, 25 May 2008.

[23] P. Runner, 'Poland and Sweden to Pitch "Eastern Partnership" Idea', *EU Observer*, 22 May 2008. Available at: <http://euobserver.com/9/26194?print=1> (accessed 18 November 2008).

[24] 'Poland, Sweden defend "Eastern initiative"', *EurActiv*, 26 May 2008. Available at: <http://www.euractiv.com/en/central-europe/poland-sweden-defend-eastern-initiative/article-172660>.

[25] P. Runner, 'Poland's "Eastern Partnership" Set for Summit Approval', *EU Observer*, 17 June 2008. Available at: <http://euobserver.com/9/26339?print=1>.

[26] R. Goldirova R., '"Eastern Partnership" Could Lead to Enlargement, Poland Says', *EU Observer*, 27 May 2008. Available at: <http://euobserver.com/9/26211?print=1>.

[27] A. K. Cianciara, '"Eastern Partnership": Opening a New Chapter of Polish Eastern Policy and the European Neighbourhood Policy?', *Analyses and Opinions,* No. 4, Warsaw: The Institute of Public Affairs, 2008, at p. 3.

from the ENP alone.[28] Russia can exert an indirect influence on the Polish-Swedish joint initiative. This far Russia does not seem to be impressed by the Eastern Partnership, and it has openly voiced scepticism over the necessity of having such a multilateral initiative.[29] Perhaps, Russia's position will change as the Eastern Partnership initiative becomes more detailed, but it is very unlikely that Russia would welcome initiatives that are aimed at countries that it considers part of its sphere of interest.[30] Pulling the eastern neighbours closer to the EU is likely to irritate Russia.

The EP proposal is still quite general, and there is little clarity as to its contents, but its approach is novel. This initiative is set to make a distinction between 'neighbours of Europe' and 'European neighbours' which did not exist within the initial ENP policy framework. The former refers to countries of the Mediterranean region that do not have a membership perspective, while the latter refers to European countries that are not EU member states, but possess a membership perspective. This distinction has been neatly formulated and, if consistently pursued, it can become sufficient basis for shifting the EU's attention eastwards. Although the Eastern Partnership initiative cannot be tied to the enlargement policy while the accession of the Balkan countries and Turkey is still uncertain, it may become a natural part of the enlargement process when the so-called 'enlargement fatigue' passes.[31] However, this is a long-term process, and no promises can be expected to be made in the short-term.

There are, however, certain caveats in the Eastern Partnership initiative. One of the most visible is that the Eastern Partnership is designed and proposed for five of six very different European neighbours. Leszek Jesień writes that 'the proposal is essentially a plan of cooperation between the EU and those eastern European countries most advanced in implementing the ENP'.[32] If this is the idea of the EP proposal, then it is a rather confusing one because this initiative covers six ENP countries, and only three of them can be regarded as being advanced in implementing the ENP, while Belarus, Armenia and Azerbaijan have been involved in the ENP to a lesser extent. For example, Belarus has released political prisoners and has thus improved its relations with the EU, but this alone would probably be insufficient for establishing a partnership based on values with Brussels. It may turn out that Belarus will only be able to cooperate with the EU on the technical level. If the EP proposal does not reflect the current state of relations between the EU and its eastern neighbours, then it is possible that Poland and Sweden are trying to inject some strategic thinking into EU's external relations.

The whole philosophy of the ENP was based on the willingness of the ENP countries to move closer to the EU. Once this has been done, then the EU would reward the 'good' countries. If the EP proposal suggests that the EU should make the first move, then it changes the whole philosophy of the ENP. In this case the balance between values (normative objectives) and interests (pragmatic objectives) would shift in favour of the latter. This would have enormous implications for EU's relations with its neighbours because countries would receive rewards for being responsive to the EU's interests rather than for implementing democratic reforms. Countries such as Georgia and Ukraine would find themselves put in the same group with countries who have done very little in terms of democracy, rule of law and good governance, while Azerbaijan and Belarus would receive the status and rewards that were previously inaccessible. In short, by inventing

[28] Runner, *supra* note 23.

[29] G. Baczynska and G. Jones, 'Russia Seen Cool on EU Eastern Partnership Plan', *Reuters*, 12 June 2008.

[30] Cianciara*, supra* note 27, at p. 3.

[31] Runner, *supra* note 25*.*

[32] L. Jesien, 'Eastern Partnership: Strengthened ENP Cooperation with Willing Neighbours', *PISM Strategic files*, No. 3, Warsaw: Polish Institute of International Affairs, 2008, at p. 1.

such a diverse group of eastern neighbours the EU risks being accused that it has apostatised from the principles that it claims to be defending.

Another caveat is related to the financial and institutional aspects of the Eastern Partnership. While the Mediterranean Union will have its own secretariat, the Eastern Partnership is not going to be institutionalised. Most likely, it will be placed under the supervision of the European Commission. Admittedly, the Mediterranean Union is a grander initiative, but the Eastern Partnership arguably has a greater potential because of the enlargement possibility. As for the nearest future, negotiations on visa-free travel, free trade agreements (including agricultural produce and services), student exchange and projects on environmental protection and energy supply are envisaged.[33] Financial aspects of the Eastern Partnership may turn out to be a problem, though. This initiative, if it receives the final go-ahead in 2009, is set out to function within the limits of the 2007-2013 budgetary perspective. This will be quite a challenge because EU member states, Poland and Sweden in particular, may have grand ideas about the contents of the Eastern Partnership, but it may be difficult to implement these ideas and to demonstrate tangible results with the current financial instruments. It has been argued that the current envelope of two billion euro per annum is largely insufficient because it is intended to cover the needs of a large number of EU's neighbours.[34] The distribution of financial resources is yet another problem because most of the money is being spent on the Mediterranean neighbours, and eastern countries receive substantially less financial resources through the ENPI. Inese Stepina has estimated that during 2007-2010 the eastern neighbours are set to receive through ENPI Country Programmes 1.154,5 million euros, while the Southern neighbours will receive substantially more – 2.962 million euro which means that Southern neighbours will receive 72 percent of the financing, while the eastern neighbours are likely to receive only 28 percent of the total financial resources.[35] Such a discrepancy places severe limitations on what can be achieved within the existing financial allocations through the ENP.

The goal of the Eastern Partnership, broadly defined, should be to strengthen the European identity in the EU's eastern neighbours, and the EU should try to stabilise the region. This objective has become more relevant in the aftermath of the Russia-Georgia conflict in August 2008. More specifically, according to Jacek Emil Saryusz-Wolski (Member of the European Parliament and Chairman of the Committee on Foreign Affairs), the EU should develop its approach to eastern neighbours on such principles as conditionality, gradualism, differentiation, support for regional cooperation, inclusion of both governmental and non-governmental actors, and adequate financial resources. The EU should enhance its diplomatic presence in the neighbouring countries, and free trade agreements should be one of the most important objectives within the Eastern Partnership. Cooperation on migration issues as well as strengthening security in the region should also be important objectives that the EU should pursue when building closer partnerships with its eastern neighbours.[36] It can be concluded that while the Eastern Partnership as such is hardly a contentious issue, it remains to be seen if the EU member states can pay more attention to the EU's eastern neighbours with the financial and institutional means available. Also, the ability of the EU member states to act in a coherent manner can be questioned, especially when it comes to countering Russia's interests in the European neighbourhood.

---

[33] Runner*, supra* note 23.

[34] Pop*, supra* note 21.

[35] I. Stepina, 'Pre-Conference Research: European Neighbourhood Policies and Finance', in T. Rostoks and M. Graudins (eds), *The Contribution of the European Neighbourhood Policy to the Development of Eastern Neighbours: Riga Conference Proceedings*, 25 April 2008, at p. 33.

[36] P. R. Weilemann, 'Workshop Summary: Eastern Partnership – Strengthening the Eastern Dimension of the European Neighbourhood Policy', Konrad Adenauer Foundation, 17 September 2008.

Interests of Latvia and other EU member states within the Eastern Partnership

This chapter aims at assessing the interests of Latvia and other EU member states with regard to the Eastern Partnership. Although the initiative has received backing from most EU member states, this chapter starts with two assumptions. First, Latvia has a natural interest in having the EU more involved with the eastern neighbours and, thus, in strengthening and implementing the Eastern Partnership. Second, EU's external relations are contested, and member states compete for influence on the EU's foreign policy, of which the ENP is a part; therefore it is likely that certain aspects of the initiative are likely to be contested. These two assumptions form the basis of the following analysis which is structured in three parts. The analysis starts by examining Latvian interests within the EP; it goes on to explore interests of other EU member states and, then, opinions of eastern neighbours are examined in the latter part of the chapter.

Latvia's interests

Latvia has been a fervent advocate of a more active EU policy towards its eastern neighbours, and that makes Latvia a natural supporter of the Eastern Partnership. Latvia has defined EU's eastern neighbours as one of its most important foreign policy priorities.[37] Conceptually, Latvia regards the Eastern Partnership as an instrument for advancement of the EU's interests in its neighbourhood. This initiative is not perceived as a means for rewarding 'good' eastern neighbours. If the EU wants to have a ring of friends, stability and security in its vicinity, then adoption of policies that aim at increasing stability, security and development is an obvious choice. Although the Eastern Partnership suits Latvia's interests, its support for this initiative is conditioned by the EU's interests.

Latvia has several important interests with regard to the EU's eastern neighbours. First, geographical closeness and historical ties provide a good basis for economic cooperation, therefore Latvia is in favour of fostering the already existing trade and investment relations with Ukraine, Belarus, Georgia and other EP countries. Latvia supports the idea of developing deep free trade area and signing free trade agreements with the eastern neighbours. Bringing these countries closer to the EU in economic terms would mean fostering economic reform, transparency and investment climate conducive to foreign investment that would open up possibilities for Latvian entrepreneurs. The deep free trade area should not be developed at once, as its creation would depend upon EU's conditionality and capacity of the EP countries to implement substantial reforms.

Energy is another priority of Latvia for the EP because Latvia is very sensitive towards EU's dependency on Russian gas and oil. Successful implementation of the EP would bring Eastern neighbours closer to the EU and would allow for the successful development of large scale energy projects with the help of the EP countries that would diminish EU's dependence on Russia as major energy supplier.

Latvia is very much in favour of facilitating mobility between the EU and its eastern neighbours. As a country that is not considered one of the most attractive destinations for immigrants and job-seekers from non-EU countries, Latvia is hardly worried about the influx of immigrants. Therefore it supports the creation of a facilitated visa regime. Increased mobility would mean better opportunities for citizens of the EP countries and would foster contacts between the EU and its neighbours. EU's readiness to open up to its neighbours would create new opportunities with respect to conditionality, as signing of facilitated visa regimes would depend upon enhanced cooperation in justice and home affairs where the EP countries would need to adjust to EU's demands in order to become eligible for the 'lighter' visa regime.

[37] 'Latvijas Ārpolitikas Pamatnostādnes 2006.-2010. gadam' [Latvian Foreign Policy Guidelines for 2006-2010]. Available (in Latvian) at: <http://www.mfa.gov.lv/lv/Arpolitika/pamatnostadnes/>.

Latvia is of an opinion that the EP does not impinge upon the Black Sea synergy initiative. When it comes to inviting third parties, such as Russia, Turkey and Central Asian countries, Latvia is cautious because, on the one hand, it favours limited, *ad hoc* involvement of third parties, but, on the other hand, it holds that these countries should not be granted the status of observer nor that their involvement should be institutionalised and made permanent. Financing the EP initiative may prove to be contentious. In general, Latvia supports changing the existing balance of financial allocations between eastern and southern neighbours. Nevertheless, it seems that countries that support the EP would be asked to do more and provide financial means on a bilateral basis and without reference to the EU budget, but it is very unlikely that Latvia would be able to provide any substantial support due to the domestic economic crisis.

Interests of other EU member states

There is little disagreement among the EU member states with regard to the EP initiative. Some genuinely support the EP while there are others that understand the necessity to be in favour of this initiative because otherwise there would be not enough support for the Mediterranean Union. In general, there is a consensus that the EU should do more with regard to its eastern neighbours. However, the devil is in the details, and there are several issues that may turn out to be quite problematic for the further development of the EP.

There is considerable disagreement among the member states on the issue of maintaining the overall framework of the ENP. Some states regard the EP as a necessary and timely initiative while others, such as Italy, Spain and Luxembourg, are concerned about its impact on the ENP. These countries would like to make sure that the ENP remains as the overarching policy framework for dealing with EU's neighbours. The EP is seen as an attempt to divide the ENP and a sign of increasing competition within the EU for financial allocations and attention towards particular neighbouring regions. Some other countries (Greece, Italy, Austria, and Portugal) emphasise that the EP should be decoupled from the possibility of EU membership for eastern neighbours. These countries are suspicious towards the EP because this initiative is seen as a covert attempt to provide an enlargement perspective for eastern neighbours, which is unacceptable to some countries because of the enlargement fatigue in the EU, and the enlargement process has not been finished in the Balkans.

Migration, mobility and mitigation of the existing visa regime between the EU and eastern neighbours is a major controversy, and some Member States (Germany, France, Netherlands, United Kingdom, Austria, Spain) have expressed concerns over the idea of abolishing the fee for EU visa application and have also warned that unconsidered changes in the existing mobility and visa arrangements may cause unwanted pressures on labour markets of the most economically advanced member states. All such moves should be carefully considered before implementation.

Greece, Bulgaria and Romania have expressed concerns over the possibility that the EP would duplicate the Black Sea synergy initiative, and these countries are in favour of clarifying relations between the two initiatives in order to avoid overlapping and inefficient use of financial means. Proliferation of multilateral platforms in the Black Sea region is approached with great caution and some degree of jealousy because member states are eager to defend their initiatives and are sceptical about others' initiatives.

Russia is another controversial issue because some member states are in favour of including Russia in the EP. Several countries (Germany, Belgium, Italy, Greece, France, Cyprus, Romania and Portugal) are of the opinion that stability and security in the EU neighbourhood can only be achieved by including Russia in regional initiatives. They perceive Russia as being able to act as a responsible stakeholder whose interests on many issues are in line with interests of the EU as a whole as well as its member states. Other states, however, do not share this vision, and opinions range from exclusion of

Russia from the EP to case-by-case involvement of Russia to permanent inclusion of Russia in the EP. It would be highly recommendable to consult eastern neighbours on this issue because some of them, seeing Russia being involved in the EP, may come to a conclusion that this may hamper their prospects of having independent foreign policies and getting closer to the EU.

Several member states are concerned about the impact of the EP on the EU's budget. The concerns are twofold. First, Bulgaria, Spain and the Netherlands are of the opinion that the EU would inevitably face financial constraints when attempting to embark upon ambitious new foreign policy initiatives and therefore financial aspects of the EP should be carefully reconsidered. Second, some member states (Denmark, Italy, and Cyprus) have warned that an enhanced policy towards EU's eastern neighbours should not be devised at the expense of the Southern neighbours. Thus, it should be noted that any attempts to re-allocate financial means within the EU's budget is likely to be met with fierce resistance.

If successful implementation of the Eastern Partnership would depend on commitment of all EU member states, then this initiative would run into difficulties. The EU has become more internally diverse than it has ever been, and its foreign policy is contested between eastern and southern member states. The Southern dimension, for various reasons, has been stronger and better equipped than the eastern dimension, therefore changing this imbalance would be a difficult task to achieve. The southern member states, such as France, Italy, Spain and Greece, are more influential within the EU, and the new member states would have difficulties in changing the current institutional and financial setup. Poland, the Baltic States, Sweden and some other supporters of the Eastern Partnership should take into account that tilting the EU's attention to its eastern neighbours may be difficult.

Even more importantly, this process will most likely be furthered by the eastern neighbours themselves rather than by its supporters within the EU. It means that advocates of the Eastern Partnership would not be able achieve their objectives unless EU's eastern neighbours would perform well in terms of progress towards democracy, human rights and rule of law. So, much depends on eastern neighbours themselves, and EU member states that are supportive to the Eastern Partnership would have to define their interests according to the performance of the countries at the centre of this policy. Thus, the success of the Eastern Partnership may to a large extent depend upon the outcome of internal political processes that are taking place in Ukraine. It can be summarised that, in general, EU member states are quite positive towards the EP, but there are several aspects that are related to this initiative that have the potential of hampering it, and much will depend on the reform process in the EP countries.

Interests of the Eastern neighbours

The degree of involvement of the six eastern neighbours in the ENP has been very different, and their expectations of the EP are dissimilar. Ukraine has positioned itself as the leading country of the EP initiative on the side of eastern neighbours. Ukraine was in favour of signing the free trade agreement during the Swedish presidency in the second half of 2009, but some of the economic gains for Ukraine are still to be specified. Certainly, there are possibilities for mutually beneficial relations between the EU and Ukraine that include trade, energy, political dialogue and increased mobility, but additional steps have to be taken in terms of coordinating the interests of Ukraine and EU member states with regard to the EP. In any case, Ukraine is unlikely to give up its aspirations of EU membership. Also, the degree to which Russia is going to be involved to a great extent would depend upon Ukraine's stance on this issue because it would be impossible to have a fully functioning EP without Ukraine.

There is little information on the preferences of Moldova, Georgia, Azerbaijan, Belarus and Armenia with regard to the EP. The inclusion of Belarus is very controversial because

some member states (for example, the Netherlands) consider it as a contentious political issue and are not prepared to include Belarus in the EP without any prior concession on the part of Belarus. In fact, there is little reason for a more intensive dialogue with Belarus because it can hardly be considered one of the most advanced ENP countries. If Belarus recognises South Ossetia and Abkhazia as sovereign states, then the participation of Belarus (or Georgia) in the EP would become impossible. Moldova would probably welcome the EP initiative because it would be seen as a step towards closer partnership with the EU. Although the EP is most likely to be divorced from membership perspectives, Moldova may consider the EP as a stepping-stone towards full-fledged membership.

The situation is different for the three Caucasian ENP countries. While Georgia may see the EP as means for fending off Russia's influence in the region (and, thus, more involvement as suiting Georgia's security interests), Azerbaijan and Armenia have a very difficult relationship therefore regional approach may not work. Both Azerbaijan and Armenia may see good reasons for participating in the EP; they may decide to do so bilaterally. Constructing a region in EU's vicinity may turn out to be more difficult than expected. Also, if Georgia and Moldova need the EU for that the EU needs these two countries. Dependency is different in the case of Azerbaijan which is a crucial player in terms of EU's energy security. It is highly unlikely that the EU would be able to apply conditionality in the case of Azerbaijan, but it may work with other eastern neighbours.

In sum, the choice of countries that are set to participate in the Eastern Partnership is problematic. The EP covers a very diverse group of countries. The EP adds an element of multilateral regional cooperation that was almost non-existent in the ENP. But how and on what terms would these five or six countries cooperate within the Eastern Partnership? These countries are very different in size, location and foreign policy aspirations. What would they be able to agree upon? Moreover, it may turn out that these countries are quite similar in terms of economic structure that would further reduce their commitment to regional cooperation. Besides, if conditionality is still present in the Eastern Partnership in the same way as it is present in the ENP, then some eastern neighbours, such as Ukraine, may feel downgraded by the new initiative.

The element of pragmatism in the ENP was evident already from the very moment when it was established. The EU attempted to create a ring of friends and contribute to stability in its vicinity, and, in return, it promised to facilitate development and democratic change in the neighbouring countries. Both eastern and southern neighbouring countries were put under the ENP umbrella thus practically excluding the possibility that this policy would eventually transform into a mechanism for enlargement. Although this was not evident at the beginning when the ENP was launched, eastern neighbours such as Ukraine, Moldova and Georgia started to display integrationist aspirations thus pressing the EU to reconsider its policy to the East. Also, EU member states such as the three Baltic states and Poland exhibited greater interest in eastern neighbours.

There are two factors that have stimulated greater EU interest in the eastern neighbours. First, the new member states brought their own foreign policy priorities to the EU with the latest enlargement round. Second, dramatic changes that have taken place in Georgia and Ukraine (and the subsequent Russian-Georgian conflict) have pressed the EU to devote more attention to the eastern neighbourhood. The real question, however, is about the ability of Poland, Sweden and the Baltic states to define the eastern neighbourhood as a common interest of all EU member states. Besides, goals that are set within this policy have to be attainable. Only then this policy has a chance of success. It has been argued in this chapter that policy goals are very likely to be greater than the means allocated for achieving these goals, therefore objectives would have to scale down.

Conclusions

The Eastern Partnership initiative is the result of growing discontent among several EU member states over the practical implementation of the ENP. This initiative was put forward by Poland and Sweden in May 2008, and the European Commission was invited by the European Council in June 2008 to work forward and present proposals at the European Council meeting in spring 2009. Although the EP would certainly attract more attention to the EU's eastern neighbours, this is a controversial initiative. There is a discrepancy between objectives and practical means for their implementation. It is uncertain whether a more multilateral approach to the region would generate regional cooperation and, eventually, facilitate positive change in EU's neighbourhood. Besides, there is a growing awareness that various regional initiatives that have been put forward in recent years may amount to increasing competition between the EU member states.

Latvia has been one of the countries that have tried to increase the EU's involvement in the eastern neighbourhood. EP is almost certainly going to be useful in this respect. Unfortunately, there has not even been an honest discussion in Latvia on the issue of whether deep free trade agreements should be put on the negotiation table between the EU and its eastern neighbours. The new member states have a tendency to think that the eastern neighbours are facing a historic choice between aligning either with Russia or with the EU. It is almost inconceivable to think that there is a third option even for a large country such as Ukraine. It is also thought that the benefits of getting Ukraine and other eastern neighbours on the 'right' side would by far exceed any costs that may arise during this process. These assumptions are questionable.

Agnieszka Cianciara writes that Poland after joining the EU has tended to underestimate some important factors (enlargement fatigue, doubt about Ukraine's pro-European path, controversial accession negotiations with Turkey) that have been behind EU's unwillingness to build closer partnerships with the eastern neighbours.[38] This way of thinking can be explained by the recent historic events that new member states have been going through. However, dilemmas and choices that this way of thinking produces may lead to false assumptions about interstate relations in Europe because there may be more options for eastern neighbours than either aligning with Russia or working towards full integration with the EU. Such options should be fully explored, and the main goal should be development of the countries situated in the EU's vicinity rather than some pre-planned objective.

To conclude, all EU member states would probably agree that they would like to have stable, prosperous and democratic countries on their borders, but the EU has grown so wide and so diverse that its member states are pulled apart when it comes to agreeing on a particular foreign policy. Southern member states would opt for prosperous, democratic and stable neighbours, but they are more concerned about the particular neighbours that they are dealing with on a daily basis. The Eastern member states, in turn, are more concerned about development of their neighbours. It is precisely the same objectives that pull EU member states apart when it comes to the ENP, and the EP initiative is less about genuine preoccupation about eastern neighbours than with the necessity to balance the Mediterranean Union initiative, promoting one's own standing within the EU and security interests of the EU.

[38] Cianciara, *supra* note 27, at p. 7.

Chapter 9

The European Neighbourhood Policy and the first generation of 'enhanced agreements' with the neighbouring countries

The cases of Ukraine and Russia

Roman Petrov
National University of Kyiv-Mohyla Academy

Introduction

Formal contractual relations between the European Union (EU) and its eastern neighbours are on the edge of global change. Ukraine and Russia are awaiting the new enhanced agreements (NEA) with the EU. Formal negotiations for the EU-Ukraine NEA started in 2007 and are expected to be completed in one or two years. Formal negotiations for the EU-Russia NEA will start by the end of 2008 and are likely to continue for at least couple of years too. The future NEAs are of significant importance for both parties. As a result, the scope and objectives of the future NEAs between the EU and Russia and Ukraine have become one of the most debated topics among academics and practitioners in the field of EU external relations law. This is because the EU-Ukraine and the EU-Russia NEAs will be the first among the new generation of the external agreements to be negotiated by the EU and these countries after the expiration of the outdated Partnership and Cooperation Agreements (PCA). Consequently, they will, to a certain extent, serve as a template and a point of reference for other future enhanced agreements to be concluded between the EU and other neighbouring countries, especially for those which participate in the European Neighbourhood Policy (ENP).[1]

To date, the future NEA occupies a top priority of the contemporary national political agenda in Ukraine. There is more or less complete harmony among the Ukrainian political elites that the NEA will be one of the major factors which influences and, consequently, determines the direction and pace of political reforms in Ukraine in the immediate future. In contrast to the issue of the Ukraine's membership in the North Atlantic Treaty Organization (NATO), the idea of joining the EU is shared and supported by the majority of Ukrainians.[2]

However, there are evident internal and external divergences in the perception of the scope and objectives of the future NEA in Ukraine. Internally, the President of Ukraine and the government do not hide their ambitious aspirations to negotiate an NEA which will eventually, if not ensure, at least significantly accelerate Ukrainian progress towards full EU membership. On many occasions President Viktor Yuschenko stated that in 2008-2009 a new association agreement can be negotiated with objectives leading Ukraine towards full EU membership and considerable political and economic integration into the

[1] The Council stated that 'certain aspects of which [an Enhanced Agreement with Ukraine] could serve as model for other ENP partners in the future'. Press Release of the General Affairs and External Relations Council meeting on 18 June 2007 (10657/07 (Presse 138)). The Council stated that 'certain aspects of which [an Enhanced Agreement with Ukraine] could serve as model for other ENP partners in the future'.

[2] Recent polls show that more than 50 precent of Ukrainians support the membership of Ukraine in the EU. See the report from 2010 at: <http://www.dw-world.de/dw/article/0,,14771817,00.html> (accessed 12 November 2011).

EU.[3] In his opinion Ukraine must be admitted to the EU because of its location on the European continent and because of the readiness and desire of the whole Ukrainian nation to adopt and to share European common values. The Ukrainian Minister of Foreign Affairs has gone further and expressed his dissatisfaction with the form and objectives of the ENP and stated that Ukraine is ready for a new more enhanced form of cooperation with the EU which might lead to EU membership.[4] The Ukrainian government does not hide its expectations that the future NEA should pursue objectives of political association and close economic integration between the EU and Ukraine with the perspective of EU full membership for Ukraine.[5]

However, many pro-European aspirations of the Ukrainian political elites are frequently dampened by a more sober approach from Brussels. In January 2008 the Commission President José Manuel Barroso stated that Ukraine has to achieve a higher level of internal political stability before establishing closer relations with the EU.[6] Commissioners from time to time have recalled in their public speeches that Ukraine has no chance of joining the EU in the short term perspective.[7] Even long-standing friends of Ukraine in the European Parliament enthusiastically propose establishing a joint cohabitation but not a marriage between the EU and Ukraine.[8] At the latest EU-Ukraine Summit the EU failed to recognise EU membership prospects for Ukraine even in the long-term future. The final document of the EU-Ukraine Summit in Paris on 9 September 2008 stated that the Parties 'acknowledge EU aspirations of Ukraine and welcome its European choice'.[9]
These divergences in the perception of objectives of the future EU-Ukraine NEA suggest that the parties involved will apply their best external tools and strategies to achieve a compromise which could suit both of them. The Ukrainian side will push hard to negotiate a deal of a transitional nature with clear perspective of full EU membership in the foreseeable future. The EU, on the other side, will perform its best to achieve a long term contractual arrangement which performs an appropriate template for other neighbouring countries and offers adequate prices to ensure the Ukraine's abidance to the EU conditionality policy.

The future EU-Russia NEA will represent an important example of contractual relations between the EU and third countries which stay outside the ENP but consider themselves strategic partners and do not have ambitions to join the EU. From the early 1990s EU-Russia contractual relations have been the most advanced in comparison to other former

[3] Interview with President Yuschenko on 7 April and 25 June 2008 at: <http://dt.ua/ARCHIVE/volodimir_ogrizko_diplomat__tse_lyudina,_yaka_vidstoyue_i_ne_zdae_nat sionalni_interesi-49543.html> (accessed 12 November 2011).

[4] Interview with Ukrainian Foreign Minister Volodymyr Ogryzko. See the report from 18 February 2008 at: <http://www.liga.net> (accessed 10 January 2009).

[5] Report of President Yuschenko on 10 July 2008 at the 'Yalta European Strategy' Forum, available at: <http://www.yes-ukraine.org> (accessed 10 January 2009).

[6] E. Vucheva, 'EU Wants "Political Stability" in Ukraine before Closer Ties', *EU Observer*, 29 January 2008. Available at: <http://euobserver.com/9/25553> (accessed 10 January 2009).

[7] For example, External Relations and European Neighbourhood Policy Commissioner Benita Ferrero-Waldner stated on 15 May 2008 that: 'At the moment Ukraine has no perspective of the full EU membership. Ukraine wants to negotiate an association agreement with clear perspective of the EU full membership. Only Enlargement Strategy envisages such option. Ukraine is not covered by the Enlargement Strategy', available at: <http://www.liga.net> (accessed 10 January 2009).

[8] See interview with Adrian Severin (Chair of the Parliamentary Cooperation Committee 'EU-Ukraine'): 'MEP Severin: Ukraine's Right to Apply for Membership Undoubted', *EU Ukraine Trade and Investment Monthly Monitor*, February 2008, at p. 9. Available at: <http://www.docstoc.com/docs/45928093/February-2008-Monthly-Monitor> (accessed 12 November 2011).

[9] 'Joint Declaration on the EU-Ukraine Association Agreement', EU-Ukraine Summit, Paris, 9 September 2008. Available at: <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/102633.pdf> (accessed 12 November 2011).

USSR republics.[10] The EU-Russian PCA provided better opportunities for Russian undertakings and nationals to access the European Communities (EC) internal market. One of the possible explanations to why Russia refused to participate in the ENP is that is seeks similar if not more favourable arrangements with the EU than other neighbouring countries without undertaking similar commitments in fields of protection of democratic freedoms and human rights. In contrast to the ambitious objectives of the Ukrainian policy towards the future EU-Ukraine NEA, which are directed at the eventual accession of Ukraine to the EU, the objectives of the Russian policy are less ambitious but more consistent with the character of the EU-Russia relations. Russia aspires to build a common area with the EU in the fields of economy, external security and justice and home affairs, culture, education and science.

The Russian side expects that the EU-Russia NEA will envisage 'truly enhanced and mutually beneficial cooperation with prospective to set up visa free regime between the EU and Russia'.[11] However, the progress of the EU-Russia negotiations process will depend on how Russia will be able to respond to specific concerns on behalf of the EU and its member states. These concerns will include issues like energy security, judicial cooperation and the Russian participation in the frozen conflicts in Georgia and Moldova.[12] Furthermore, Russia will be expected to abide by international commitments which are likely to cover democratic freedoms and human rights, market economy, energy and security.[13] Therefore, similarly to the EU-Ukraine negotiation process, the same process between the EU and Russia should result in a mutually beneficial compromise. It will allow the Russian side to ensure better access for Russian undertakings and nationals to the freedoms of the EC internal market and the EU side to obtain considerable concessions from Russia on issues of serious European concern, especially in the field of energy supply and security (to ensure efficient and uninterrupted gas supply to the EU from Russia in the aftermath of the Russia-Ukraine gas conflict in January 2009).

Objectives and scope of the new enhanced agreements

Objectives and scope of the future EU-Ukraine and EU-Russia NEAs have become a topic of popular debate by politicians and experts in Ukraine, Russia and elsewhere. Since formal negotiations directives for the all parties are not open to public the whole debate is highly speculative exercise. Nevertheless, it is possible to deduce the potential objectives and scope of the future EU-Ukraine and EU-Russia NEAs from the parties' binding and soft law, political statements and the contemporary EU external policy towards the neighbouring countries.

The scope of the objectives of the future EU-Ukraine NEA as they are seen from Ukraine could be guessed from the non-binding statement of the *Verkhovna Rada* of Ukraine (the Ukrainian Parliament), 'About the initiation of negotiations between Ukraine and EU on the new fundamental agreement', which was issued on 22 February 2007.[14] This statement welcomes the resolution of the European Parliament issued on 7 April 2006

[10] R. Petrov, 'The Partnership and Cooperation Agreements with the Newly Independent States', in A. Ott and K. Inglis (eds), *European Enlargement Handbook* (The Hague: T.M.C. Asser Press, 2002).

[11] 'Concept of the External Policy of the Russian Federation', issued on 12 July 2008 by the President of the Russian Federation. Available at: <http://archive.kremlin.ru/eng/text/docs/2008/07/204750.shtml> (last accessed 12 November 2011).

[12] R. Goldirova, 'EU Ends 18-Month-Long Deadlock over Russia', *EU Observer*, 21 May 2008.

[13] 'Joint Statement of the EU-Russia Summit on the launch of negotiations for a new EU-Russia agreement', Khanty-Mansiysk, 27 June 2008, 11214/08 Presse 192.

[14] *Postanovlenie* (Statement) of the *Verkhovna Rada* No. 684-V, 'About the Launching of Negotiations between Ukraine and the EU on New Fundamental Agreement', 22 February 2007.

which called on the European Commission to launch negotiations on the new association agreement between Ukraine and the EU.[15] In particular, the *Verkhovna Rada* called the EU to direct the negotiations towards the following objectives:

1) To acknowledge the possibility of full EU membership for Ukraine;
2) to negotiate a new agreement in line with existing agreements between the EU and countries of central and eastern Europe;
3) To specify timetables for every stage of integration between the EU and Ukraine in political, economic, energy, security, legal and humanitarian spheres;
4) To ensure that the new NEA will contain provisions that are directly effective in the EU legal order;
5) To conclude the new NEA for a specific time duration;
6) To ensure the long term objectives of the NEA, which should target the full membership of Ukraine in the EU, and the medium term objectives, which should ensure the sufficient access to the EC Internal Market.

Therefore, the Ukrainian side aspires to negotiate an association agreement with the clear objective of EU membership and access of the Ukrainian undertakings to the EC internal market which resembles either the Europe Agreements (EA)[16] or the Stabilisation and Association Agreements (SAA)[17] with the Western Balkan countries.

The EU institutions have been very careful to avoid any premature public discussion about the objectives and scope of the future EU-Ukraine NEA. It is only the European Parliament which has openly supported the Ukrainian aspirations and asked to conclude the future NEA as an association agreement with objectives of membership in the EU.[18] Until recently, other EU institutions (with more decision-making powers in this field) preferred to keep meaningful silence on this important issue of the EU external policy.

---

[15] Resolution (P6_TA-PROV(2006)0138) on Elections in Ukraine states in paragraph 10 that the European Parliament 'notes that the current Partnership and Cooperation Agreement between the European Communities and Ukraine (3) expires in 2008, and calls on the Commission to begin to negotiate an *Association Agreement* [emphasis added]'. This position of the European Parliament was reiterated in Resolution (A6-0217/2007) from 9 July 2007 where it stated that 'the negotiations should lead to the conclusion of an *association agreement* [emphasis added] that contributes efficiently and credibly to the European perspective of Ukraine and opens the corresponding process'.

[16] The EAs concluded with the following CEE countries: Poland (*Official Journal of the European Communities*, L 348/2, 1993, in force since 1 February 1994), Hungary (*Official Journal of the European Communities,* L 347/2, 1993, in force since 1 February 1994), the Czech Republic (*Official Journal of the European Communities*, L 360/2, 1994, in force since 1 February 1995), the Slovak Republic (*Official Journal of the European Communities,* L 359/2, 1994, in force since 1 February 1995), Romania (*Official Journal of the European Communities,* L 357/2, 1994, in force since 1 February 1995), Bulgaria (*Official Journal of the European Communities,* L 358/3, 1994, in force since 1 February 1995), Lithuania (*Official Journal of the European Communities,* L 51/3, 1998, in force since 1 January 1998), Latvia (*Official Journal of the European Communities,* L 26/3, 1998, in force since 1 January 1998), Estonia (*Official Journal of the European Communities,* L 68/3, 1998, in force since 1 January 1998), and Slovenia (*Official Journal of the European Communities*, L 51/3, 1999, in force since 1 February 1999).

[17] The SAAs have been concluded with the FYROM (*Official Journal of the European Union,* L 084, 2004), Croatia (*Official Journal of the European Union,* L 026, 2005), Albania (*Official Journal of the European Union,* L 300, 2006), and Montenegro (*Official Journal of the European Union,* L 108, 2010). The FYROM, Croatia, Albania and Montenegro SAAs entered into force on 3 May 2001, on 12 December 2001, 1 April 2009, and on 1 May 2010 respectively. The SAAs with Serbia and Bosnia and Herzegovina were signed and await ratification by all member states in the nearest future. Until that, the relations between the EU and Serbia and Bosnia and Herzegovina are governed by Interim Agreements (Council Regulation 1616/2006, *Official Journal of the European Union,* L 300, 2006).

[18] Resolution of the European Parliament (A6-0217/2007) from 9 July 2007.

Even within the academic community there was no uniform position on the future EU-Ukraine NEA. To date, the most outstanding contribution to the academic discussion on the potential scope of the EU-Ukraine enhanced agreement has been offered by Christophe Hillion,[19] who has provided a comprehensive overview of the possible scope of the future EU-Ukraine enhanced agreement. In particular, he has argued that the future EU-Ukraine enhanced agreement will pursue the objectives of setting up a comprehensive and deep free-trade area between the EU and Ukraine, enhanced multi-faceted co-operation (in various fields, such as energy, the environment, transport and education) with emphasis on cross-pillar dimensions, and it will be a reciprocally-binding document.

At the same time, Hillion believed that the new EU-Ukraine association agreement will contain a conditionality clause, and will, therefore, require constant monitoring on the part of the EU. Most importantly, he argues that the future EU-Ukraine enhanced agreement would be an association agreement based upon Article 310 EC, which is 'potentially close although not necessarily exactly similar to the EAs or the SAAs with the Western Balkan countries'.[20] The author drew his conclusions from 'the terminology of several ENP documents' and 'the inherent logic of the Neighbourhood Policy'.[21] Most importantly, he stated that 'any agreement below association would not be perceived as an enhanced contractual relationship'.[22]

However, there was a view that the scope and legal basis of the new EU-Ukraine NEA could differ from the generally-expected association agreement based upon Article 310 EC.[23] Two considerations were relevant to this opinion. The first consideration was of legal nature. From legal point of view, objectives of an association agreement based upon Article 310 EC do not automatically imply that Ukraine could be given a legal commitment on the part of the EU in order to obtain the possibility of joining the EU. Furthermore, the objectives of the EU-Ukraine cooperation in the short-term and medium-term perspective could be achieved either by an association or by a partnership agreement.

The second consideration was of political nature. On the one hand, the EU is better to conclude an enhanced agreement which should be in line with the neighbourhood clause (Article 8 TEU as amended by the Lisbon Treaty) and Article 212 Treaty of Functioning of the European Union (TFEU) which provides better procedural arrangement for a third country than Article 217 TFEU (all decisions by the Council related to the conclusion of the partnership agreement can be taken by a qualified majority while the conclusion of the association agreement would require unanimity). On the other, a 'privileged' association agreement between the EU and Ukraine might be in contradiction with the objectives of the evolving EU-Russia strategic partnership. On many occasions the Russian government has explicitly stated that it would not welcome the EU closer rapprochement with former Soviet countries which hinder regional integration in the post-Soviet area.[24]

---

[19] C. Hillion, 'Mapping-Out the New Contractual Relations between the European Union and Its Neighbours: Learning from the EU–Ukraine "Enhanced Agreement"', *European Foreign Affairs Review*, Vol. 12, 2007, 169-82.

[20] Ibid., at p. 174.

[21] Ibid.

[22] Ibid., at p. 175.

[23] R. Petrov, 'Scope of the New EU-Ukraine Enhanced Agreement: Is There Any Room for Further Speculation?', *Max Weber Programme Working Papers* 2008/17.

[24] See 'Russia's Middle Term Strategy towards the EU (2000-2010)', available at: <http://www.mgimo.ru/fileserver/2004/kafedry/evro_int/reader4meo_3-6.htm> (accessed 12 November 2011). See also S. Kashkin and P. Kalinichenko, '"Problem 2007" in Relations between Russia and the European Union and Its Legal Solutions', *Journal of Foreign and Comparative Law*, Vol. 3, 2005, at p. 64.

Notwithstanding the thorny issue of the legal basis of the new EU-Ukraine NEA, more or less uniform consensus could relate to the objectives and the scope of the neighbourhood agreements, and the EU-Ukraine NEA in particular. The objectives of the neighbourhood agreements can be deduced from the general objectives of the ENP, which offers neighbouring countries the chance of participating in various EU activities through close co-operation in the political, security, economic and cultural fields. In accordance with logic of the ENP, the future NEAs' objectives will not be identical, but will differ in order to reflect the existing status of the relations between the EU and each neighbour country, its needs and capacities, as well as their common interests. The NEAs will be preceded by jointly-agreed, tailor-made Action Plans, which cover a number of key areas specific to each neighbouring country as provided by the ENP:

1) Political dialogue;
2) Economic and social development policy;
3) Participation in a number of EU programmes (education and training, research and innovation);
4) Sectoral cooperation;
5) Market opening in accordance with the principles of the WTO and convergence with EU standards; and
6) Justice and Home Affairs co-operation.[25]

It is likely that NEAs will reproduce both general and individually tailor-made objectives of the relevant bilateral Action Plans. Thus, the general objectives of the NEAs could focus on close cooperation in political, security, economic and cultural fields with the eventual access of the neighbour countries to the EC internal market. The individual objectives of the NEAs would reflect various strategic priorities of the EU towards specific neighbour countries. It is suggested that the new EU-Ukraine NEA will be either an association or a partnership agreement based upon various articles of the EU founding treaties with cross-pillar dimensions.

It is not excluded that the new EU-Ukraine partnership agreement will have a new ambitious title which emphasises its enhanced character will satisfy the expectations of the Ukrainian political elite. For example, it could be called an 'enhanced neighbourhood agreement' or 'strategic partnership agreement' in order to emphasise its difference from the EU-Ukraine PCA[26] and to underline a new level of political and economic cooperation between the parties without any immediate perspective of full EU membership.

Recently the EU decided to unveil some of its plans concerning the scope and legal basis of the future EU-Ukraine enhanced agreement. At the EU-Ukraine Summit in Paris on 9 September 2008 the Parties agreed that the future EU-Ukraine agreement will be 'an Association Agreement' (based on Article 310 EC) which envisages reciprocal rights and obligations (implying the competence of common institutions to issue binding decisions).[27] Among the most ambitious objectives of the new agreement will be the establishment of a comprehensive free trade area and the long-term prospect of a visa-free regime between the EU and Ukraine in return for the 'large-scale regulatory approximation of Ukraine to EU standards' and enhancement of mutual cooperation in the areas of 'justice, liberty and security, including migration issues'.[28] Nevertheless, the

[25] Communication from the European Commission 'European Neighbourhood Policy Strategy Paper', COM (2004) 373 final.

[26] EU-Ukraine PCA (*Official Journal of the European Union,* L 49, 1998), entered in force on 1 March 1998. See V. Muravyov, 'Polozhenia Ugody pro partnerstvo ta spivrobitnitsvo, yaki reguluyt sferu pidpriemnitsva ta investitsiy (pitania implementasii)', *Ukrainskiy Pravoviy Chasopys*, Vol. 2, 1998, 31-35.

[27] Joint Declaration, *supra* note 9.

[28] Ibid.

EU fails to recognise EU membership prospects for Ukraine even in the long-term future. Instead, the parties 'acknowledge the European aspirations of Ukraine and welcome its European choice'.[29] However there are many issues of the EU-Ukraine enhanced agreement which still remain open. Among them: what will be the depth of the political dialogue between the EU and Ukraine?; how far will the Ukrainian undertakings be allowed to access the EC Internal Market?; will Ukraine be allowed to enter the EU-funded programmes? These questions will remain open until the very end of the negotiation process.

The future EU-Russia NEA is likely to reflect the major objective of the Russian policy towards the EU which is targeted at the development of the four-dimensional common spaces area with minimum application of the EU conditionality policy. The EU-Russia PCA is to expire in 2007. The negotiations on new enhanced agreement were blocked by Poland and Lithuania for 18 months. Only in May 2008 the Commission obtained the mandate to launch negotiations on the new agreement with Russia which have been launched in June 2008 at the EU-Russia Summit in Siberian city of Khanty-Mansiysk. It is very likely that Russian negotiators will push for the new agreement that if not equals but exceeds the level of economic integration between the EU and Russia.

The legal base and scope of the new EU-Russia enhanced agreement remains unclear. After Vladimir Putin came into power in 2000 the Russian government formally ruled out any desire to join the EU. Instead, officially the Russian government prefers to develop bilateral contractual relations with the EU in order to maintain 'its freedom to determine and implement its domestic and foreign policies' towards the EU.[30] The Russian Federation is interested in strategic partnership with the EU with purpose to 'solve specific and considerable tasks which are of interest for both parties'.[31] At the same time, the EU-Russia strategic partnership should pursue the task of 'consolidating Russia's role as a leading power in shaping up a new system of interstate political and economic relations in the CIS [Commonwealth of Independent States] area'.[32]

In general, there are several scenarios of the future contractual relations between the EU and Russia taking into consideration recent political and economic complications in relations between them:

1) To extend the force of the recent EU-Russia PCA;
2) To amend the recent EU-Russia PCA as to envisage changes in the bilateral relations (WTO accession);
3) To conclude a new enhanced partnership or an association agreement;
4) To conclude bilateral agreements on sectoral cooperation similar to what exist between the EU and Switzerland.

In the opinion of Russian experts any other way of development (absence of a framework cooperation agreement similar to what exist between the EU and the USA) would deteriorate EU-Russia relations and would lead to permanent trade and energy wars and 'consequent geopolitical confrontation'.[33]

The Russian attitude towards the ENP is quite ambiguous. Russia does not welcome EU's attempts 'to hamper the economic integration in the CIS, in particular, through

[29] Ibid.

[30] Article 1.1 of Russia's Middle Term Strategy towards the EU (2000-2010), *supra* note 24.

[31] Ibid., Article 1.2.

[32] Ibid., Article 1.8.

[33] Kashkin and Kalinichenko, *supra* note 24. See also M. Entin, 'Strengthening Legal Grounds for Developing Russian Relations with the European Union', *Azerbaijani-Russian Journal of International and Comparative Law*, Vol. 1, No. 2, 2005, at p. 152–154.

maintaining 'special relations' with individual countries of the Commonwealth to the detriment of Russia's interests'.[34] It means that far-reaching contractual agreements between the EU and the neighbour countries could not be welcomed by Russia since these relations should definitely hinder any further integration within the CIS. Recent stalemate in EU-Russia relations sooner or later will be eventually solved by signing a new bilateral agreement between the EU and Russia. Both parties put high hopes on this document. President Putin stated that 'all positive results of our [EU-Russia] relations must be fixed and developed in new fundamental agreement on strategic partnership Russia-EU'.[35]

There are considerable hopes on the new EU-Russia agreement on the EU side as well. It appears that in return for Russia's long-term guarantees of secure energy supplies for Western Europe the EU is ready to offer a free trade area perspective for Russia. The European Commission President Jose Manuel Barroso publicly stated that the new EU-Russia agreement 'we are proposing [that] Member States give us a mandate for negotiating with Russia a comprehensive agreement that will bring a new quality to our relationship', Barroso said. 'In particular, we propose to move towards a free-trade area, to be completed once Russia accedes to WTO [the World Trade Organization].' Whether Russia will be interested in this proposal remains to be seen. Taking into consideration the Russian reluctance to enter into any association relations with the EU and to abide to strong and binding conditionality and human rights clauses one may predict that the future agreement is most likely to be an enhanced version of the PCA underpinned with the free trade area. In this case, a new EU-Ukraine enhanced agreement concluded as an association agreement might contradict the logic of the strategic partnership between the EU and Russia. Whether the EU and the Russian Federation allow it taking place remains to be seen.

Concluding remarks

We have set out a number of considerations which lead us to believe that the outgoing PCAs and the incoming NEAs will possess several similar characteristics. Both of these agreements are most likely to be framework agreements of a cross pillar nature which entail considerable legal and regulatory reforms in the neighbouring countries before they can obtain better access to the EU internal market. Similarly to the PCAs, the new NEAs risk being outdated in a very short period of time. Two factors justify this judgement. The first factor is the broad framework character of the future NEAs. Constitutional reforms in the EU are not completed and could continue even after the Lisbon Treaty enters into force. It is possible that the EU will occupy new areas of competence which are not covered by the EU founding treaties. Thus, sooner or later the EU will face the necessity of revising the scope of framework agreements with third countries in order to align them with its own competences.

The second factor is a possible dissatisfaction of the parties with the objectives and scope of these agreements. On the one hand, the EU side will be pressed to offer at least a passage about long term European prospects which can be relied on by at least some neighbouring countries in their integration aspirations. On the other hand, it is most likely that the future NEAs will avoid any specific enlargement formulas inherent to the EAs and SAAs thereby causing some degree of dissatisfaction for the EU and neighbouring countries.

[34] Article 1.6, Russia's Middle Term Strategy, *supra* note 24.

[35] Address of President Vladimir Putin to the Federal Assembly on 26 March 2007. Available at: <http://archive.kremlin.ru/appears/2007/04/26/1156_type63372type63374type82634_125339.shtml> (accessed 12 November 2011).

Chapter 10

EU neighbourhood policy towards Belarus Challenges and future perspectives

Aliaksei Anishchanska and Maryia Yuryeva
Belarusian State University

Origins and development of the ENP

Enlargement of the external frontiers of the European Union (EU) not only provided for new possibilities for member states, but also put new objectives before the community; the appearance of new neighbours required the development of fresh approaches to cooperation with these countries. The European Neighbourhood Policy (ENP) became a response to the realities of the integration process in the EU. The European Commission launched the ENP in its 'Communication on Wider Europe' in March 2003[1] and complemented it with a Communication in July 2003 which introduced the concept of Neighbourhood Programs.

The ENP lays the ground for closer cooperation with the neighbouring countries of the enlarged Union. The ENP aims to forge closer ties with countries to the South and East of the EU without offering them a membership perspective. Through this policy, the EU seeks to promote greater economic development, stability and better governance in the neighbouring areas. Following endorsement of these concepts by Council conclusions in March and October 2003 respectively, the Commission further elaborated the policy initiative in a Strategy Paper in May 2004. The Council and European Council welcomed and endorsed the Commission's Strategy Paper in June 2004.

In 2004, the Commission presented the ENP and unveiled action plans for closer ties with seven new neighbours. The countries involved in the first round were Ukraine, Moldova, Israel, Jordan, Morocco, Tunisia and the Palestinian Authority. The second ENP round was outlined in 2005, when the Commission issued country reports on Egypt and Lebanon as well as the Southern Caucasus countries of Armenia, Azerbaijan and Georgia.

In 2007 the Commission introduced the European Neighbourhood and Partnership Instrument (ENPI), a comprehensive new fund to promote co-operation, together with a new lending mandate of the European Investment Bank (EIB). All partner countries covered by the ENP are eligible for support under the ENPI.

The EU has drawn up individual action plans for each partner country under the ENP and regularly monitors progress through bodies established by the partnership and co-operation agreements or association agreements. Prioritised cooperation spheres are common external policy and security policy as well as questions of trade and economic development. It should here be noticed that the ENP is a unilateral policy of the EU.

The Republic of Belarus is one of the countries that falls within the scope of the ENP. Initially, Belarus welcomed the ENP concept and suggested specific areas for cooperation. However, as the country's current system got used to being considered authoritarian by the EU, contractual links were claimed to be improved only upon the establishment of a democratic form of government and complying with certain other requirements (even

[1] Communication from the Commission to the Council and the European Parliament, 'Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours', COM(2003) 104 final, 11 March 2003.

when formally called 'proposals'). Until very recently there was no particular interest on either side to change the situation and to take steps forward.

Relations overview

The EU–Belarus relations have developed in a number of distinguishable stages:

EU-Belarus relations 1991-1997

Although EU–Belarus relations progressed soon after the EU recognised the independence of Belarus from the Soviet Union in 1991 and in August 1992 established diplomatic relations. In 1994, relations began to take a turn for the worse. In 1995 both parties negotiated a Partnership and Co-operation Agreement (PCA); however, so far the Republic of Belarus remains the only country among the countries that falls within the scope of the ENP policy whose PCA is not in force, and the interim agreement is also not in force. Political reforms in Belarus in 1996-1997 resulted in cold relations between EU and Belarus.

EU-Belarus relations 1997-2005

During the period of 1997-2005 there were no improvements to the EU-Belarus relation. The October 2000 parliamentary elections, the September 2001 presidential elections, and the October 2004 parliamentary elections and referendum all failed to meet international standards for democratic elections, as confirmed by the Organisation for Security and Cooperation in Europe (OSCE). The EU reacted to the elections by setting forth the conditions on which the development of relations with Belarus were essentially dependent, but there were no tangible results.

The situation regarding human rights, fundamental freedoms and independent media continued to deteriorate between 2003 and 2005. The European Parliament in its Resolution of 11 February 2003[2] called for moving towards a future partnership with Belarus. In November 2004, due to absence of changes in Belarus, the EU Council decided to limit the multilateral contacts and contacts necessary for transborder relations, to establish bilateral ministerial contacts of the EU and Belarus solely through the Council Presidency, Secretary-General of the Council of the European Union/High Representative Common Foreign and Security Policy, the Commission and the Troika. The assistance programs supported only the needs of the population and democratisation, a visa-ban was introduced against the officials directly responsible for the fraudulent elections and human rights violations. In 2005 Belarus was designated as a priority country for the European Initiative for Democracy and Human Rights and Decentralised Cooperation Instruments in the period 2005–2006.

EU-Belarus relations 2006-2008

The presidential elections of 2006 also failed to meet the OSCE standards for democratic elections. In the view of this event in April 2006 the Council decided to adopt restrictive measures against the Belarusian President and other officials that took the form of a visa ban and asset freeze.[3] In March 2007 the list of sanctions was rolled-over until April 2008 by virtue of another Common Position.[4]

---

[2] European Parliament resolution on relations between the European Union and Belarus: towards a future partnership (2002/2164(INI)).

[3] Both were introduced by Common Position 276/2006/CFSP of 10 April 2006 concerning restrictive measures against certain officials of Belarus, *Official Journal of the European Union*, L 101, 11 April 2006.

[4] Common Position 288/2008/CFSP of 7 April 2008 renewing restrictive measures against certain officials of Belarus, *Official Journal of the European Union*, L 95, 8 April 2008.

On 21 November 2006, Benita Ferrero-Waldner, the European Commissioner for External Relations and European Neighbourhood Policy, published a document setting out what the EU could bring to Belarus. The document stressed the importance of closer relations between the EU and its neighbour countries and comprised variety of values and principles such as democratisation, respect for human rights and civil society, intercultural contact and the development of a strong opposition within the country. However, the ENP underlined Belarus had to show that it was bringing forward reforms. It demanded the freedom of speech, freedom of assembly and democratic elections.

EU-Belarus Relations 2008-up to now

Until the spring of 2008 there were hardly any positive changes in the cooperation between the EU and Belarus. On 1 April 2008 a representation of the European Commission opened in Belarus, which proves there will be a renewal of the negotiation process. A full-scale dialogue is just about to begin and the first step towards it has recently been taken.

On 13 October 2008 a Troika meeting with the Belarusian Minister for Foreign Affairs was held, as a result of which the EU decided to restore the contacts with the Belarusian authorities which had been restricted pursuant to the Council conclusions of 22 and 23 November 2004, travel restrictions imposed on certain leading figures in Belarus (41 individuals) with certain exceptions (five individuals) will not apply for a period of six month and may be renewed unless all 27 EU member states vote for cancelling them. The decision on freezing assets is still in force.

Finally, a Commission delegation headed by Hugues Mingarelli, Deputy Director General of the Directorate-General for External Relations, visited Minsk 3-5 November 2008 during which a set of meetings were held on a very high political level, including a meeting with the Head of the Presidential Administration.

EU-Belarus trade relations

Without a PCA or an interim agreement, bilateral trade between the EU and Belarus is still covered by the most-favoured nation (MFN) provisions of the 1989 Agreement between the European Community and the former Soviet Union, which subsequently was endorsed by Belarus.

EU–Belarus trade relations, as well as political cooperation, suffered steep declines from time to time. In 1999, due to the repercussions of the Russian financial crisis which hit in August the same year and which also to a certain extent influenced the Belarussian economy, EU exports dropped by 13 percent. Positive developments in the Belarussian economy led to a renewed increase in EU exports to Belarus starting from 2001.

Belarus also used to be a beneficiary of the Generalised System of Preferences (GPS). However in response to a violation of the core principles of the International Labour Organization (ILO), of which Belarus is a member, the European Commission recommended that trade preferences to Belarus under the Generalised System of Preferences should be withdrawn. The EU member states approved this proposal in December 2006 and the withdrawal entered into force on 21 June 2007. According to the official position of the EU, once Belarus has shown that it respects basic trade union rights, the EU is ready to immediately reverse its decision on GSP withdrawal. It should be noted that GSP withdrawal is claimed not to be a sanction related to the political situation, but rather a cancellation of a trade privilege. The removal of the trade preferences does not halt Belarus' exports to the EU – it simply returned Belarus' import tariffs to the standard, non-preferential rate.

The EU does not apply any trade sanctions against Belarus, but the country is subject to one of the tightest bilateral textile trade regimes amongst EU trade partners. The

bilateral textile agreement between the European Communities (EC) and Belarus setts the quotas on Belarus' textiles exports to the EU has been in place since 1993 and has been renewed on several occasions (in 1995, 1999, 2003, 2004, 2005, 2006 and 2007) and is currently applicable until the end of 2008.

The EU is now the second most important trade partner for Belarus with the Russian Federation being the first one. Economic and trade relations between the EU and Belarus are being characterised as highly dynamic: starting from 2001 the commodity turnover increased almost seven times and Belarusian export enlarged more than 18 times. The EU accounts for 32 percent of Belarus' total trade, some 44 percent of Belarus' exports go to Europe while for the EU the trade flow from Belarus is 0,1 percent of EC trade.

Today the EU is a major investor in the Belarusian economy. The amount of investments drawn to Belarus from EU member states reached USD 2,8 billion in 2006, showing a growth rate of 125 percent in comparison to the year before. The positive trend continued in 2007, which saw Belarus export goods to the EU for a value of EUR 4,3 billion and import good from the EU to a value of EUR 4,8 billion. Belarus' exports to the EU are dominated by processed oil products (56,7 percent) while other product categories make up a much lower share: base metals and base metal products (12,9 percent), wood and articles of wood (6,3 percent), chemicals (5,9 percent) and textiles (3,9 percent). The EU exports mainly machinery (33,8 percent), transport equipment (15,5 percent) and chemicals (11,3 percent) to Belarus.

EU-Belarus technical cooperation

As it was stated above, despite major political controversies, a lot has been done in EU-Belarus technical cooperation in the meantime, in particular, in energy, transport, environmental protection and customs. Joint cooperation in these spheres shall be continued and developed in the nearest future as the EU's political leaders decided to restore contacts with Belarus at the ministerial level. During the next half-year period they are going to maintain dialogue with the Belarusian authorities in order to discuss issues such as the freedom of the press, more freedom for non-governmental organisations, electoral legislation, health and safety regulations, and freedom of speech. EU claims that democratic transformation in these areas in Belarus will help the country to become a full member of the ENP policy. Cooperation with the EU is entering into a practical phase, which means contacts at the level of experts.

Meanwhile, Belarus is qualified to participate in three of the current ENP programmes (Baltic Sea Region Programme, Latvia-Lithuania-Belarus, Poland-Ukraine-Belarus). Belarus is also eligible under the new ENPI. These programmes were subsidised with around EUR 19 million.

Technical cooperation between the EU and Belarus is developed within certain programs unilaterally introduced by the EU:

- Technical Assistance for the Commonwealth of Independent States (TACIS) Program (1990-2003) promoting the process of economic reforms in the Commonwealth of Independent State (CIS) countries;
- INTERREG EC Program (2004-2006) – an EU-funded program that helps Europe's regions form partnerships to work together on common projects;
- European Neighbourhood and Partnership Instrument (2007-2013) – provides Community assistance for the development of an area of prosperity and good neighbourliness involving the EU and its neighbours. The ENPI serves as a more flexible source of funding for building and promoting democracy.

The EU is one of the major donors of technical assistance for Belarus. During the period of operating TACIS program in Belarus there were over 320 projects brought to life for the total of EUR 204 million, nine projects are still being performed. The EU renders technical support to Belarus in the following spheres: environmental protection, improvement of border infrastructure (cross-border cooperation program), social protection, nuclear safety, fighting illegal migration and smuggling, education (e.g. the TEMPUS program financing exchanges of young Belarusian university students abroad, development of European studies and capacity building in local universities), local government. A new coordination model was set up in the autumn 2003 for activities related to the alleviation of Chernobyl consequences under the CORE programme (Cooperation for Rehabilitation) in which the EU is participating. It was established with the objective of improving the living conditions of the inhabitants of selected districts by reaching out to the people themselves.

The ENPI is supposed to support the priorities agreed in the ENP Action Plans and provides for a simplified approach for cross-border co-operation, technical assistance expressed in institutional capacity-building. The ENPI shall invest almost EUR 12 billion plus a 32 percent increase in 'real terms'.

Apart from that, there is also a separate ENP Action Plan developed with respect to the Republic of Belarus. The Action plan outlines the key operational instruments based upon individualised (tailor-made) country specific, including jointly defined political and economic reform, priorities (short and medium-term priorities ranging from three to five years) and agenda as well as guidance for assistance programming and for others. However the Action Plan was never adopted and has thus not come into force.

As it was recently announced when EU delegation was in Minsk, the EU is ready to initiate cooperation in three more areas: quality and standards, interaction of finance services, food and agriculture. The new initiatives are of practical interest. Further cooperation is said to be possible only if Belarus makes adequate moves in human rights, rule of law and democracy.

Finally, Belarus was invited to become more involved in the Technical Assistance Information Exchange Unit (TAIEX) Instrument, which operates under the Institution Building Unit of the Directorate-General Enlargement of the European Commission. The purpose of TAIEX includes providing technical and expert assistance of the EU for the objectives of rapprochement of the Belarusian national legislation and the law of the EU. It aims to provide to the new member states, acceding countries, candidate countries, and the administrations of the Western Balkans, short-term technical assistance, in line with the overall policy objectives of the European Commission, and in the field of approximation, application and enforcement of EU legislation. Assistance is also provided to other countries included in the ENP, as well as Russia.

Challenges and future prospects

There have been many challenges to the EU–Belarus relations in the past and there is still so much to be changed on the way to mutual prosperity, stability and security. One of the major questions faced by the Belarusian population now is determining the vector of external policy as well as making peoples' own minds.

Although it has been declared for numerous times that Belarus has a multi vector policy, which tended to be treated as a guarantee for the independency of the state, there is now an objective requirement of choosing the closest economical and political partner.

On one hand, the long-lasting cooperation between the Republic of Belarus and the Russian Federation is strong enough, although it is being influenced by contradictable international factors which are having an impact on the pace of building a Union between

Belarus and Russia. These factors include globalisation, European integration as well as national objectives and subjective political and economical processes.

On the other hand, the strengthening of the EU, the enlargement of its role and impact in the global economy and politics provide for the necessity to acknowledge the priority of relations with the EU in the system of foreign policy and economy ties of the Republic of Belarus. Along with the energy put into addressing and improving the cooperation with Russia, boosting the cooperation with the EU could to an even greater extent meet the interests of Belarus. However, in Belarus there are different views on the issue of European integration, varying from rejecting any contacts with 'capitalistic' Europe or supporting them only on conditions set by Belarus, to ascertaining that there is a necessity to switch to a European integration process on any conditions and as quickly as possible. These are opposing and extreme points of view, but they reflect the moods of the population and are to be taken into consideration when reconciling the most visible vector of external policy.

Finally, there is a growing interest in the development and maintenance of a neutral balance between East and West, which would lead to the multiplication the benefits of having good relations with both strategic partners.

Irrespective of the personal choices made, nobody in Belarus will protest against the actual and active participation in the ENP. Although Belarus is declared to fall within the ENP policy, it is little involved in it as the relations need serious promotion of trade and a strengthening of the economic ties. Belarus has up to now received far less assistance than its neighbours despite the fact that ENP is supposed to be a one-sided policy and that the countries neighbouring the EU are supposed to share the benefits of European integration regardless of any feedback on their part. Apparently it is very much expected that the recent political warming shall inevitably result in a more active involvement of Belarus in ENP initiatives and technical cooperation with the EU in general.

Chapter 11

Comparative legal analysis of European and Belarusian conflict law in the sphere of contractual obligations

Alena Babkina
Belarusian State University

Introduction

Taking into consideration the absence of real material unification in certain spheres, it is no wonder that conflict of law unification, i.e. establishment of uniform rules of applicable law for different states, is a unique method of eliminating legal drawbacks. The normal functioning of the internal market creates a need for conflict law in member states to designate the same national law, irrespective of the country of the court in which an action is brought, in order to improve the predictability of the outcome of litigation, certainty as to the law and the free movement of judgments.[1]

While accepting legal acts, the European Union (EU) bodies should base them on the concrete provisions of the Treaty endowing them with the corresponding authority – a so-called principle of 'special authorities'. The EU primary law practically does not contain norms which can form a basis for legal integration in the conflict law sphere. The only provision indirectly regulating this problem is Article 220 of the Treaty of Rome (Article 293 in the present edition) which governs the opportunity for the states to negotiate the conclusion of international agreements only in two spheres: international corporate law and international civil process. Cooperation in the field of international treaties conclusion did not lead to a significant result. Both the Convention on the Mutual Recognition of Companies and Bodies Corporate signed on 29 February 1968 and the Convention on *Insolvency Proceedings* concluded on 23 November 1995 have not yet come into force. Nowadays legal regulation in this sphere is carried out within the EU secondary law.[2]

The Rome Convention

The Directives of the Community contain the solitary unilateral conflict rules, which are dedicated to consumers' rights protection, insurance, etc. The Convention on the Law Applicable to Contractual Obligations[3] adopted on 19 June 1980 (hereinafter the Rome Convention) is not the European one in the strict sense, though the Community took active part in its drafting.[4] At the same time, this Convention constitutes the actual basis of present European treaty conflict law.

---

[1] Regulation of the European Parliament and of the Council of the law applicable to contractual obligations (Rome I), *Official Journal of the European Union*, 4 July 2008, L 177/6, at p. 6.

[2] For example, 'Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies', *Official Journal of the European Union* – L 295. – C.36; 'Council Directive 82/891/EEC concerning the division of public limited companies', *Official Journal of the European Union*. – L 378. – C.47; 'Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies', *Official Journal of the European Union*. – L 395. – C.40.

[3] *Official Journal of the European Union*, L 266, 9 October 1980.

[4] *Патрикеев Е. А.,* Развитие международного частного права стран-членов Европейского Союза: На примере коллизионного права / Е.А. Патрикеев // Правоведение. -2006. - № 5. - С. 121 – 132 [E. A. Patrikeev, 'Development of the International Private Law of the European Union Member States: By the Example of Conflict of Laws', *Jurisprudence*, No. 5, 2006, 121-32].

A significant part of the doctrine considers the Rome Convention to be one of the most successful examples in the sphere of conflict law unification. It has greatly influenced the development of international private law in many countries beyond the EU, including the international private law legislation of the Russian Federation. At the same time, the practice of the Convention application caused certain difficulties. One of the main law enforcement problems is that at the present time there is no a full-fledged uniform interpretation mechanism of the Convention because the Second Additional Protocol to the Convention[5] responsible for the delegation of powers to the European Court on uniform interpretation of the Convention has come into force only after its ratification by Belgium in August 2004. Despite the requirements of Article 18 (‘Uniform interpretation‘) of the Convention, its interpretation was not uniformly carried out by the participants.

Moreover, in certain cases the courts of the member states came to opposite decisions.[6] The content of the international treaty was also rebuked in the doctrine. Some treaty provisions were criticised: too flexible criteria for the close connection definition (Article 4 of the Convention); the permissive character of the rule contained in Article 7 (1) concerning an opportunity for the court to apply overriding mandatory provisions of the state with which the situation has a close connection; Article 10 (1) concerning sphere of *lex causae* application; and the tough character of rules in Article 5 regarding protection of the consumers’ rights. Such complaints have led to the necessity of the Convention reforming, which was discussed both in the doctrine and in the body of the legislative initiative – the EU Commission.

Article 26 of the Rome Convention contains the revision mechanism. The legislative initiative right on this question allows any member state to demand that the President of the EEC Council convene the conference. However the long-term ratification practice of the Convention and its Protocols required the application of more efficient mechanisms, which have been established in the Amsterdam Treaty that entered into force in 1999. Under Articles 61 and 65 of the Amsterdam Treaty the competence in the sphere of international private law has been handed over from the third pillar – the European Union, to the first one – the European communities. That allows regulating conflict law matters by means of European law sources: Directives and especially Regulations – as acts of direct effect.

European law already has examples of successful international treaty transformation into Regulations. The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil Matters Concerning Jurisdiction and Compulsory Execution of Judgments of 27 September 1968 has been replaced by several Regulations representing the European international civil process.[7]

The replacement of the Rome Convention by the Regulation ‘Rome I’ achieves some important goals, in particular:

- *to improve the content of conflict rules in the treaty law sphere* by putting into operation the improved range of conflict law rules applied in case of absence of the law chosen by the parties;
- *to enlarge the application sphere of the uniform EU conflict law norms in the field of the treaty law*, in particular, by including special rules on definition of the law applicable to insurance contract;

[5] *Official Journal of the European Union*, C 027, 26 January 1998, at pp. 0052-53.

[6] Патрикеев [Patrikeev], *supra* note 4.

[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. *Official Journal of the European Union*, L 12/1, 16 January 2001, at p. 1. Amended by Council Regulation 1791/2006 (EC) of 20 November 2006, *Official Journal of the European Union*, L 363, 20 December 2006, at p. 1.

- *to simplify and democratise the amendment procedure* directed on the further EU conflict law rules improvement in the field of the treaty law: in contrast to the Rome Convention, the Regulation 'Rome I' is to be adopted and amended according to the joint decision-making legislative procedure demanding the consent both the European Parliament as the EU institute made up of members directly elected by the EU citizens and the Council of the European Union as the EU institute consisting of the national governments representatives, making a decision by qualified majority (i.e. in the absence of veto right among certain member states).
- *to establish uniform judiciary practice (case law) on the basis of the EU Court decisions,* giving the legal interpretation of the Regulation 'Rome I' including the European Commission claims against member states breaking its rules, and on inquiries of national courts.[8]

The final text of the Regulation 'Rome I' (EC) No. 593/2008 of the European Parliament and of the Council on the Law Applicable to Contractual Obligations of 17 June 2008 (hereinafter the Regulation 'Rome I') and applicable to contracts concluded after 17 December 2009 has essential differences both from the Rome Convention content and from the text of the Proposal for the Regulation presented by the EU Commission on 15 December 2005.[9]

The Regulation 'Rome I' is based on the main principles, which are quite close to Belarusian legislator approaches in the field of legal regulation concerning the conflict law matters on contractual obligations – Freedom of choice and the Characteristic Performance.

International private law is a rather young branch of Belarusian law. During the Union of the Soviet Socialist Republics (USSR) the possibility for civil relations involving a foreign element was inappreciable because there were no prerequisites or bases of development. Adoption of legal rules in this sphere was rarely necessary for dispute settlement. However, we should not assert that there was no international private law in Belarus at all. The Civil Code of Belarus Soviet Socialist Republic contained Section VII 'Legal capacity of foreign nationals and stateless persons. The application of foreign civil laws and international treaties'. This Section consisted of 12 articles containing legal regulation of legal capacity and capability of foreign nationals, foreign enterprises and organisations; law, applicable to the form and the content of a contract, the property law, the law of torts and succession. Thus general international private law theoretical matters (qualification of legal terms, *renvoi* and *renvoi* to the third country law, rules of direct effect, etc.) remained beyond the legislator's vision and were resolved in the doctrine.[10] Only the public policy ('*ordre public*') was set forth in the Civil Code of Belarus Soviet Socialist Republic (Article 563).

The situation radically changed after the new Civil Code of the Republic of Belarus (hereinafter the Civil Code) was adopted on 7 December 1998. This legal act, worked out

---

[8] *Четвериков А.О.*, Предисловие к Регламенту (ЕС) № 593/2008 Европейского Парламента и Совета Европейского Союза от 17 июня 2008 г. о праве, подлежащем применению к договорным обязательствам («Рим I») [A. O. Chetverykov, 'Preface to the Regulation No 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)']. Available (in Russian) at: <http://eulaw.edu.ru/documents/legislation.htm>.

[9] COM (2005) 650 final. Available at: <http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0650en01.pdf>.

[10] There was no Belarusian doctrine in international private law sphere at the Soviet Union time as the authority was extremely centralised. The international private law doctrine had a Russian 'nationality'. См. *Лунц Л.А.*, Международное частное право. – Учебник в 3-х т.т. – М., 1970-1978 г.г. [L. A. Lunz, *International Private Law,* Manual in 3 v., Moscow, 1970-1978].

on the base of Model Civil Code of the Commonwealth of Independent States (CIS) and adopted by the Inter-Parliamentary Assembly of CIS,[11] is quite modern. Section VII of the Civil Code is called 'International private law' and was already composed of 42 articles. It is worth noting that the Belarusian legislators perceived modern legal tendencies in most international private law problems. At present most moot points of international private law, general part, have been regulated: qualification of legal terms, *renvoi*, overriding mandatory provisions, evasion of law, and foreign law content determination. *Lex personalis* is determined differentially: *lex patriae, lex domicilii*, law of the country with which a person is most closely connected, and law of state granted asylum. Legal issues of international private law, special part, were fixed throughout complex regulation.

Certain rules regulating the law applicable to the passing and protection of property and the property law on certain categories of objects (cargo in transit, property subjected to registration) have appeared. Belarusian law contains detailed and modern tendencies in its law applicable to contractual obligations: Articles 1124–1125 of the Civil Code perceive the approach offered by the Regulation 'Rome I', while, for example, international treaties within the Commonwealth of Independent States set forth *lex loci contractus* – an obsolete conflict law rule nowadays – as the basic subsidiary principle of the law applicable to contracts. Law applicable to non-contractual obligations, inheritance, and the form and the content of the testamentary will have also received complex and detailed regulation.

The negative feature of new international private law legal regulation in Belarus is certain archaic rules passed down from the Soviet legal acts (for instance, obligatory written form provided for foreign trade contract when one of the parties is a Belarusian subject), inclusion into the Civil Code text of the provision concerning invalidity of a contract concluded in evasion of law (Belarusian or foreign), as well as an extremely limited sphere for freedom of choice application – it applies only in regard to contract field. The regulation of family relations fixed in the Family Code of 9 July 1999 in edition of 23 June 2008 also falls short of modern tendencies in this sphere.

Provisions for contractual obligation regulation within European and Belarusian conflict law

Freedom of choice *(lex voluntatis)* is the indisputable predominate principle in all international treaties being examined in present research. The uniform standpoint is taken with respect to the expression of will: the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

At the same time, in all documents there is a distinction in the interpretation of 'presumed intention of the parties'. Neither the Rome Convention nor the Civil Code of the Republic of Belarus considers the choice of competent jurisdiction made by the parties to be a choice of law. On the contrary, under the Proposal for the Regulation 'Rome I' a provision on jurisdiction has the additional presumption that it also is declaring in favour of applicable law choice, and therefore significantly facilitating its choice. The final text of the Regulation is more discreet on this issue: such consent of the parties should be one of the factors which are to be taken into consideration in order to define whether the choice of law was obviously expressed. Thus, having abandoned both the

[11] Гражданский кодекс. Модель. Рекомендательный законодательный акт Содружества Независимых Государств // Приложение к Информационному бюллетеню. Межпарламентская Ассамблея государств-участников Содружества Независимых Государств. - 1996. - N 10. - С. 3 - 84. ['Civil Code. Model. Recommendatory legislative act of the Commonwealth of Independent States', Application to the Newsletter, The Interparliamentary Assembly of the Commonwealth of Independent States, 1996, N 10, C. 3 – 84].

non-recognition of jurisdictional reservation as the competent choice of law and order and unambiguous identification of jurisdiction choice and choice of law, the Regulation made a 'judgment of Solomon'. It seems a court on the basis of the case circumstances should resolve that forenamed problem.

In the Regulation 'Rome I' it is not prohibited for the parties to include into their contract the reference to a non-governmental law, i.e. non-obligatory acts of intergovernmental and governmental organisations (for example, UNIDROIT Principles of International Commercial Contracts, Principles of the European Contract Law, INCOTERMS, i.e. sources of *lex mercatoria* and rules of international treaties.

In the absence of a choice of applicable law, the Regulation 'Rome I' uses an approach different to that established in the Rome Convention. European legislators refused to apply the law of the country with which the legal relationship is most closely connected as the main subsidiary principle of contractual obligations. European law directly indicates the law applicable in particular contractual types:

1) A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
2) A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
3) A contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated (with the exception of a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country);
4) A franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
5) A distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
6) A contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place.

The contracts covered by the Regulation 'Rome I' shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. But if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that state shall apply.

The Regulation rules concerning the law applicable to consumer contracts are worthy of a high opinion. The Regulation 'Rome I' contains the compromise between the Rome Convention approach and the Proposal for the Regulation and proceeds to balance consumer interests.

Firstly, the principle of freedom of choice removed from the Proposal for the Regulation remains in the Regulation 'Rome I', though the basic conflict rule is the law of the country where the consumer has his habitual residence, provided that the merchant pursues his commercial or professional activities in the country where the consumer has his habitual residence, or by any means, directs such activities to that country or to several countries including that country.

Secondly, the consumer is being protected as a weak party to a contract by means of the prohibition of overriding mandatory provisions in force in the country where the consumer has his habitual residence.

Thirdly, there are some exceptions to the aforementioned rules: a contract relating to immovable property; a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence; a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 On Package Travel, Package Holidays and Package Tours.

In the conflict law of Belarus we have a similar approach to applicable law. The Article 1125 of the Civil Code defines the law applicable to contracts in the absence of choice, as well as the law applicable to 15 contract categories:

1) Law of the seller – in a contract for the sale of goods;
2) Law of the landlord – in a contract of tenancy;
3) Law of the lender – in a contract of loan;
4) Law of the commission agent – in a contract of commission;
5) Law of the law agent – in a contract of agency;
6) Law of the guarantor – in a contract of guarantee;
7) Law of the grantor – in a contract of grant;
8) Law of the contractor – in a contractor's agreement;
9) Law of the carrier – in a contract carriage;
10) Law of the forwarding agent – in a contract of forwarding;
11) Law of the custodian – in a contract of custody;
12) Law of the depositor – in a contract of the deposit;
13) Law of the insurer – in a contract of insurance;
14) Law of the creditor – in a contract of debt;
15) Law of the licensor – in a license contract on the exclusive rights use.

Thus, basic distinctions between European and Belarusian conflict law regulation in contractual obligations field lie in the following. Firstly, the Belarusian legislators do not designate concrete law applicable to a franchise and a distribution contract. Secondly, the application of the law of the country where the immovable property is situated, with regard to contracts for which property appears to be the subject of the contract, as well as to contracts of trust management, is governed by overriding mandatory provisions, i.e. the freedom of choice principle shall not apply, which is contrary to European law. Thirdly, Belarusian law applies the law of the country where the auction takes place (or law of the country of exchange location) to any contracts concluded on such auctions or exchanges, not only to contracts for the sale of goods.

Furthermore, Article 1125 of the Civil Code betakes *lex loci solutionis.* For instance, according to paragraph 3, in the absence of applicable law choice to joint activity contracts; to construction, fitter's and capital construction works, the law of the country where this activity takes place or the results provided by the contract are being produced is to be applied.

It is necessary to pay attention to the changes made in the Regulation 'Rome I' final text in comparison with the Proposal for the Regulation. So, the Regulation does not define the law applicable to contracts concluded by an agent (agency contracts) and to contracts relating to intellectual or industrial property rights. It can be presumed that the European legislators considered a problem of definition of law of the place where the

party performing the service characterising the contract has his habitual residence to be an obvious issue. However, solitary participants of the 1978 Hague Convention on the Law Applicable to Agency as well as complex structure of an agency relationship (existence of internal and external relations), different doctrine approaches and law enforcement practice of the Community member states make the matter of applicable law detection with respect to such legal relationships rather complicated. Both the French doctrine and solitary judicial practice proceed from the same conflict law rule – *lex loci solutionis*[12] – which arises from the combination of the contract of commission and the contract of representation. The English doctrine supports application of various conflict law rules regulating internal and external relations: law of the country where an agent exercises his main activity and *lex causae*.

Article 5 of the Regulation 'Rome I' is dedicated to the contracts of carriage. As it is also provided in the text of the Rome Convention, in the absence of choice of applicable law the main subsidiary conflict law rule will be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. However, unlike the Rome Convention, the Regulation 'Rome I' proceeds from the necessity to apply the law of the country where the place of delivery as agreed by the parties is situated, if the aforesaid requirements are not met. Paragraph 2 of this article contains an innovation unknown both to the Rome Convention and the Proposal for the Regulation 'Rome I', which concerns the law applicable to a contract for the carriage of passengers in the absence of applicable law choice.

For instance, the applicable law to a contract for the carriage of passengers is the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply. Moreover, the Regulation 'Rome I' sets forth the restrictions regarding the freedom of choice principle defining the rule that the parties may choose as the law applicable to a contract for the carriage of passengers only the law of the country where the passenger has his habitual residence; or the carrier has his habitual residence; or the carrier has his place of central administration; or the place of departure is situated; or the place of destination is situated. At the same time where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with other country, the law of that country shall apply.

Article 7 'Insurance contracts' of the Regulation 'Rome I' is an example of an extremely differentiated conflict law rule. Firstly, it shall be applied to all insurance contracts, except for reinsurance; to contracts covering risks situated inside the territory of the member states; while to insurance contracts covering large risks as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Direct Insurance other than Life Assurance – regardless of if the fact whether the risk covered is situated in a member state or not. European legislators provided an opportunity for parties to choose any applicable law only with regard to the last type of the insurance contract. When the parties have not chosen the applicable law, the law of the country where the insurer has his habitual residence shall govern such type of the insurance contract.

In other types of insurance contracts, the contracting parties are free to choose only the alternatives contained in Article 7(3) of the Regulation 'Rome I'. Moreover, the member

[12] H. Batiffol*, Les conflits de lois en matièrs de contrats* (Paris: Sirey, 1938), at p. 282; Y. Loussouarn and J. Bredin, *Droit du commerce international* (Paris: Sirey, 1969), at pp. 710-716; P. Hay and W. Muller-Freienfels, 'Agency in the Conflict of Laws and the 1978 Hague Convention', *The American Journal of Comparative Law*, Vol. 27, No. 1, 1979, 1-49, at p. 28.

states that grant greater freedom of choice of law applicable to insurance contracts may take advantage of that freedom. If the parties did not designate the applicable law, such a contract shall be governed by the law of the country in which the risk is situated at the time of conclusion of the contract (for instance, the law of the country where the property is situated, the law of the country where the vehicle is registered, *lex loci contractus*, the law of the country where the insurer has his habitual residence, etc.).

European conflict law regulation of the individual employment contract did not undergo serious changes in comparison to the text both of the Rome Convention and the Proposal for the Regulation 'Rome I', with the exception of the fact that conflict law rules formed an hierarchical system (the law of the country where the place of business through which the employee was engaged is to be applied if it is impossible to determine the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract regardless of the fact that he carries out his work in several countries).

Restriction mechanisms in European and Belarusian law

The last problem within the present research is the analysis of restriction mechanisms provided for by foreign law application both in European and Belarusian law. We must not expect changes in content of public order reservation while its definition is invariable in all legal acts in private international law field. Meanwhile, certain changes have touched upon the overriding mandatory provisions institute.

Firstly, the terminology modification should be evaluated positively. Former legal acts (official texts in English) did not make a distinction between mandatory rules and overriding mandatory provisions which are to be applied despite the fact that legal relation is governed by foreign law. Belarusian law also contains such a contradiction in Article 1100 of the Civil Code.

Secondly, unlike the Rome Convention the text of the Regulation 'Rome I' defines overriding mandatory provisions as provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation. Such a statement is probably based on the position of the European Court of Justice formulated in the well-known *Arblade* case decision of 23 November 1999:

> The mandatory rule *(loi de police)* must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the state concerned as to require compliance therewith by all persons present on the national territory of that state and all legal relationships within that state.[13]

Unfortunately, Belarusian law contains an omission on this issue that adversely affects law enforcement practice as a judge faces a problem of extracting such rules out of all legal normative body. In case the overriding mandatory provision does not contain a qualificatory element (under territorial or subject criterion), determination of its legal nature appears to be rather difficult. The absence of precise criteria on referring foreign rules to the overriding mandatory provision involves a very large freedom of the court in certain circumstances, which results in inconsistency and ambiguous application of such rules.

Thirdly, it is necessary to pay attention to a range of overriding mandatory provisions falling under the Regulation 'Rome I' scope. It is generally known that the Rome Convention sets forth the obligation of member states´ courts to apply the overriding

[13] Judgment of the Court of Justice of the European Union of 23 November 1999 in the joined Cases C-369/96 and C-376/96 *Jean-Claude Arblade, Arblade & Fils SARL* and *Bernard Leloup, Serge Leloup, Sofrage SARL*. Available at: <http://www.peruzzetto.eu/cours/arblade.pdf>.

mandatory provisions *lex fori* and endowed the courts with the right to apply the overriding mandatory provisions of the state with which a contract is most closely connected. The problems of overriding mandatory provision qualification became a reason to reserve the right not to apply the provisions of Article 7(1) at the time of signature, ratification, acceptance or approval of the Convention. Great Britain, Ireland, Luxembourg and Germany enjoyed this right offered by the developers of the Convention in Article 22(1)(a).

Particularly, the draft of *Introductory Act to the German Civil Code* in its first version contained the provisions based on Article 7(1), but they have faced impetuous debates and it was decided to reserve the right for non-application of Article 7(1) of the Rome Convention (though in practice courts sometimes applied this mechanism). The above-mentioned problems have been removed from the Regulation 'Rome I' as its rules have a direct effect and are binding for all individuals and legal persons of the member states. However the final text of the Regulation differs from both the Rome Convention and the Proposal for the Regulation 'Rome I' since it allows the courts to apply the overriding mandatory provisions only of those states where the obligations arising out of the contract have to be or have been performed. This provision narrowed the range of overriding mandatory provisions as compared to the former version – 'the overriding mandatory provisions of the state with which a contract is most closely connected'. It seems that such an approach contributes to the appearance of 'limping legal relationships'. Belarusian law proceeds from the opportunity of applying overriding mandatory law of any other state being most closely connected with the considering legal relations (article 1100 of the Civil Code).

The afore-mentioned analysis allows the conclusion that both recent European and Belarusian private international laws are based on uniform principles. At the same time, the European system of rules of conflict law has many perspectives and is characterised by a greater complexity: on the one hand, it is responsive to both parties' interests, weighted to protect consumer rights and, on the other hand, overcomes obstacles to free movement of persons, capital, goods and services.

Chapter 12

European Union and Belarus
Legal assistance in criminal matters

Vadzim Samaryn
Belarusian State University

Introduction

State borders do not stop persons committing crimes in the present-day world. As experience shows the development of economic and cultural relationships among nations is used by criminals to suit their unlawful ends. Each state naturally needs legal assistance of other states; at this point the necessity of co-operation of independent sovereigns comes into existence. Nowadays it is undoubtedly clear that states need to unite legal means of combating crime in order to jointly resist it. That is why we should speak about the harmonisation of private as well criminal law. And Belarus takes steps in this direction.

It is well known that police and judicial co-operation in criminal matters was the third pillar of the European Union (EU). This pillar is still in the intergovernmental dimension. Taking into account the Central European location of Belarus, it is no wonder this state co-operates fruitfully in the sphere under research. The issue of compliance of the legislation of Belarus with the legislation of neighbouring countries (including the European Union) in the field of legal assistance in criminal matters remains topical.

Belarusian legislation on legal assistance in criminal matters

The President of the Republic of Belarus signed the law that amended the Code of Criminal Procedure with the provisions on the legal assistance in criminal matters on 4 January 2008.[1] The law is in force from 12 February 2008. For the first time ever bodies that carry out criminal proceedings (according to the Article 6 of the Code they are bodies of criminal prosecution and courts) have a national instrument, which they can use in their day-to-day work.

The Code of Criminal Procedure of the Republic of Belarus[2] provides the following opportunities for the legal assistance in criminal matters:

- mutual legal assistance (carrying out of investigative actions, summon of person for purpose of investigation, temporary transfer of person held in custody for purpose of investigation, delivery of subpoenas or other judicial acts, transfer of items, etc.);
- extradition of a person for purpose of prosecution or for purpose of enforcement of a sentence;

[1] Нац. реестр правовых актов Респ. Беларусь [National registry of legal acts of the Republic of Belarus], No. 6. – 2/1405, 2008.

[2] Ведомости Нац. Собрания Респ. Беларусь [Bulletin of the National Assembly of the Republic of Belarus], No. 28-29, Ст. 433, 1999.; Нац. реестр правовых актов Респ. Беларусь [National registry of legal acts of the Republic of Belarus], No. 47. – 2/152, 2000; No. 8. – 2/922, 2003; No. 80. – 2/969, 2003; No. 83. – 2/974, 2003; No. 74. – 2/1112, 2005; No. 121. – 2/1137, 2005; No. 175. – 2/1144, 2005; No. 1. – 2/1168, 2006; No. 6. – 2/1179, 2006; No. 9. – 2/1192, 2006; No. 92. – 2/1219, 2006; No. 111. – 2/1242, 2006; No. 4. – 2/1292, 2007; No. 170. – 2/1348, 2007; No. 264. – 2/1378, 2007; No. 291. – 2/1385, 2007; No. 1. – 2/1387, 2008; 2/1394, 2008; No. 6. – 2/1405, 2008; No. 14. – 2/1412, 2008; 2/1414, 2008; No. 184. – 2/1508, 2008.

- transfer of proceedings in criminal matters;
- execution of criminal judgments;
- transfer of sentenced persons to the state of their nationality.

We name these as types of legal assistance in criminal matters. There are common and special provisions for each type of legal assistance in the Code. But in this report we will pay our attention to the common provisions.

In a case where a foreign authority needs the legal assistance of the Belarusian body that carries out the criminal proceedings, it should make sure that there is an international treaty between these two states in the field of legal assistance. If there is no such a treaty the procedure is prescribed in the Code of Criminal Procedure. The procedure looks as follows:

1) the foreign authority transmits the request for assistance to the appropriate Central authority (matters of investigation – General Prosecutor's Office of the Republic of Belarus; matters of criminal proceedings by the court – Supreme Court of the Republic of Belarus);
2) approval of the request by the Central authority;
3) execution of the request by the body that carries out the criminal proceedings.

The Code names general conditions for rendering legal assistance in criminal matters. The request for legal assistance should be accompanied by: (1) an authenticated copy of the decision of the foreign authority to carry out the appropriate activities; (2) an obligation in written to carry out the same type of legal assistance on the request of the Belarusian authority according to the reciprocity principle; (3) an obligation in written to follow the specific provisions for the particular type of legal assistance; (4) other required documents in order to execute the request; (5) an authenticated translation in written of the request and all attached documents into Belarusian or Russian.

The general grounds for refusal are the following:

1) legal assistance can injure the sovereignty of the Republic of Belarus, its national security, rights and freedoms of citizens or it is in conflict with legal acts and international treaties of the Republic of Belarus;
2) according to the Criminal Code of the Republic of Belarus there is no crime;
3) the conditions of the Code of Criminal Procedure are not fulfilled;
4) the foreign country does not follow the reciprocity principle.

Comparison of Belarusian and EU legislation: The example of extradition

Belarus is not a member state of the European Union. That is why the norms of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on mutual assistance in criminal matters between the member states of the European Union, the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, relating to extradition between the member states of the European Union and other EU legal acts in the sphere under research are not applied to this state. Belarus is moving in the direction of ratifying of the Conventions of Council of Europe in the sphere of co-operation on criminal matters for a long period of time. At the same time, Belarus has bilateral treaties with some countries of the EU: in the order of legal succession after the USSR with Czech Republic, Hungary, and Slovakia and signed on its own with Latvia, Lithuania and Poland. With other member states of the EU Belarus can render legal assistance in criminal matters on the basis of the principle of reciprocity. The following issue is arising: will the new provisions of the Belarusian Code of Criminal

Procedure conform to the standards of the legislation within the EU? The issue is very extensive, but we will try to find an answer on the basis of comparison with the European Convention on extradition (1957)[3] (in the following referred to as the Convention).

Speaking of extradition, we should first of all compare the extraditable offences. Both the Code of Criminal Procedure and the Convention set two kinds of extradition: extradition for prosecution and extradition for enforcement of a sentence. The minimum term of the possible punishment in the first case is the same and is imprisonment or deprivation of liberty for a maximum period of at least one year, or a more severe penalty. And the term of imprisonment for the extradition for the enforcement of sentence in Belarus is a little bit longer – six months versus four months in the Convention. But it's understandable. Extradition demands considerable expenses and time.

The Belarusian Code of Criminal Procedure does not name directly the principle of double punishment that is laid down in Article 2 of the Convention. But the principle can be deduced indirectly from the provisions of Articles 481 and 484 of the Code where it is said that the offence should be named as a crime both in the Belarusian Criminal Code and the criminal law of a foreign state.

If we compare the grounds for refusal of the extradition request (Article 484 of the Code) with the appropriate provisions of the Convention (Articles 3-11) we can conclude that they agree on most points. But there are also some differences:

- the Code contains some grounds that are not included in the Convention (for example, an offence is prosecuted privately);
- the Code does not contain such an important ground for refusal as judgment *in absentia* (Article 3 of the Second Additional Protocol to the Convention). To our mind it does not fully comply with the provisions of Article 294 of the Code and does not contribute to fulfilment of the right of the accused to defend in the criminal proceedings;
- the nationality of the requested country, commitment of the crime within the territory or against the interests of the requested country are the mandatory grounds for refusal in the Belarusian Code of Criminal Procedure and optional grounds in the Convention;
- the Code contains as a ground for refusal the fact of granting of asylum in Belarus, but has no such a ground as commitment of 'political crime'. It is understandable because Belarusian legislation does not provide such a term. In the case of ratification by Belarus of the Convention it will express an appropriate reservation as it did the Russian Federation.

At the same time the Belarusian Code of Criminal Procedure does not allow extraditing a person threatened with capital punishment in a case for which there is no such punishment for the same crime in the Belarusian Criminal Code. This provision meets the requirements of Article 11 of the Convention. Unfortunately the Belarusian legislators provided as a ground of refusal the existence of requests from more than one state without laying down criteria for determining the to-be-executed request, in contrast to Article 17 of the Convention.

The provisions of the Belarusian Code of Criminal Procedure concerning the content of the request and the list of the supporting documents are fully complied with Article 12 of the Convention. Indirectly we can deduce the principle of speciality (Article 14 of the Convention) from norms of Articles 494, 475, 496 of the Code of Criminal Procedure

[3] European Convention on Extradition, Paris, 13 December 1957. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>.

where it is said that an extradited person can be processed only for the crime for which he was extradited; for other offences his rights cannot be restricted.

The matter of conformity of arrest, on the basis of an order issued by the prosecutor or an order issued by the investigator authorised by the prosecutor, with provisions of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms also does not come up. It should be attached to the request for extradition 'the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party' according to Article 12 paragraph 2a of the Convention.

Terms concerning extradition agree in the Code with the Convention. For example, the term of provisional arrest shall not exceed 40 days from the date of such arrest (Article 16 paragraph 4 of the Convention, Article 513 paragraph 1 of the Code).

The provisions on postponed and conditional extradition (Article 19 of the Convention, Articles 476, 486, 486 of the Code), extradition of nationals (Article 6 paragraph 2 of the Convention, Article 477 of the Code), and transit (Article 21 of the Convention, Articles 479, 489 of the Code) also agree in the both legal acts.

The experience of the legal assistance in criminal matters between Belarus and EU Member States

The officials of the Supreme Court of the Republic of Belarus and of the General Prosecutor's Office always welcome reciprocal co-operation. For example, in May 2008 the prosecutor of the Court of Appeal in Leeuwarden (The Netherlands) requested the delivery of the subpoena to Mr B (national of the Netherlands, living in Minsk, Belarus) as an accused. The judge of the Supreme Court of the Republic of Belarus retrieved Mr B, summoned him to the court and serviced the documents.[4]

During rendering of legal assistance in criminal matters, the law of the foreign state can be applied also if: (1) it is requested, and (2) such provisions of foreign law are not in conflict with Belarusian law. For example, in February 2008 the Polish prosecutor requested the examination of a Belarusian national. At the same time it was requested to notify him in advance about criminal liability for bearing of false witness according to the Polish Criminal Code. The person was notified.[5]

There are also some typical problems that accrue during such interaction. The authorities of some East European countries sometimes refuse the extradition of persons that are accused of called economic crimes making reference to political grounds of such accusation. The authorities of European countries not always transmit the full information about persons to-be-found. For example, the French authority requested in January 2008 the delivery of documents to some persons, but their names were written incorrectly and they could not be found. The request with all attached documents was sent back.[6] In some cases the General Prosecutor's Office has to refuse the rendering of legal assistance in criminal matters *durante absentia* bilateral treaty with another state and non-attachment of the obligation in written to carry out the same type of legal assistance on the request of Belarusian authority according to the reciprocity principle.

Having studied the practice of rendering of legal assistance in criminal matters between EU states and Belarus, we can conclude that the most efficient co-operation exists in the relations with Lithuania, Latvia, Poland and Germany.

[4] Archives of the Supreme Court of the Republic of Belarus.

[5] Archives of the General Prosecutor's Office of the Republic of Belarus.

[6] Archives of the General Prosecutor's Office of the Republic of Belarus.

Conclusions

We can conclude that, on the whole, the latest amendments to the Belarusian Code of Criminal Procedure allow Belarus to render legal assistance in criminal matters in accordance with the provisions of international law and European standards. During such a rendering the human rights and fundamental freedoms that are included in the Belarusian Constitution and Convention for the Protection of Human Rights and Fundamental Freedoms will be respected.

Belarus has also had fruitful experiences interacting with the member states of the European Union in the field of criminal proceedings.

Chapter 13

Collision of interests over the Nord Stream

The policy means to manage the divergence of corporate, national, regional and European perspectives within the Union

Csaba Törő
Karoli Gaspar Protestant University, Budapest

The nature of the Baltic pipeline: Bilateral, European or corporate matter?

Nord Stream, the grand Baltic energy project, is planned as an offshore gas pipeline of around 1200 km across the Baltic Sea connecting terminals at its eastern and south-western rim in Vyborg (Russia) and in Greifswald (Germany) respectively. The consortium today is made up of Gazprom (51 percent), BASF-Wintershall, and E.ON (each with 20 percent of the shares), the Dutch energy company, N.V. Nederlandse Gasunie (nine percent).

Although it is a business investment initiative by private parties with the official bilateral government support of their countries, the multilateral and multidimensional nature of the German-Russian pipeline became quickly apparent. The envisaged immense gas tube cutting across the entire Baltic Sea diagonally is manifestly and genuinely a project of European character for several reasons. The chapter explores that European character, how it impacts security concerns of the Baltics, and how the proper policy may help to manage these potentially conflicting interests.

Background

Nord Stream is planned as a pair of two parallel pipelines to transport eventually 55 billion cubic meters per year. The planned dual set of pipes on the seabed is estimated to cover altogether an area of 2400 square km.[1] Since natural gas is transmitted under high pressure in the pipelines, it needs to be compressed at every few hundred kilometres. In case of the Nord Stream, the transported gas will be compressed at the Vyborg station and again somewhere half way through (within the range of 500-600 km) in one service platform before it arrives in Greifswald.[2] The proposed gas pipeline will be the longest dual sub-sea gas pipeline in the world.

In September 2005, the signature of an international business contract by German and Russia energy corporate giants heralded the ceremonial launch of the largest undersea pipeline project ever prepared. The governments of Germany and Russia accorded their approval to a complex undertaking by private enterprises which represented a very ambitious initiative of unmistakable strategic importance far beyond the calculations of the involved business partners. OAO Gazprom (on the Russian side) and BASF/Wintershall AG as well as E.ON Ruhrgas AG (from the German part) signed the underlying contract as the legal basis for the transnational commercial energy delivery project. In this basic agreement on the construction of the pipeline, the corporate partners agreed to establish

[1] European Parliament resolution of 8 July 2008 on the environmental impact of the planned gas pipeline in the Baltic Sea to link up Russia and Germany, P6_TA-PROV(2008)0336.

[2] S. Nies, 'Oil and Gas Delivery to Europe: An Overview of Existing and Planned Infrastructures', *Gouvernance européenne et géopolitique de l'énergie*, 4 bis. (Paris: Les Etudes IFRI/French Institute for International Relations, 2008).

the North European Gas Pipeline Company (later renamed Nord Stream AG) as their consortium to organise and finance the technical and economic conditions for the implementation and operation of the East-West Baltic pipeline connection. The consortium was originally made up of Gazprom (51 percent), BASF-Wintershall, and E.ON (each with 24,45 percent of the shares). Later in November 2007 the transnational consortium was enlarged to include the Dutch energy company, N.V. Nederlandse Gasunie obtaining a packet of nine percent of shares at the price of the reduction of those held by the two German companies to 20 percent each.

Despite being technically a private business initiative, the envisaged immense gas tube cutting across the entire Baltic Sea diagonally is manifestly and genuinely a project of European character for several reasons. First of all, the composition of the Nord Stream 'galaxy of vested business interests' vividly demonstrates the very European dimension of the entire enterprise. The shareholders of the consortium, its contracted purchasers as well as contractors from several European Union (EU) member states illustrate the high profile nature of the project attracting many prime or leading national corporations in the energy sectors of various member states and in other related areas with precious knowledge and advanced technological skills.

Secondly, the Nord Stream will probably have a direct effect on certain environmental, security and economic interests of eight EU member states (Germany, Sweden, Finland, Latvia, Lithuania, Estonia, Denmark and Poland). According to the European Parliament (EP) resolution: 'the Baltic Sea area, which is a common asset of the states bordering the Baltic Sea, not a matter of bilateral relations between states'.

Thirdly, in the 2006 revision of the earlier Trans-European Energy Networks (TEN-E) Guidelines,[3] the Nord Stream, along with other gas pipelines (such as Nabucco) or connections between European networks, received formal recognition as an initiative of European interest and the status of a trans-European network project. The Trans-European Energy Networks policy aims at securing and diversifying additional gas import capacity from sources in Russia, the Caspian basin region, Northern Africa and the Middle East.

The European corporate dimension of the Nord Steam project

The European owners of 49 percent of the pipeline project represent flagships of the German and Dutch energy sectors. Gas de France also appeared in the frame as one of the main contracted gas purchasers beyond the immediate participant energy corporations. The circle of stakeholders in the implementation and operation of the Nord Stream extends much farther and draws an impressive list of other Western European companies into the preparation, construction and maintenance of the gas link through the Baltic Sea. The blend of corporate participants is composed of various technical specialists (such as seabed survey) and some generalists (port facilities) service providers, which all happen to be companies from Western or Northern European EU members. None of these interested parties are chosen from states along the Baltic shores between Germany and Russia. Vested interests in the Nord Stream project have been carefully spread across the spectrum of various energy suppliers and service providers related to the energy sectors in all senior continental EU member states.

The list of additional corporate partners is likely to increase as the project makes progress to reach further stages of implementation. The Nord Stream consortium has successfully engaged a growing number of partners to reinforce the European dimension of the controversial pipeline and generate more direct 'European interests' in the accomplishment

[3] Decision No 1364/2006/EC of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks, *Official Journal of the European Union*, L 262, 22 September 2006.

of the planned direct Russian-German gas connection, which is expected to open up opportunities for subcontractors to tap into the massive expenditure of the project.

Nord Stream and energy security in the EU: Diversification and/or reinforced dependency at the same time

Diversification as a central strategic objective of an energy policy has been identified in various EU documents – from the guidelines of trans-European energy networks of 2006 to the second Strategic Energy Review of 2008. The analysis given by the Commission in its policy proposals to the European Council and the Parliament in January 2007 stressed that the EU should promote diversity with due regard to all of its dimensions: sources, suppliers, transport routes and transport methods.[4] All elements represent indispensable components in the balanced allocation of energy risks stemming from increased and disproportionate dependence on any particular source, route or supplier. Therefore, effective diversification demands equal attention to all aspects and should not be mistakenly perceived as accomplished by any move restricted to only one dimension. New supply routes from the same source do not satisfy the conditions of genuine diversification. More of the same simply does not suffice to create reasonable dependence on foreign energy of variable origins and delivered through different connections.

The construction of any gas pipeline can introduce immovable means for the reliable transportation of energy as long as at one end of the connection sufficient amount of gas can be pumped into the system to fulfil the needs at the other end. These massive steal tubes demonstrate enduring energy links which solidly hold producers as well as consumers in a long-term relationship of bilateral dependence. It certainly can lend predictability to their co-operation in the provision and purchase of a steady flow of natural gas. The security of supply and demand can be firmly anchored in the mutually assured reliance on durable channels of delivery of vital hydrocarbon resources. Laying a gas pipeline is very expensive, but it has the advantages of significant longevity, between 35 and 60 years, and lower maintenance investments.[5]

Nord Stream has been explained as an important instrument to attain and maintain direct supplies to German and other Western European distributors and consumers of natural gas. Westbound extensions from the Baltic pipeline are planned to the Netherlands and even further to the United Kingdom with the aim to connect Russian sources to other European networks beyond Germany. The creation of the channel for delivery of natural gas directly to Western European energy networks would certainly contribute to the security of energy supply of these countries. As one of the strategic objectives of national and European energy policies alike, supply security stands out as the highly valued and recognisable benefit for the states at the receiving end of the planned Baltic pipeline.

The installation of a new supply pipeline may well accomplish the objective of direct delivery through the introduction of an additional connection to the energy supplier. At the same time, it can effectively undermine the attainment of the other strategic condition of energy security: the extension of choices with regard to potential sources of energy supplies. The Nord Stream can certainly be conceived as a project that may promote one aspect of energy security for Western European, namely the security of gas supply through the diversification of routes. By the same stroke, this new energy lifeline will further increase overall European dependence on Russian sources of natural gas. The Baltic

[4] 'An Energy Policy for Europe', Communication from the Commission to the to the European Council and the European Parliament, COM(2007) 1 final, Brussels, 10 January 2007, Paragraph 3.2.

[5] This is very different from the telecommunication industry with their continuous innovations. There are very few innovations in gas pipelines. Cf. C. von Hirschhausen, A. Neumann and S. Rüster, 'Competition in Natural Gas Transportation? Technical and Economical Fundamentals and an Application to Germany', Working Paper WP-GG-21b, Technical University Dresden, 2007.

pipeline project may reassure western purchasers of eastern gas and the Russian monopoly provider of the desired gas supply that no country between them could disturb the flow of energy, but at the strategic price of enhanced and prolonged exposure to resources under the control of one single country outside the EU.

Geopolitical reasons for and against the pipeline

Offshore pipelines laid through difficult seabed topography are certainly more demanding and expensive undertakings than the construction of pipeline connections on firm land. Despite the obviously much higher costs, undersea routes may still prove politically preferable if the energy supplier and/or consumer intend to avoid third country involvement as transit corridors and establish direct links. This consideration motivated the Blue Stream project across the Black sea from Russia to Turkey which opened in 2005 – the year in which the Nord Stream was officially announced.

Russia has been seeking ways to curb its dependence on transit countries by means of large investments in more direct connections to the largest consumers of Russian gas in Western Europe. The Nord (planned to be operational in 2012) and the South (planned to begin service in 2013) Streams would have the advantage of avoiding certain transit countries and also the consequence of reinforcing the dominant position of an extra-communitarian state-owned giant enterprise within the European market.

The pipeline project across the Baltic Sea from Russia to Germany was conceived as the northern flank of a strategic circumvention of the states between Russia and its most important energy clients, and therefore of the need for sustained co-operation with those intermediary states. The proposal to establish the means of direct delivery from the producer and monopoly supplier to its favourite and affluent consumer received support from both ends of the connection at government levels and in industrial quarters alike.

Every disturbance in the operation of the current land-based gas transport system through Belarus or Ukraine, again confirms the utility of such a direct Baltic connection, which utility overrides any consternation or worrisome prediction of strategic consequences by the Polish-Baltic quartet of opponents. Each disruption of Russian gas transport to their European destinations, following periodical (since 2006) and seemingly commercial disputes of Gazprom over gas prices and incurred debts with intermediary countries between Russia and the EU, has exerted significant pressure on potential beneficiary member states to reconsider the foreseeable advantages of the Nord Stream. In the light of their conceived vulnerability to Eastern European transit routes of gas from Russia, several European states tend to find real promised added value in a direct Baltic energy artery from their supplier into Western European gas distribution networks. As such, support for Nord Stream grows steadily with each instance of interruption of Russian gas delivery to EU members due to disagreements in their Eastern neighbourhood.

Even prior to the conclusion of the project contract, the concept of a direct northern gas connection initiative sparked controversy and criticism on the part of EU member states situated along the eastern shores of the Baltic Sea from Germany to Russia.[6] For these states, the *entente cordial* struck between the Russian state monopoly of gas supply and German corporate titans, with the unequivocal endorsement of the federal government in Berlin, raised the spectre of the familiar historic pattern of a Russian-German pact to seal the overriding strategic convergence of their interests to the detriment of nations squeezed between them in Central Europe and in the Baltic region. Beyond the worrying political

[6] P. Antoniades, 'Poland Angry at Russian Pipeline Plans', *EUobserver.com*, 4 August 2005. Available at: <http://euobserver.com/9/19668>; M. Beunderman, 'Germany and Lithuania Clash over Russian Gas Pipeline', *EUobserver.com*, 26 October 2005. Available at: <http://euobserver.com/19/20183>.

symbolism of this recurring conduct of affairs in German-Russian relations, Poland, Estonia, Latvia and Lithuania have found several practical reasons for their opposition to the Baltic offshore pipeline venture.

At the strategic level, these countries voiced security and economic anxieties over the loss of assured future gas supplies, as conduits for Russian gas export towards Western Europe. Under the existing technical arrangements, their impossible exclusion from and indispensable co-operation in the westward flow of Russian carbohydrates provided Poland and the three ex-Soviet Baltic states with an insurance against arbitrary interruptions, without serious repercussions for Germany and other Western recipients of Russian energy export. The elimination of these countries as transit connections to Western European energy networks will separate the security of their gas supply from that of major EU consumers of Russian gas. This is going to leave them perilously vulnerable to Russian political and economic extortion, through suspension or severance of energy supplies, without hurting the more important partners of Russia west of Poland and the Baltic countries. The EP resolution of 2008 on the Baltic pipeline warns of 'the geopolitical aspects of dependency on imports and the potential therein for politically motivated interruptions'.[7]

These Polish and Baltic anxieties have so far been either simply ignored or plainly rejected as ungrounded concerns. Their claims and clamour for consideration of their legitimate security and economic interests, as members of an economic community and political union of states supposedly committed to permanent co-ordination and co-operation on all issues of common concern, has not influenced the original strategic decision of the corporate partners taken with the decisive support of their government patrons.

Beyond geopolitical objections: Consideration to solidarity?

In spite of all the indignation and sense of insecurity of new EU members in the Baltic region expressed in the wake of the German-Russian strategic agreement on the bypass of Polish and Baltic energy interests, the security needs of these countries have been consistently left out of consideration and no adjustment in the planned project has addressed their future vulnerability stemming from their marginalisation in gas transit to Western Europe. No political or security arguments of Poland or the Baltic states have yet induced receptivity or understanding for their concerns in German governments (regardless of their composition) since the official announcement of the project in 2005.

References to solidarity and community interests within the Union have also proved ineffective and futile in the face of determination of the largest EU member state to pursue its earlier decision on strategic energy alignment with Russia. The head of the federal government of Germany at the time of signature of basic agreement on the Baltic pipeline, together with his successor, rejected criticism of the unilateral German decision and the ostentatious disregard for the interests of other EU member states by the invocation of Germany's 'sovereign right to secure its energy supply in the long term free of disruptions'.[8] The sovereign rights of EU members with respect to the basic choices of their energy policy have been and will remain basically unbound by the norms of community law. No common energy policy rule would oblige countries within the Union to submit their national policy decisions to approval through Qualified Majority Voting (QMV) or the consensus of other member states. Although the Lisbon Treaty reinforced the notion of solidarity 'if severe difficulties arise in the supply of certain products, notably in the area of energy'[9] and stated that 'Union policy on energy shall aim, in a spirit of solidarity between

[7] Paragraph 4.

[8] B. Benoit and H. Williamson, 'Merkels Meeting with Putin Signals Policy Continuity', *Financial Times*, 9 September 2005.

[9] Article 122, the Consolidated Treaty on the European Union and the functioning of the European Union.

Member States, to […] ensure security of energy supply in the Union',[10] it also expressly confirmed 'Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply'.[11]

Consequently, the desirable solidarity among EU member states in the security of energy supply has been heavily qualified by the reserved domain of sovereign choices made independently by each member of the Union. The principle of solidarity can not be called upon as binding reason due to consideration of the legitimate interests and concerns of other members of the same political and economic community. As the lessons of the Nord Stream project have demonstrated, appeals to solidarity and consideration seem particularly inapplicable and useless to achieve the reversal of a strategic decision on the political economy of energy security after being enshrined in a trans-national corporate agreement with the open bilateral support of governmental partners in the gigantic project.

Neither political lamentations nor demands for more sensibility towards the perceived strategic needs of other members in a supposedly ever closer community of European states are very likely to change strategic energy policy decisions *ex post facto*. No arguments of strategic logic or appeals to community values appear strong enough to take hold against the priority of those interests displayed in the proposed pipeline project. Although the project is officially steaming ahead undaunted by various objections, its course and outcome can still be effectively influenced or corrected by resort to the adequate means to save all sort of legitimate interests whose protection has been given recognition in international and community legal instruments. All countries along or affected by the planned pipeline may be able to add real weight to their concerns only through the steady demand for full compliance with every prescription relevant to such a complex and consequential project with manifold potential or actual ecological, economic and security repercussions.

International, European and regional environmental requirements of implementation

The Nord Stream project must meet serious requirements before it can be allowed to proceed towards implementation. These requirements and standards represent the multiple layers of regulations that determine the conditions of feasibility as well as permissibility of investments with complex and multiple transboundary consequences. International conventions, regional agreements and Community legislation constitute the complementary and reinforcing layers of normative restraints and prescriptions.

Multilateral obligation of environmental impact assessment

The Espoo Convention imposes the obligation of on state parties to carry out, either individually or jointly, appropriate environmental impact assessment (EIA) and take effective measures to prevent, reduce and control significant adverse transboundary ecological consequences of various activities proposed within their jurisdiction.[12]

Nord Stream will run through the Exclusive Economic Zones (EEZ) and/or territorial waters of six countries (Russia, Finland, Sweden, Denmark, Germany and Estonia). As a cross-border project, Nord Stream is subject to international conventions and national legislation in each of the countries through which it passes. Before any stage of the construction of the Nord Stream pipeline may start, an EIA has to be submitted about the environmental implications of the Nord Stream pipeline at national level to the relevant authorities of

[10] Ibid., article 194(1).

[11] Ibid., article 194(2).

[12] Article 2(1), Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991 (the Espoo Convention)

parties of origin (directly involved) together with all affected countries. The Nord Stream AG officially planned the final and comprehensive EIA covering the entire pipeline for 2009.

Three Baltic Sea states (Sweden, Estonia and Lithuania) have already pronounced their dissatisfaction and doubts concerning the accuracy or depth of the environmental impact assessment undertaken so far within the preparations of the Nord Stream project.[13] The Swedish government authorities (12 February 2008) pointed at significant procedural and substantive shortcomings and the lack of analysis of an alternative route including the option of abandoning the construction of the pipeline. The Lithuanian parliament (27 March 2007) stressed the need to suspend the implementation of large-scale infrastructure projects in the Baltic Sea before the completion of a through analysis of alternative solutions together with independent and comprehensive environmental impact assessments. The Estonian government declined (21 September 2007) to grant permission for undersea studies in the exclusive economic zone of the country due to doubts about the scope and scale of those studies. As the European Parliament resolution on the Baltic pipeline underlined, the officially adopted timetable of the Nord Stream project prevent a thorough analysis of the results of the environmental impact assessment by interested states and international (intergovernmental or non-governmental) organisations.[14] The EP intended to rectify the situation resulting from the lack of reliable environmental impact assessment and called upon the Commission to evaluate the additional impact on the Baltic Sea caused by the Nord Stream project.[15]

Alternatives to the proposed pipeline

In accordance with the relevant norms of the Espoo convention,[16] consultations with parties exposed to the harmful effects of transboundary projects must be pursued including implementation costs and environmental safety as well as an analysis of the conceivable alternatives to the proposed projects. In this case, the analysis of alternatives has to cover overland routes for the proposed gas connection and even the possibility of abandonment of offshore plans.

Currently, opposition to Nord Stream is particularly strong in Sweden and Finland, which are contesting the planned route through their Exclusive Economic Zones including a planned compression station on Gotland Island in Swedish territory. In early April 2008, the Swedish authorities announced that Gotland would be preserved as a tourist area and not serve as a stage for the project.[17] It will be difficult to find another route for the Nord Stream that avoids these Finish and Swedish exclusive economic zones, since it should cross Estonian, Latvian or Lithuanian EEZ which represent even more 'hostile terrain' for the implementation the proposed pipeline.

Community law on conservation areas

The proposed route of the Nord Stream will traverse zones designated as special areas of conservation in the Natura 2000 programme in the relevant piece of Community legislation.[18] Under the normative framework of the adopted programme, member states are required to take necessary measures to avoid the deterioration of natural habitats of species in special areas of conservation.[19] Furthermore EU member states are obliged to undertake an appropriate assessment of the implications of any plan or project not directly connected with or necessary for the management of the conservation areas, but likely to

[13] EP resolution on the Baltic pipeline.

[14] Paragraph 16, EP resolution.

[15] Paragraph 21, EP resolution.

[16] Article 5(a), ibid.

[17] Directive of Nord Stream AG, 7 April 2008.

[18] Directive 92/43/EEC.

[19] Ibid., article 6(2).

have significant effect on the conditions of these ecologically highly valuable sites.[20] Another provision of the relevant directive stipulates the duty of member states to agree to these plans or projects 'only after the having ascertained that it will not adversely affect the integrity of the site concerned' in the light of the conclusions of the above assessment.[21]

The role of the Commission can assume particular significance in situations which require its approval based on the conduct of a thorough assessment of whether the implementation of certain projects fully comply with the rules governing activities and decisions of community concern. This control function is exemplified by the requirement of Commission endorsement of projects affecting Natura 2000 conservation areas.[22]

Summary: Normative restraints on the Nord Stream as remedy for the lack of strategic or geopolitical means of influence

Instead of the lofty ideas and expectations of solidarity and reciprocal respect for vital national interests within the Union, effective remedy can be found in the requirement of compliance with the prescriptions of orderly management of common concerns and public affairs among the members of a community governed by the rule of law. Similarly to national normative systems of governance, the regional intergovernmental constitutional order of the European Union offers the promise of the ultimate relief of *rights* against *might* in the clash of interests and rivalry of priorities over matters subject to mutually agreed norms.

The significance of the project on a European scale is reflected not only in its outstanding influence on the energy relations of several EU countries with Russia, either by their inclusion (Germany and other western European states) or by their exclusion (Poland and the three Baltic states), but also in its impact upon the effective application of all relevant EU and international norms to the proposed controversial project within a community governed by the rule of law. The planned construction and operation of the Nord Stream is required to comply with prescriptions determined by rules laid down in international conventions and also in secondary sources of European community law. With the exception of Russia, all the other countries located around the Baltic Sea and affected by the project are directly bound by the rules of EU law.

The involvement of Community institutions would have a better chance to address the uncertainties and anxieties of several member states concerning the potentially grave implications of the Nord Stream project. Drawing on the European Parliament, the European Commission and the Council, within their own competences, to play their parts in the deliberations on the impact of the proposed Baltic pipeline on the environment and on the security of the EU member states could mean the effective 'Europeanisation' of the controversy surrounding the German-Russian gas link. The moves to mobilise the principal institutional components of the Union signal the elevation of strategic disagreements and contending priorities out of their initial regional context through the successful multilateralisation of the discourse. Multilateralisation at the level of the Union and reliance on binding EU, as well as international norms, can provide for the reassurance against the exclusion and marginalisation of the legitimate interests and needs of EU members outside the consortium of beneficiaries.

[20] Ibid., article 6(3).

[21] Ibid.

[22] Article 6(4), Directive 92/43/EEC.

Appendix

Workshop programme

European Integration – Challenges and Visions from the Baltic Perspective: debates on the Future of Europe from the Constitutional to the Lisbon Treaty and beyond

Programme

Venue: Riga Graduate School of Law, Riga, Latvia
Date: **November 20-21, 2008**

The debates on the future of the European Union following the recent waves of enlargement marked by ratification drawbacks of Constitutional and Lisbon treaties have revealed a deeply contested nature and visions of the ongoing institutional reforms and process of constitutionalisation of the Union. The divergent conceptions of a role of a state and supranational democracy at the national and European levels determine the vectors of future of the European integration and conceptualisation of the democracy.

On the basis of different normative models and their operationalisation, RECON tests three options for the reconstitution of democracy in the European Context.

- Can democracy in Europe be reconstituted at the national level, with a concomitant reframing of the EU as a **functional regulatory regime**?

- Can democracy be reconstituted through establishing the EU as a **federal state** based on a collective identity?

- Can democracy in Europe be reconstituted through developing a **post-national Union** with an explicit cosmopolitan imprint?

The workshop aims to bring together leading experts from Estonia, Latvia, Lithuania and other countries to explore the EU's constitutional future and prospects for supranational democracy in the EU from a particular Baltic perspective. The workshop will explore the positions, priorities and discourses among the main political, social and economic actors from all three Baltic countries on ongoing Treaty reforms and recent and future enlargements of the European Union. The separate section of the workshop will be devoted to the issue of Eastern enlargement of the EU with the focus on EU cooperation with Belorussia, Ukraine and Russia.

Through analyzing constitutional and legal-institutional adaptations at the national levels as well as the role of the intermediary organizations and mass media in each country the workshop seeks to explain and compare the prospects for supranational democracy in Europe as conceptualized by three RECON models among three selected Baltic countries. Therefore, the main issues to be addressed at the workshop are:

- What are the position of the main political and social/economic actors from Baltic countries on the reform of the European Union *i.e. what are the 'visions'/understanding of the legal-political construction of the European Union in the context of the ongoing reform of the founding Treaties and recent and possible further enlargements.*

- Building on the RECON models what are the Baltic countries position on the further construction and reform of the European Community and understanding of the meaning/functioning of the supranational democracy.

- What are the models of co-operation and the position of the national actors from Baltic countries on the the Eastern non-EU member countries, specifically Belarus.

The workshop is organised around five thematic panels that focus on the EU reforms as follows: on national legal - constitutional dimensions (Panel 1); on the socio-economic dimension (Panel 2), on the neighbourhood policy dimension (Panel 3); on the political dimension (Panel 4); and finally, on the public mass media dimension (Panel 5).

November 20, 2008

09.30 – 10.00	Registration and Coffee
10.00 – 11.00	**Opening of the Workshop**
10.00 – 10.15	**Prof. Dr. iur. Lesley Jane SMITH** Rector, Riga Graduate School of Law
10.15 – 10.45	**Reconstituting Democracy in Europe** **Prof. Dr. John Erik FOSSUM** Senior Researcher, University of Oslo, ARENA - Centre for European Studies
10.45 – 11.00	Discussion
11.00– 12.45	**Panel 1: Challenges from national Constitutions and legal dilemmas in the process of debates on European Union reforms.**
11.00 – 11.10	Moderator: **Prof. Dr. iur. Thomass SCHMITZ** Guest lecturer of the DAAD at the University of Latvia
11.10 – 11.35	**The EU Constitutional Treaty and the Lisbon Treaty: the Matrix Reloaded?** Dr. Irmantas JARUKAITIS, Researcher, University of Vilnius
11.35 – 12.00	**Legal scholarship in the Baltic states: Prospects for effective participation in European governance discourse** Dr. Anneli ALBI, Senior Lecturer, University of Kent
12.00 – 12.25	**Collisions between the European Union and national legal norms; and the general principles of law** Dr. Daiga IĻJANOVA, Associate professor, University of Latvia
12.25 – 12.45	Comments and discussion
12.45 – 13.30	Buffet lunch
13.30 – 15.40	**Panel 2: Intermediaries in the political process: role, structure and positions of interest groups in deliberations on Europe.**
13.30 – 13.40	Moderator: **Dr. Elmar RÖMPCZYK** Coordinator of Friedrich Ebert Stiftung for Baltic countries
13.40 – 14.05	**Trade Union Role and Partnership for better Jobs** Irena KALNINA, Legal Counsel, Latvian Telecommunications and Post Office Worker's Trade Union

14.05 – 14.30	**Overcome the gap in social trust** Peep PETERSON, Chairman of the Board, Estonian Trade Union of Transport Workers
14.30 – 14.55	**Tackling climate change: environmental activism and NGOs as stakeholders in EU climate and energy policy setting and implementation** Alda OZOLA-MATULE, Chairwoman, Latvian Green Movement NGO
14.55 – 15.20	**Collision of interests over the North Stream: the policy means to manage the divergence of corporate, national, regional and European perspectives within the Union** Dr. Csaba TÖRÖ, Professor, Budapest College of Communication and Business; Senior Research Fellow, Intsitute of International Studies, Corvinus University, Hungary.
--	***Laval* and *Viking:* Baltic Interests before the European Court of Justice** Uladzislau BELAVUSAU, Ph.D. Researcher - Department of Law, European University Institute (*unfortunately unable to attend, see however draft paper in the conference materials*)
15.20 – 15.40	Comments and Discussion
15.40 – 16.00	Coffee Break
16:00 – 18:10	**<u>Panel 3:</u> Eastern boarders and the enlarging EU: the current situation and future perspectives**
16.00 – 16.10	Moderator: **Victor MAKAROV** Director, Political Centre EuroCivitas, Latvia
16.10 – 16.35	**Future of the European Neighbourhood Policy and the first generation of "enhanced agreements" with the neighbouring countries: Cases of Ukraine and Russia** Prof. Dr. Roman PETROV**,** Professor, Donetsk National University; Chairman of the Ukrainian European Studies Association
16.35 – 17.00	**EU Neighbourhood Policy Towards Belarus: Challenges and Future Prospective** Aliaksei ANISHCHANKA, Senior Lecturer, Faculty of International Affairs, Chair of International Private and European Law, Belarusian State University Attorney-at-Law, Partner "Vlasova Mikhel and Partners" LLC

	Maryia YURIEVA, Lecturer, Faculty of International Affairs, Chair of International Private and European Law, Belarusian State University; Associate in "Vlasova Mikhel and Partners" LLC
17.00 – 17.25	**Comparative-legal analysis of European and Belarusian conflict-of-laws provisions** Dr. Alena BABKINA, Head of the Department of the International Private and European Law, Belarusian State University
17.25 – 17.50	**European Union and Belarus: Legal Assistance in Criminal Matters** Dr. Vadzim SAMARIN, Associate Professor, Chair of Criminal Procedure, Belarusian State University
17.50 – 18.10	Comments and Discussion
19.00 – 20.30	Reception at the Riga Graduate School of Law

November 21, 2008

09:30 – 10.00	Registration and Coffee
10.00 – 12.10	**<u>Panel 4.</u> National MS interests vs. Baltic regional interest vs. European? Perspectives and parameters of cooperation between national and European levels on EU.**
10.00 – 10.10	Moderator: **Professor *Dr.paed.* Zaneta OZOLINA** Head of Department of Political Science, Director of Advanced Institute of Social and Political Research University of Latvia.
10.10 – 10.35	**Latvian and European interests in the Eastern partnership initiative** Dr. Toms ROSTOKS, University of Latvia
10.35 – 11.00	**Is the Common House of Europe Being Built on Democratic Foundations?** Vytautas SIRIJOS GIRA, Analyst, Centre for Eastern Geopolitical Studies, Lithuania
11.00 – 11.25	**Interests and possibilities for a Baltic cooperation in legal matters in the EU** Dr. Christoph SCHEWE, DAAD-Lecturer, University of Tartu
--	**Representation of National Interests in the EU and Organisational Infrastructure for the Coordination of MSs National Opinion**. *The Case of Administration of the European Agricultural Fund's of the Rural Development Amount for Lithuania*

	Živilė ŠUKYTE, Chief Specialist, Ministry of the Agriculture of the Republic of Lithuania; PhD candidate and lecturer, Vytautas Magnus University. (*unfortunately unable to attend, see however draft paper in the conference materials*)
11.25 – 11.45	Comments and Discussion
11.45 – 13.00	Buffet lunch
13.00 – 14.20	**<u>Panel 5:</u> Deliberative public sphere - a wishful thinking or an emerging reality? Role of the Baltic mass media in communicating European debate to the publics.**
13.00 – 13.10	Moderator: **Prof. Dr. *paed.* Inta BRIKŠE** Dean, Faculty of Social Sciences, University of Latvia
13.10 – 13.35	**How does the 'going local' work in practice? Disclosing EU news and information management processes – from Brussels' institutions to the publics in Lithuania** Ausra VINCIUNIENE, Ph.D. Candidate and Lecturer at the Faculty of Political Science and Diplomacy at Vytautas Magnus University (VMU), Lithuania.
13.35 – 14.00	**No watchdog, no worries...** Ansis BOGUSTOVS, Journalist, Freelancer for production agency "HansaMedia", newspaper "Latvijas Avize" and also "Radio Latvia"; Host of the European affairs TV magazine "Eirobusiņš" (Latvian TV).
--	**The role and future of professional journalism in deliberative public sphere. Baltic media perspective** Dr. Halliki HARRO-LOIT, Head of Institute of Journalism and Communication, University of Tartu (*unfortunately unable to attend, see however draft paper in the conference materials*)
14.00 – 14.20	Comments and Discussion
14.30 – 15:30	**Closing of the Workshop – Round Table Discussion** Prof. Dr. iur. Lesley Jane SMITH Prof. Dr. John Erik FOSSUM Prof. Dr. iur. Thomass SCHMITZ Victor MAKAROV Prof. Dr. Inta BRIKŠE