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TOWARDS A COMMON ENERGY POLICY IN THE EUROPEAN UNION?

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Abstract. *Energy policy issues have got increasing relevance in the strategic orientation of the European Union (EU) in general, and in identifying specific economic policy tasks, in particular. Steadily high energy (oil and gas) prices in the last years constitute one factor. However, global political and security issues of growing degree of uncertainty, the level of dependence on imported energy and, not less importantly, the forecasts of growing external dependence of the EU in this field have substantially contributed to the upgrading of the energy question. Finally, the liberalization of the single market, not least in the crucial area of energy supply and the enlargement of the EU by 12 new members, with specific composition of production and not less specific pattern of imports of energy, enhanced the importance of energy in the enlarged EU, with a view to shape and implement a common energy policy.*

Keywords: *EU energy policy, energy consumption, energy security*

The idea of creating a common energy policy is anything but new. Two out of the three basic documents of the Rome Treaties (1957) addressed the energy question. One of them focused on the European Coal and Steel Community, while the other gave birth to the Euroatom. One and a half decade later, the first oil price explosion and related uncertainties of continuous and reliable supply happened to raise political and economic policy attention to the necessity of creating a common energy policy. The key answer was constrained to the increase of the obligatory national (not community-level!) reserve rate to cover 90 days of regular demand. The Delors plan of creating a single market, started in the mid-eighties, aimed at dismantling protectionist national barriers in all sectors, not least, in the field of energy. Initiatives to design a common energy policy obtained additional impulse in the nineties, in connection with the strengthening of environmental priorities. Despite all supporting elements in the last decades, member countries have not yet been able to agree on a common energy policy, and not even to eliminate national barriers or to transfer national decision-making competence to community level. On the one side, a number of fundamental Commission documents, although with different policy relevance, have been dealing with energy policy objectives (see the Amsterdam and Maastricht Treaties and the renewed version of the former). Still, energy policy issues have predominantly remained in member country competence, because no member was ready to give up national competence and let it upgrade to community level.

This is the current situation, despite the fact that, in the last years, energy became one of the key elements of sustainable development, both regarding production, import dependence and environmental policy. Today, the EU is the most important oil and gas importer of the world (representing about 16 to 18 per cent of global imports), while its consumption amounts to 14 per cent of the world. Despite its determining role in world imports of energy, it has a rather modest influence on shaping global production and supply conditions. The most effective instrument can be identified on the demand side, by formulating and implementing policies

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with limited impact on the EU's position in the global energy market (energy saving, gradual transformation of the pattern of energy production). Longer-term prospects are by no means more promising, since the EU's dependence on imported energy (mainly natural gas) may raise from 50 % at present to about 70 % by 2030. At the same time, it seems already obvious that the original environmental targets set in Kyoto are far from being achieved.[1] As a result, the share of renewable energy will fundamentally fall short of the 12 % target of primary energy consumption by 2012/2020.

The current and future energy situation of the EU is aggravated by the fact that the specific energy consumption of the new members of 2004 and 2007 is generally higher than the average of the EU-15. In addition, their import dependence is stronger and, in most cases, they reveal a unilateral dependence on Russia. Let alone the fact that, in the next years, they will have to carry out a strong coordination and harmonization process with EU directives both in the field of energy and of environmental/climate change policies.

Some global features

In 2004, the determining weight of global primary energy production was represented by three sources. Oil accounted for more than one-third, coal had a share of one-quarter and natural gas participated with 21 per cent. In addition, 6.5 per cent was produced in nuclear plants. The total share of 13 per cent of renewable energies was dominated by hydroelectricity, while other new energy sources (wind, geotermic, solar or those based on the tides of the seas) altogether were responsable for hardly more than 0.5 per cent of total energy production.[2]

Although some experts still nourish hopes that the share of renewable energy can be substantially raised in the next decade(s), forecasts until 2030 remain characterized by the dominant role of fossile energy carriers within the global energy demand. Between 2005 and 2030, global energy demand is expected to rise by 1.8 per cent a year, or by 55 per cent in a quarter of century. Above average demand increase characterizes natural gas (68 per cent), mainly supported by the rapid increase of energy demand and structural change of energy consumption in one part of the developing countries (emerging economies). Similarly, the demand for coal is estimated to rise by 73 per cent, hopefully accompanied by strict implementation and higher efficiency of environment-friendly technologies. In 2030, oil, natural gas and coal are expected to cover 82 per cent of world energy demand (see Table 1.).

[1]One of the latest official documents of the European Commission wants to reduce the emission of contaminating materials by 14 per cent in the EU-27 group until 2020. Világgazdaság, January 24, 2008.
[2]Figures taken from official documents of the International Energy Agency.

Table 1

Global energy demand by dominant energy carriers (in mn tons oil-equivalent and in per cent)

Energy carrier	Demand 2005	Demand 2030	Demand growth between 2005 and 2030 (in per cent)	Demand structure 2005 in per cent	Demand structure 2030 in per cent
Oil	4.000	5.585	39.6	35.0	31.5
Coal	2.892	4.994	72.7	25.3	28.2
Natural gas	2.354	3.948	67.7	20.6	22.3
Biomass	1.149	1.615	40.6	10.1	9.1
Nuclear	721	854	18.4	6.3	4.8
Hydroenergy	251	416	65.7	2.2	2.3
Other renewable energies	61	308	404.9	0.5	1.7
Total demand	11.429	17.721	55.1	100.0	100.0

Source: International Energy Agency and World Energy Outlook, 2005 and 2007.

In the last years, several new developments with longer term impact have emerged in the energy market in general, and in some specific segments of the market, in particular.

First, figures characterizing specific energy consumption and environmental impacts reveal big cross-country differences. The United States generates 27 per cent of world GDP by consuming 25 per cent of the global oil consumption.[3] In turn, the EU produces 30 per cent of world GDP by using only 18 per cent of the world oil consumption. More significantly, China contributes by 6 per cent to the global GDP by registering 9 per cent of global oil consumption. Differences concerning environment-contaminating emission are even bigger. The share in global emission of the USA amounts to 21, that of China to 19 per cent, while the EU is „only'" responsible for 15 per cent.[4]

Second, significant changes have been occurring in the geographic pattern of oil production and consumption. In 2006, the share of OPEC amounted to 42 per cent of total oil production, while 58 per cent was provided by non-OPEC oil-producers. In case that the membership structure of OPEC remains unchanged, by 2015 both groups are expected to have equal share in total production. However, by 2030, based on already proved reserves and on expected global demand, the OPEC group is likely to represent 52 % of total production. In other

[3] The above figures do not only indicate that the EU has a lower specific energy consumption but also calls attention to the fact that the EU is making higher use of other energy carriers than the USA (particularly coal and natural gas).

[4] Based on UN statistics, see: Androsch (2008), Turbulences in the world economy and financial markets. What Europe could do. The Central and Eastern European Forum. Euromoney Conference, Vienna, January 15-16.

words, global dependence on OPEC seems to be rising. More important shifts can be forecast in the geographic pattern of consumption. The still dominant position of the OECD countries (56 per cent in 2006) will dramatically diminish by 2030 (to about 45 per cent), while other parts of the world will represent 55 per cent of total consumption. In this context, China's share of 8.4 per cent in 2006 is expected to reach more than 14 per cent and that of India to rise from 3 to 6 per cent.

Third: several countries will not be able to keep pace with domestic consumption (e.g. China), or, even worse, domestic production is predicted to fall, accompanied by rising consumption (as in the EU) while the share of imported energy in total consumption will be growing. According to our current level of knowledge, the basic problem is not whether, in physical terms, the required amount of energy can be obtained, an issue many experts and politicians were afraid of during the first oil crises 35 years ago. Proved resources are at disposal, even if at higher prices. A more important risk factor consists in the gradual concentration of production (and reserves) in the hands of a big producer, in general, and in politically unstable countries, in particular.[5] Based on figures from 2006, almost three-fourths of the proved global oil reserves (1.2 trillion barrels) is located in seven countries, out of which six belong to the OPEC (plus Russia). If the current growth rate of oil production is maintained, oil reserves of the USA and China will be depleted in 12 years, those of Canada in 14 and those of Russia in 22 years. On the contrary, the reserves of Iraq and Kuwait will last for more than 100 years, those of the United Arab Emirates for 90, those of Iran for 87 years (similar figures for Venezuela point to 78, and those of the by far largest producer, Saudi Arabia, to another 67 years, respectively). It means that the uneven time horizon of depletion of reserves may dramatically increase global dependence on some (mostly Middle Eastern and Central Asian) countries with huge oil reserves within the next one or two decades.[6] Concerning natural gas, the geographic pattern seems to be a bit more favourable (better balanced). By far the highest reserves have been registered in Russia. However, the combined natural gas reserves of the Near and Middle East are 27 per cent higher than the proved reserves of Russia and of other CIS-countries.[7]

Fourth: security of supply does not only depend on the geographic concentration of production and transportation routes but also on the institutional and company-level frameworks that control strategic movements and policy steps related to key energy carriers. In fact, the latter does not reflect a lower degree of concentration of political power and market dominance. To be sure, at present most of the currently leading oil and natural gas companies of the world are located in the USA and in Western Europe. However, it cannot be ignored that the influence of firms located in the Middle East and elsewhere, many times either in state ownership or at least under strict state control has started growing in the last years. As far as Europe is concerned, particular importance has to be attached to the Russian Gazprom. In the global context, the role of Petrochina, that in the summer of 2007, following its

[5] This statement holds not only for large part of energy carriers (oil and natural gas), but for most of the raw material market. For an outstanding analysis of concentration on politically risky countries and its consequences, as well as of the available economic policy instruments in order to have access to basic resources, see the 2007 annual report of UNCTAD. UNCTAD (2007), World Investment Report 2007, New York.

[6] Forecast of British Petroleum, as reported by The Financial Times, 2007.

[7] RWE Weltenergiereport (2007), Eon Ruhrgas, Bundesverband der Energie- und Wasserwirtschaft

introduction into the Shanghai stock exchange, suddenly became the world's leading company, has to be emphasized.[8]

Energy situation and outlook of the European Union

Between 1990 and 2005, the energy consumption structure of the EU experienced substantial changes. The share of coal decreased by one-third, while oil consumption grew in line with total consumption (16, vs. 15 per cent, respectively), consumption of natural gas skyrocketed by 63 per cent. In addition, nuclear energy production grew by 26 and that of other, mainly renewable energy carriers, from a very low initial level, by 31 per cent. In the next 15 years no such radical shifts have been predicted. However, the relative role of natural gas will keep on increasing. In the next one and a half decades, growth rate of natural gas consumption is expected to be around 19 per cent, as compared to the overall consumption increase by 6 and that of oil by 4 per cent. In turn, nuclear electricity production may be reduced by more than 10 per cent as a result of previously approved closing down of several plants, particularly in Germany).[9] Basic figures are contained in Table 2.

Table 2

Composition of EU energy consumption by key energy carriers (at million tons of oil-equivalent)

Energy carriers	1990	2005	2020	Change 2005/1990 1990=100	Change 2020/2005 2005=100	Share 2005 %	Share 2020 %
Total	1314	1509	1608	114.8	106.6	100.0	100.0
Coal	301	201	218	66.8	108.5	13.3	13.6
Oil	545	632	658	116.0	104.1	41.9	40.9
Gas	222	363	431	163.5	118.7	24.1	26.8
Nuclear	181	228	199	126.0	87.3	15.1	12.4
other	65	85	102	130.8	128.4	5.6	6.3

Source: Eurostat.

As a result of continuing energy savings, the total energy consumption of manufacturing will remain practically unchanged, meaning that specific energy consumption will keep on declining across different industrial sectors. In turn, energy consumption by transportation, but particularly that of the residential sector (private consumption for heating, cooling,

[8] Petrochina's market capitalization trebled in the first day of its presence on the stock exchange. Altough the introductory value has dropped in the meantime, the company is still not only the leading global firm (according to market capitalization) but as big as the two following US firms together (Exxon-Mobil and General Electric).

[9] This forecast does not take into account the construction of new nuclear plants already announced or started in some EU member countries (from Finland to Bulgaria). Neither does it reckon with the potential change in the energy strategy of some member countries in order to let nuclear plants continue functioning or fundamentally revising the energy strategy, due to the changing evaluation of external dependence (e.g. Germany for nuclear energy and EU strategy towards Russia concerning dependence).

cooking, etc.) will maintain its increasing trend. What is more important is that in the consumption structure of the residential sector, the importance of natural gas is dominant and its share keeps on growing.

Against the moderate increase of energy consumption, opposite development can be identified in EU production of energy. Taking into account all energy carriers, EU domestic production reached its peak level around 2000. Until 2010, the current production volume can be maintained or will only insignificantly start decreasing. However, after 2010, the process of reduced production will gather momentum and this trend is expected to last in the next two decades. In consequence, domestic energy production in 2020 may fall short of about 10 per cent of its current level and of one-third in 2030.

Based on diverging production and consumption trends, even a moderate increase of consumption enhances the EU's dependence on external energy supply. Between 1990 and 2000, new energy sources both in the EU and in Norway have allowed the growth of domestic consumption to be completely covered by the expanding domestic (and Norwegian) production, while extra-EU imports of energy remained unchanged or even indicated modest decrease. This trend is turning around between 2000 and 2020, so that growing domestic demand cannot be covered any more by stagnating production until 2010 and decreasing output after this date. This development does not only result in increasing imports but also in the fact that by 2020 energy imports are likely to exceed domestic energy output (as expressed in mn tons of oil equivalent). Until 2030, the gap between steadily rising imports and declining domestic production will be constantly widening. Imports that accounted for less than half of total EU consumption in 2000, will represent 55 per cent in 2010 and 63 per cent by 2020. Nevertheless, it is important to mention that imports of different energy carriers will reveal very different dynamics. Largest increases are expected in the imports of natural gas and coal, being the latter easily available from reliable partners and in unlimited quantities. Imports of coal represented 47 per cent of total coal consumption in 2000, with rapidly growing shares for 2010 and 2020 (52 and 70 per cent, respectively). Natural gas sector reveals an even more dynamic growth of imports in total consumption. The import share of 40 per cent registered in 2000 will exceed 50 per cent by 2010 and almost 70 per cent by 2020.[10] A fundamental difference between coal and natural gas is that the former can be purchased from stable (reliable) countries, while the latter, at least according to some energy experts in the EU, cannot avoid supply from less or definitely unstable and politically „difficult" countries. The main supply sources based on geographic and sectorial breakdown, are summarized in Table 3.

[10] Energy import dependence of the new member countries is even higher, since already today they cover half of their energy demand from imports. This share will reach 63 % in about 15 years. However, their consumption and energy import structure differs from that of several large (and smaller) EU-15 countries. On the average, they are less dependent on coal imports (below 50 per cent of coal consumption), while their dependence on oil imports in total oil consumption will increase from the already very high 80 per cent to almost 90 per cent. Again, the most fundamental change is predicted in their natural gas balance. While in the last 15 years, natural gas imports did not reach half of total natural gas consumption, its share will rise to 60 per cent in 2010 and to around 75 per cent in 2020.

Table 3

Geographic and sectorial pattern of the energy demand of EU-27 (2004, in per cent of total coal, oil and natural gas consumption)

Geographic origin of supply	Coal	Oil	Natural gas
Domestic production	54	18	37
Imports	46	82	63
- developed countries	24	13	17
-South Africa	13		
- Australia	7		
- USA	4		
- Norway		13	17
- Russia	8	26	29
- developing countries	14	43	17
- Colombia	6		
- Indonesia	3		
- others	5	10	2
- Saudi Arabia		9	
- Libya		8	
- Iran		5	
- Algeria		3	13
- Kazahstan		3	
- Nigeria		3	1
- Iraq		2	
- Qatar			1

Source: European Commission, as quoted by André Sapir (ed., 007), Fragmented Power: Europe and the Global Economy. Bruegel, Brussels.

It can be seen that on the one hand, the EU's oil imports are rather diversified, particularly the diversified supply structure from the OPEC countries. On the other hand, however, natural gas imports are more concentrated on one country, namely Russia. As a result of growing demand and depleting resources both in the EU and in Norway, the imports are likely to substantially increase in the next two decades. Moreover, supply security is influenced by the fact that the natural gas business is managed and controlled by state monopolies in practically all countries. This does not apply for Gazprom only, but holds true for Statoil of Norway, as well as for Sonatrach of Algeria, BBOC of Nigeria or Qatargas of Qatar. In the above cases, direct state ownership varies between 65 and 100 per cent.

In spite of the dynamic growth of energy imports in general and of natural gas imports in particular, as predicted for the next years and decades, there are several options regarding how to try to achieve a decrease of

dependence, at least in relative terms. One is import substitution by different energy carriers either already available in the EU or to be developed in the next period. Another possibility is offered by further reducing specific energy consumption. Third, the creation of the really unified energy market of the EU could obviously contribute to the savings capacity of the European integration. Finally, increasing imports can be diversified in geographic terms by discovering new supply sources.

If fossile energy carriers will be excluded from the potential sources of substituting imports (oil because of the already high degree of import dependence and coal due to environmental reasons), two basic scenarios can be outlined. One is the intensive construction of nuclear energy plants, the other is huge investments into the generation of renewable energy. However, all options hide a clear handicap against natural gas. They cannot be stored or can only be stored with substantial loss (nuclear, hydro or wind energy). In addition, and with the exception of nuclear energy, the energy volume to be generated is definitely insufficient to substitute for larger amounts of natural gas imports. As a new trend, several EU member countries started to reexamine their previous opposition to nuclear energy. Emerging supply uncertainties, compared to previously dominant negative attitude towards nuclear energy (technological risks and the likelihood of terrorist attacks), seem to rewrite the balance between different options. Some countries started to build new nuclear plants (e.g. Finland, Bulgaria). In Germany, a new debate has started about the already approved timetable of shutting down nuclear plants. In turn, Austria still insists on its opposing behaviour.

In 2006, there were more than 150 nuclear energy generating blocs in operation. More than 40 % were located in France, 15 % in the United Kingdom and 11 % in Germany. New member countries added 23 blocs, the same amount as the number of plants operating in the United Kingdom only.[11] In several cases, nuclear energy production represents a relevant to predominant share in the total electricity production of the respective countries. In addition, sometimes they generate huge export revenues (France, and until the closure of two blocs in Bulgaria). Nuclear plants produce 78 % of electricity in France, 40 % in Hungary, 32 % in Germany, 27 per cent in Finland, 20 per cent in the United Kingdom. Even in Romania, one nuclear bloc contributes with 10 % to electricity production.[12]

Another alternative energy source is the production of bioenergy. This purpose had been accompanied by high hopes in the last decade, hopes that, according to recent developments, appear to be to a large extent excessive.[13] At first glance, high oil prices and environmental considerations seemed to give priority to the rapidly growing production of bioenergy, because the production costs of ethanol, if produced from sugar cane, amounts to one-third to one-half of the oil prices stabilized on a high level.[14] In the direct sense, utilization of ethanol, particularly if

[11] Der Standard, July 23, 2006.

[12] Statistical data released by the International Atomic Energy Agency, as quoted in Világgazdaság, January 17, 2006.

[13] In 2005 global production of bioenergy was equal to 20 mn tons of oil, or about 3 % of the total oil consumption of the EU. Leading producers were Brazil (8.2 mn tons) and the USA (7.7 mn tons). In turn, the bioenergy produced in the EU reached 3 mn tons (in oil equivalent).

[14] In turn, ethanol extracted from maize has a cost advantage of 20 % only. In case of biodiesel the cost difference is

gained from sugar cane, has a much lower environmental burden than the utilization of the same amount of oil. However, our environment can be burdened in very different ways, including by enhanced bio-plant production. Experience of the last years indicates that companies have started massive deforestation in several parts of the world in order to create land for bio-plant cultivation. This process was geographically concentrated on tropical zones that definitely play a key role in maintaining the climatic balance in our globe. In other words, short-term economic (cost-oriented) rationality became quickly confronted with longer-term considerations based on sustainable development. Let alone the fact that, excluding sugar cane, the production of bioenergy is far from being economical, while it gives rise to relevant negative spillover effects. One of the best examples is that in 2007 the USA used one-third of its maize cultivation to get ethanol and this, together with other factors, had a significant impact on the rapid rise of global food prices and probably also on the stabilization of food prices at a high level. Arguments in favour of alternative energy production did not take into account secondary impacts that, in many cases, have vital and adverse consequences for large part of the world population. Last but not least, renewable energy production (sometimes by creating a non-renewable environmental situation) has been accompanied by substantial financial support from the central budget of the respective governments. Budgetary and income redistribution aspects of a state subsidy policy remained outside the framework of impact studies (provided such studies were carried out at all). Moreover, unfavourable economic and social consequences originating from the emergence of a new and highly influential „rent-seeking" group have not been considered. (If state-level or other subsidies rise on the horizon, a wide range of „entrepreneurs" appear very quickly, including those who don't have even the slightest insight regarding the given activity, but who would like to make themselves rich by means of the subsidies.) It has to be added that both in political and economic terms, it is easy to create a subsidy and rent-seeking mentality, but it is very difficult to eliminate it if the respective subsidized policy targets prove to be erroneous and economically unsustainable.

Finally, generating wind energy enjoys widespread EU- and government-level financial support. Largest capacities have been installed in Germany (18.000 MW), followed by Spain (10.000 MW). More modest production is reported in Denmark, Italy, the United Kingdom and in the Netherlands.[15] As already mentioned, the electricity generated by wind is irrelevant in the overall national energy balance, while its area and duration of utilization remain very much limited.

The second major opportunity consists in the improvement of energy efficiency (savings). In this context, substantial progress has been made in the last decades. Still, new areas of savings can be identified, not least in the new member countries. Despite the disappearance of large part of energy-eating ex-socialist factories and, in some countries, as a result of the development of less energy-

minimal. Evidently, further rise of oil prices could change the above comparative cost structure, particularly in potential bioenergy producing countries that either use US dollar as their domestic currency or adjust their national currency to the US dollar (mainly producers in Latin America). Different natural endowment substantially influences comparative costs of substitution. One hectare of sugar cane provides 3000 to 6000 litres of gasoline, while one hectare of maize only enables production of 1500 to 3000 litres.

[15] The Financial Times, September 10, 2007.

intensive sectors, the average of specific energy consumption (per capita consumption compared to per capita GDP) is still (much) higher than the average of EU-15. While the difference amounts to 25 to 30 per cent for Slovenia or Hungary, in 2004 Slovakia used 75 per cent, the Czech Republic and Romania 60 per cent more energy for producing one unit of GDP.

We are far from underestimating the importance of the above mentioned policy options. Evidently, each and every reasonable opportunity has to be seized in order to reduce energy dependence and specific energy utilization. However, a much larger positive impact could be expected from the establishment of a common EU energy market. The topic has been on the agenda for two decades at least, and its relevance can be supported by a series of arguments. Some of them are as follows:

- keener competition improves efficiency and reduces producer and consumer costs of energy,
- in consequence, global competitiveness of the EU can be enhanced, for the price of most commodities (and services) allocated on different markets includes certain (generally rather different) shares of current energy prices,
- price differences among countries, a competition distorting factor at the moment on the otherwise unified market could be eliminated,
- basic objectives of energy production and environmental protection could be better coordinated,
- in contrast to national projects, joint initiatives could be implemented with lower investment costs,
- the currently compulsory national storage figures could be reduced,
- last but not least, a common energy market could fundamentally support the united representation of the EU's interests on the itnernational energy market (in fact, this is one important institutional condition of reducing the risk factors originating in the high-level dependence on imports).

Unfortunately and despite a large number of rational arguments, we cannot speak of a common and united European energy market, and even less of a common EU energy policy. To be sure, some countries have already liberalized their domestic energy markets (either for electricity, for natural gas or for both). In turn, other member countries only allow very limited competition (if any). According to the figures published by the European Commission, the Netherlands and Slovenia take the lead in liberalizing national energy markets, followed by Denmark, Hungary and Lithuania. Interestingly, the first group of five countries includes three new members. Other countries indicate substantial delay, not least France that tries to keep its state monopoly with a number of legal and policy instruments. Most likely, the biggest barrier to EU-wide liberalization is that the energy market in the EU is dominated by big monopolies, characterized generally by (majority) state ownership shares. An obvious example is Electricité de France (EDF), with market capitalization of about Euro 150 bn. But others, as Eon from Germany (over Euro 90 bn), Suez from France, Iberdola from Spain, RWE from Germany, Enel from Italy and Gas de France can also be mentioned.[16] A further obstacle in the way of market-conform

[16] The Financial Times, November 22, 2007.

liberalization consists in the fact that the above mentioned companies are not ready to accept the principle of the „four freedoms" that should regulate the smooth functioning of the internal market. It is evident that barriers that do not enable mergers and acquisitions of and by leading (state) energy companies within the EU fundamentally contradict and violate the principle of free circulation of capital. Some steps have been done in the last years, but the really large acquisition plans got shipwrecked on short-sighted national opposition. The most quoted example is the failed attempt of Eon at buying Endesa of Spain (ultimately, the latter entered a partnership with an Italian company). In fact, obstacles in the way of establishing the common energy market largely explain why no common EU-level energy policy could be implemented until today.

Some experts nourish the hope that, similar to other areas, the really vital impact in this direction may not be produced by protracted intra-EU developments but by inevitable external pressure. In this context, we have to be aware of the obvious fact that, in the next decades, the EU's dependence on energy imports will keep on increasing, whatever alternative option or options will be implemented. Thus, security of energy supply is a key strategic intrest of each member country. No wonder that most analyses consider energy supply security as the decisive factor of overall economic security.[17] In fact, energy supply security essentially includes four factors:

(a) physical availability of the given energy carrier (meaning that the respective energy carrier will not be depleted within the period of forecast),
(b) price of the energy carrier (whether the potential buyer is ready or able to pay the price demanded by the producer or supplier/transporter),
(c) supply dependence on political developments: to what extent can sellers use or abuse of their monopolistic position towards the buyers and subordinate the guaranteeing of supply security to criteria that are independent from fundamental economic indicators, as price and quantity (such criteria can be of political or cultural, value-transmitting character but also linked to pursuing non-energy-related economic interests),
(d) transportation security of the respective energy carrier between the producer and the user.

As for the first security problem, it practically does not exist for the EU and other energy users and net importing economies of the world. In physical terms, the necessary resources will remain available on the global scale.

Although oil and gas prices (the latter with some time gap, as usual) have been significantly increasing in the last period, and the price of one barrel of oil has been above USD 100 for a longer time now, this did not constitute a major financial burden for the EU to pay for the higher sum of the energy import bill. This is due in part to the fact that higher oil prices were accompanied by continuous and substantial devaluation of the US dollar (in which oil prices are denominated) against

[17] In our view, it is a rather one-sided approach, since economic security, most probably the key security factor in the 21st century (ruling out wars with catastrophic consequences), has a number of other components as well (market access, exchange rate and monetary, environmental, social, technological security, etc.). In more detail see: András Inotai (2007), A gazdasági biztonság kihívásai (Challenges of economic security), in: Gábor Fóti Tamás Novák (eds.), A biztonság gazdasági vonatkozásai (Economic aspects of security), Budapest, Institute for World Economics, pp. 152-201.

the Euro. In fact, as expressed in Euro, the increase of the import bill remained modest. Of course, how competitive are the EU exports, as a compensating item against oil and gas imports on markets accounting in or with currencies tied to the US dollar, is another question.

The picture becomes much more contradictory once we start to address the issue of the geographic map of dependence. If basic physical and technical possibilities are available, it is a natural effort of all countries to sufficiently diversify their energy (mainly oil and gas) imports and obtain the necessary volume for domestic consumption (sometimes for re-exports as well) from as many producers as possible. From the point of view of the importer, the ideal market situation is based on two factors. On the one hand, the more potential suppliers appear on the market, the higher is the degree of selecting the best suppliers. On the other hand, the more reliable suppliers are present, the easier is the decision-making process of the buyer. As already indicated, at present, the international oil and gas market does not fulfil any of these conditions. The number of potential suppliers is limited, and due to the different degree of depletion of resources in these countries, the circle of suppliers may become even more restricted in the next decades. In addition, an ever larger share of production and exports is shifting towards politically unstable and more or highly unreliable countries. In such a situation, „ideal geographic diversification" of import dependence has serious constraints. Thus, a new (and sometimes constantly changing) balance has to be established between the highest possible geographic diversification and the lowest possible security risk. Thus, there must be a point, where giving priority to geographic diversification may be accompanied by additional political, economic and other risk factors that, regarding the longer term import and supply strategy seem to represent a higher level of uncertainty than a choice based on a small number of (more reliable) countries but with a higher geographic concentration of import dependence. In effect, this is *the* dilemma the EU is confronted with today. Moreover, this is the context in which Russia has a key position. To put it a bit simplified: which strategy is likely to offer higher degree of supply security for the European integration for the next 20 to 25 years? The highest possible geographic diversification of all potential sources, and, as a consequence, the reduction of dependence on Russia at any price, or the consideration of the political, security and economic risks related to (partly unreliable and unstable) potential exporters? Preferring the second option, the EU has to get prepared for a relatively significant degree of „dependence" on Russian energy supplies. In fact, it would be rather difficult to find convincing arguments in favour of several oil exporting countries, from Iran through the Middle East to Nigeria and Algeria that they would be definitely more stable, predictable and reliable partners than Russia. (The recent events in Georgia do not change this statement. Just the opposite, they underline strong geopolitical realities the EU has to reckon with in its future strategy towards Russia in general, and in shaping its energy strategy, in particular.)

Strategic decisions upon shaping the best possible dependence structure are heavily influenced by the transportation routes of oil and gas. First, it generally involves additional players into the seller-buyer relation (all those through which countries the transit occurs). Second, the establishment of fixed transportation routes (pipelines, electricity

grids) requires long-term contracts (sometimes covering several decades) in order to guarantee the security of the seller and of the buyer simultaneously.

In this context, oil and natural gas have to be approached differently. Oil being a product sold on the „free market" and mainly transported by large fleets of tankers, direct dependence on the producer or the seller is modest. In addition, geographic orientation can be modified within a short period of time (necessary supply is regularly available on deep sea) and with a sufficient level of flexibility. (For example, oil imports from Nigeria can easily be substituted by oil imports from Libya, or viceversa.) The natural gas picture is different, for a large part of the gas used to be delivered through pipelines. Certainly, some EU countries (first of all Italy but also Spain and France) have been importing substantial quantities of liquified natural gas (LNG), mainly from Libya and Algeria. However, the transportation costs are higher, and the development of the necessary technical infrastructure and o the special port capacities is extremely costly. In addition, further (technical) bottlenecks have to be considered, since only part of the natural gas physically available can be transformed and transported in liquified form.

In sum, natural gas supply of the EU represents *the* core issue in the shaping of the future energy policy of European integration. The underlying reasons are the following:

- in the next quarter of century, natural gas indicates the highest consumption increase among all energy carriers,
- as a result of decreasing domestic production and shrinking possibilities of importing gas from Norway, this area reveals the highest level of dependence from third countries,
- the international gas market is characterized by relatively few suppliers,
- the circle of reliable and long-term suppliers is even narrower,
- transportation of gas is mainly linked to pipelines that cross the geographic territory of several countries and, as a result, may incorporate additional players with enhanced supply security risks on a multi-player market (or in a multi-player deal).

The EU's potential and rational energy strategy options have to be evaluated in this framework. Existing East-West gas pipelines had been working satisfactorily during decades. Continuous delivery was only disturbed once newly independent transit countries (previously part of the Soviet Union), more precisely their price disputes with the Russian supplier became part of the previously bilateral „game". Delivery cuts of a few days towards the Ukraine and a year later towards Belarus aimed at achieving higher but still substantially less than world market gas prices to be paid by these countries to the Russian supplier. Understandably, the management of this problem by Russia produced a much more negative psychological impact on the Western European policy-makers and societies than its (irrealistic) impact on supply security. In fact, the reliability of Russia as a major gas exporter was questioned. This situation contributed to strengthening the search for alternative sources and pipelines. Russia's response was twofold. First, it announced plans to build new pipelines not crossing the territory of other (politically uncertain) countries (both the North and the South Stream fall into this category). Second, it has signed long-term bilateral contracts with the

gas importers (mostly state or state-controlled monopolies) of more than one leading EU member country. The North Stream will start from Russian territory to Germany, crossing the Baltic Sea, For several reasons, this project had been facing serious opposition by the neighbouring countries, first of all by Poland and Lithuania, but also by Finland. Still, it is unlikely that the project were not implemented. The original itinerary of the South Stream was modified, because Turkey was left out of the project. Energy is expected to come directly from Russia through the Black Sea to Bulgaria and from there, the pipeline would be directed to Central and Western Europe crossing several EU member countries (including Romania and Hungary). As a competitive project, Nabucco had been in discussion for a long time (well before the South Stream idea was announced). In this case, the pipeline would cross Turkey and arrive to Bulgaria (and further to Romania/Serbia and Hungary).

The decision concerning which pipeline should be built strongly devides the EU. The fundamental considerations are the following:

(a) There is no doubt that, in the next decades, the EU badly needs natural gas imports through one or both pipelines. However, it is far from clear which country's gas will be pumped into the pipeline. The South Stream is based on gas produced in Russia as well as in Uzbekistan, Turkmenistan and Kazakstan, all of them under Russian control. In turn, but in principle only, Nabucco would get gas from Iran. The first project has already left behind the first stage of planning (including the signing of some contracts based on this pipeline), while the second is still waiting for a clear initial step. In addition, the source of gas seems to be clarified in the first case but is far from this stage concerning Nabucco. At the same time, preliminary but not necessarily reliable calculations indicate that South Stream would cost more than Nabucco.

(b) It is an evident and desirable strategic objective of the EU to avoid „unilateral dependence" on Russia and, to eliminate this obvious dependence in case of several new member countries. This is a realistic approach provided that the risk factor of dependence from alternative sources is not higher than that of dependence on Russian deliveries. At present, we can hardly find rational arguments supporting the first option. Iran's appearance in this game did certainly not provide convincing arguments for avoiding Russian deliveries.

(c) It is not difficult to identify important US interests behind Nabucco. These interests are hidden behind the argument that Nabucco would substantially decrease Europe's dependence on Russia. The key question is, whether and if yes, to what extent can US and EU interests be coordinated? The driving force of US strategy is not its own energy supply security but clear foreign policy considerations (keeping and strengthening its presence in the Middle East, regional stabilization, growing influence on the Central Asian republics, as well as supporting Turkey's membership in the EU). Moreover, fundamental production and marketing interests of US oil monopolies working in the Middle East and in Central Asia have to be added to the „strategic

framework".[18] In turn, the EU's key strategic interest consists in the security of energy supply by taking the relatively lowest level of additional risks (including non-energy-related ones). A relevant uncertainty stems from the unclear (or missing) common foreign and security policy of the EU. Regrettably, as things stand today, it is not able to clearly define the geographic boundaries of the enlarged and perhaps further enlarging integration. In addition, the EU has hardly any meaningful influence in shaping politics in the region from which, apparently, Nabucco would be filled with gas. Not less problematic is the relationship between the EU and Turkey. While the USA, following both its strategic interests and its hidden or at least ambiguous aim of weakening the EU, firmly supports Turkey's quick EU membership, the EU is much more divided on this issue, let alone the clear opposition to Turkish membership by several (large) member countries within the foreseeable future. Nevertheless, this issue contains a very realistic „technical" component, regrettably never mentioned or deliberately concealed in overall discussions on the potential itinerary of the new pipeline(s). In effect, current Turkish legislation gives priority to domestic energy supply under all circumstances, including international pipelines crossing Turkish territory. If, based on domestic demand, these pipelines might always be cut or tapped by Turkish authorities, the external conditions of the EU's energy supply security could hardly be improved.

(d) Without taking into account several factors, it is hardly convincing to talk about unilateral „dependence on Russia". In fact, gas delivery through pipeline(s) makes both exporter and importer interested in long-term cooperation. If the exporter does not deliver and it does not have any interconnected pipeline ready, it could hardly market its gas (of course, it can cut back production, but not without significant additional costs). In addition, it would not get the important financial transfers. Finally, such a situation would have a very negative impact on its reliability, with negative impacts on all other fields of EU-Russian bilateral relations. It cannot be realistically believed that this would be the strategic interest of Russia.[19]

(e) The evolving Russian gas business requires a deeper survey regarding two aspects. First, the security of the EU's natural gas supply does not primarily depend on the reliability of the Russian partner but on the amount of gas that would be available to be transported through the new pipeline over several decades. In the last years, the exploration of new gas fields lagged behind the growth of gas output, so that the total volume of „easily" exploitable reserves has been falling. In order to have Russia as a reliable exporter of gas over a longer period, the first precondition is not political will but the

[18] Miklós Hegedűs (2008), Mindörökké Nabucco?! (Nabucco, for ever?!), Világgazdaság, March 19.

[19] In some EU circles, the „geopolitical tunnel vision" rooted in the period of the Cold War can still be experienced. The most recent developments in Georgia have certainly not mitigated this approach. On the other hand, influential circles keep on supporting the strengthening of strategic cooperation between the EU and Russia. For a balanced analysis see: Andreas Goldthau (2008), Russia's energy weapon as a fiction. Europe's World, Spring, pp. 36-41.

availability of the necessary quantity of gas. Thus, new exploration is urgently needed. Of course, the falling output in the Russian gas fields can be compensated by the rich gas fields in Central Asia. However, they are controlled mostly by the same Gazprom whose power and influence is dreaded by a number politicians in the EU in general, and in some new member countries, in particular. In addition, the maneouvring margin of the Russian gas delivery strategy is determined by the existence of other pipelines and their transportation capacity. At present, pipelines that are to be built to India, China or to the Pacific Ocean are on the drawing table or in the initial stage of implementation. Therefore, currently, the reorientation of the available gas volume following political purposes is not yet possible. Even if different pipelines were filled from natural gas available in different geographic areas (countries), this option is unlikely as long as the main production fields are not interconnected and incorporated into an integrated gas pipeline network. In this context, the fundamental interest of the EU is to contract the required volume of Russian gas production before the Russian manoeuvring margin will be widened and, in consequence, the Russian bargaining power would be enhanced.

(f) From a strategic point of view, narrowing the time required between constructing the pipeline and serving the gas import needs of the EU deserves special attention. Therefore, the decision on making the choice of which pipeline should be built, cannot be delayed any more. We have to admit that, at the moment of this decision, some questions are likely to remain unclear and, based on our current knowledge of future development, these questions cannot be clarified in a satisfactory way. The EU has to launch a several billion Euro investment and sign a contract of long-term (bilateral) commitments whose real advantage and security degree will be possible to determine only after about one decade has passed. However, the highest degree of supply insecurity, in other words the predictable massive energy deficit in the EU, would be the consequence of further delaying the decision and neglecting the importance of the time factor. As compared to this element, the country risk (supply risk) seems to be secondary. In principle, both South Stream and Nabucco can be built, if financing is secured, the available energy to be transported makes both investments profitable, and the supply side as well as the European demand are guaranteed for a longer time. It should not be ruled out that Europe would need both pipelines in order to cover its natural gas import needs in a reliable and predictable framework.

(g) Finally: the EU should not address its natural gas supply separately from its strategic relationship with Russia. EU-Russian relations have to be firmly based on the adequate and deeper and wider level of interdependence. Relations should be driven by giving priority to seizing the advantages of strategic cooperation according to the requirements of the global challenges and opportunities of the 21st century. In this framework, the security of gas supply represents a very important but

by far not the exclusive, and perhaps not even the most dominant factor.

Whatever supply security pressure the EU will be facing in the next period, the establishment of a common energy policy cannot automatically eliminate some basic obstacles, such as:

- member countries have different energy production structures,
- the proportion between domestic production and imports, or the dependence on imported energy carriers is different from country to country,
- import dependence shows different cross-country geographic priorities (Norway, Southern Mediterranean area, Middle East, Russia),
- the degree of geographic diversification of imports (how many countries participate in the domestic consumption, broken down to different energy carriers),
- opposing interests of energy monopolies in leading EU member countries, many times enjoying effective „patriotic" support by the respective state,
- predominance of short-term interests against a joint European energy strategy, as clearly proved by recent long-term bilateral treaties of Eon from Germany or ENI from Italy with Gazprom.

Concluding remarks, with special reference to the new member countries

Most new member countries are fundamentally interested in shaping and implementing a common energy policy of the EU. The arguments varied from the current unilateral dependence on Russian imports, to the basic interest in deepening the process of European integration and to the geographic situation of the new member countries (direct or indirect borders to Russia). It is justified to expect that a common energy policy could essentially contribute to the geographic diversification of the one-sided import dependence in several countries and could, in the case of emergency, create access to alternative European reserve sources. The full-fledged implementation of the European energy market, as a relevant part of the full liberalization of the internal market, could generate production costs advantages for all (new) member countries. At the same time, it would strengthen the decision-making process at community level. In this way, smaller countries could find a better forum to protect, identify or implement their interests than the traditional framework of inter-governmental decision-making, almost always dominated by the big(gest) member countries. Finally, substantial advantages can be derived from the geographic position, if the planned pipeline(s) were crossing the territory of several new member countries. This fact would not only increase the security of gas supply, but, although indirectly, it would significantly reduce unilateral dependence (even if gas were provided by the same supplier). Moreover, it would generate additional revenue for all countries involved in the geographic route of the pipeline.[20]

A national energy strategy firmly based on realities cannot ignore the fact that the high degree of desirability of shaping a common European energy strategy does not mean that

[20] The current pipeline crossing Slovakia (contracted and built in the late 1970s) generates an annual extra revenue of about USD 800 mn for this country. At least partly, this explains why, according to Eurostat figures, per capita income in Bratislava seems to be higher than in Budapest (pipeline revenues add to Bratislava's income).

such a strategy can be implemented within a short time, even if internal and, more importantly, external pressures were on the rise. Therefore, in the transitional period that may cover several years, a period characterized by crucial and long-term decisions, the development of a flexible energy strategy must remain a basic priority. It should take into account European and national priorities and adequately identify different member country interests and the wider or narrower manouevring margin resulting from this situation.

As a decisive principle, national energy policy (similar to all other policy areas) must not become the hostage of prejudiced, biased, one-sided and emotion-driven considerations. Country-specific opportunities and constraints can only be determined if European energy realities and the respective country's economic and geographic position are reckoned with as a result of comprehensive and balanced surveys. No member state has the right to teach or press any other member country to follow a so-called „European" energy policy as long as its own decision-makers and companies behave quite differently in everyday practice. It is unjustified and counterproductive to qualifiy any contract with Gazprom as „anti-EU" or to criticize the special but by far not realistic position of any (new) member country concerning Nabucco, as long as the Italian state-owned gas company just has signed a 20-year contract with Gazprom and Germany is involved in building a joint and direct pipeline missing or ignoring the interests and fears of some other (new) member countries with the same Russian company. Not to forget about the sheer fact that, at the moment, Nabucco exists only at the level of ideas, without any serious preliminary paper prepared. Most probably, the latest events in Georgia (and the Caucasus) will not contribute to the consolidation of the arguments in favour of Nabucco...

Considering that the energy policy in all countries with heavy dependence on energy imports (and most new member countries belong to this group) is an anchor of economic security and competitiveness, it is particularly dangerous and irresponsible to downgrade energy policy discussion at the level of short-term and cheap domestic party-politics. Such an attitude would keep on narrowing the manoeuvring margin of the given member countries and deprive them of some existing comparative advantages in the European „energy game". Still, and unfortunately for the future of European integration, all member countries have to keep in mind the first phrase of the leading article published in December 1973 by "The Economist", referring to the short-term and very much short-sighted reactions of the Western European countries to the first oil crisis: "Everybody for himself and God save the strongest". To be sure, the new member countries are by far not the "strongest" ones. Even more importantly, they have to be at least "clever", and there is no problem if they are in some strategic questions the "most clever ones".

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THE TRAPS OF THE EUROPEAN UNION GOVERNING: DEFICITS OF NORMATIVE AND SOCIAL LEGITIMACY

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Abstract. *The purpose of this essay is to investigate the various dimensions that indicate deficiency in the normative and social legitimacy at the level of the EU governing. The approach is structured on a theoretical framework defining the conceptual understanding of these notions and an analytical one where the focus will be on identifying different traps/impediments within the EU governance, which motivate these deficiencies.*

Keywords: *normative and social legitimacy, EU governance, EU identity, EU institutions*

Following the enlargement process, the EU has grown to become an impressive economic and political body able to define the major development prospects of its Member States. Nevertheless, the more its regulatory sphere has expanded to cover decisions concerning the allocation of key resources and the more it has come to challenge the dominance of the state in these matters, the greater the concern became with enhancing its normative and social legitimacies. Though founded on the principle of unity in diversity, the EU governance needs to be able to provide a coherent institutional framework and decision making mechanism in order to represent fully and fairly the range of constituencies affected by its actions. Defining the normative and social dimension of legitimacy across these lines, the purpose of this paper is to investigate upon their limits within the EU governance.

1. THEORETICAL FRAMEWORK

> *"Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions*[1].

1.1. The Normative Dimension of Legitimacy

Founded on jurisprudential ground, the normative dimension of legitimacy is concerned with the justifiability of laws / policies to the people who live under them. These norms of law are determined in accordance to external standards[2], such as the efficacy of their objectives, their teleological character being related to the effectiveness of the institutional environment. In other words, within a consolidated democratic system, such as EU, the institutional framework is responsible with providing the citizens with the necessary solutions to their requests, solutions which have a normative shape. These solutions should be the product not only of efficient decision making process reflecting power relations within the institutions themselves, but also of the

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[1] Suchman, M. C. (1995) "Managing Legitimacy: Strategic and Institutional Approaches" in *Academy of Management Journal*, Vol. 20, No. 3, p. 574

[2] Neil Walker, *The White Paper in Constitutional Context*, paper presented at The Jean Monnet Programme,

consultation with the affected civil society groups.

At the same time, laws are insofar normatively legitimate as they impose a moral duty on their subjects to comply with them[3]. Hence, one can investigate whether the governance is able to secure a core of fundamental rights reflecting values and ideals which are the expression of broad consensus. Thus, according to Richard Bellamy, one can motivate the normative assumption that consensus over rights and public interest are generated by impartial procedures, fostering deliberation and openness among well-informed and motivated persons.[4] Nevertheless, this theory implies the assumption that citizens do have a general understanding when it comes to assessing the normative legitimacy of their own political order.

1.2. The Social Dimension of Legitimacy

The social dimension of legitimacy refers to the social acceptance of a political system (i.e. EU), expressing to what extent this is rooted in popular consent and reflects the values, preferences and aspirations of its public constituencies[5]. According to Luhman, the efficient use of authority within a certain political arrangement can only be legitimized through an existing social order. Thus, social legitimacy represents the label for the procedures employed in order to obtain loyalty of the citizens with respect to decisions taken within a political system[6].

1.3. The Relation Between the Normative and Social Dimensions of Legitimacy

The interconnection of the normative and the social dimensions of legitimacy is motivated, on one hand, by the presumption that the latter is unsatisfactory unless it is grounded in the first one. The fact that social legitimacy is unlikely to develop in a coherent manner unless it embraces the product of normative legitimacy is motivated by the existence of a wide variety of individual preferences which need to be molded into justificatory discourses in order to form a collective will[7]. Hence, social legitimacy is democratically secured by criteria of normative legitimacy which are the creation of the political system. Consequently, they guarantee the self-legitimating of the political system[8].

On the other hand, normative legitimacy is unsatisfactory unless it is embedded in the outcome of social deliberation. Laws, as well as policies, are socially legitimate if the citizens are loyal and abide by them. As a general rule, social legitimacy requires that the population believes that the institutions producing these laws/policies are normatively legitimate. According to Weber, the fact that a valid social order is binding at the individual level is due to a system of social order where even if there are some who deny the legitimacy of norms most people would react to their violation.

Symposium: *Mountain of Molehill? A Critical Appraisal of the Commission White Paper on Governance*, available at: http://www.jeanmonnetprogram.org/papers/01/011001.rtf

[3] Beetham, David (1991), *The Legitimation of Power*. London: Macmillan, p.46

[4] Richard Bellamy (2006) 'Still in Deficit: Rights, Regulations and Democracy in the EU", in *New Modes of Governance*, Project no CITI-CT-2004-506392

[5] Walker, op.cit

[6] Luhman, Niklas (1981) *Politische Theorie im Wohlfahrtstaat*. München

[7] Walker, op.cit

[8] Luhman, op.cit

2. ANALYTICAL FRAMEWORK

2.1. The Vertical Approach: Insufficient Indirect Legitimacy as a Consequence of the Relation between the Member States and the EU

Despite its relative novelty, the EU has emerged as an extensive entity with significant normative and social influence. Nevertheless, its rapid development has yet to reflect a corresponding consensual understanding of its democratic quality. The difficulty in comprehending its numerous dimensions is a consequence of the predominance of the economic aspects of its policies. Although it promotes policies like European economic integration, single market or monetary union as dominant for the EU identity, these are nothing more than aspects that are directly influenced by the national interests of the Member States. Furthermore, one of the basic principles of the EU governance is the principle of subsidiary. The vertical approach is reflected through the assumption that the EU, being conceived as a functional organization that offloads the Member States of difficult tasks, grounds its legitimacy on its ability to provide services and solve problems at the national level. Therefore, one could advance the statement that the source of the EU legitimacy is not represented by a common democratic political identity but by the transfer of legitimacy from the national level to the EU level.

It is true that today's EU governance is built on an extremely wide variety of policies covering all aspects of life of the Member States in a uniform manner, thus trying to create a common political identity with equal rules applying to everyone; through measures aimed at redistribution, through regulation of social, environmental and health policies, through police and judicial co-operation it affects all its citizens in the same manner. Nevertheless, its legitimacy does not rely on a collective identity or common set of European values that provide a sense of community attachment and that can be readily drawn upon to settle grievances.

At the same time, it is true that its institutional configuration reflects the structure of a supra national regulatory body determined by a single jurisprudence. Still, the only way in which representative institutions or majority rule can provide legitimacy for the EU governance is through a collective identity which is absent in Europe. According to Abromeit Heidrun there are ”triple deficits [...] lack of a pre-existing sense of collective identity, the lack of Europe-wide policy discourses, and the lack of Europe-wide institutional infrastructure that could assure the political accountability of office holders to a European constituency.”[9] Bearing these considerations in mind, we can now concentrate on clear aspects that are relevant for furthering the idea of the insufficiency of the EU normative and social dimensions of legitimacy.

2.1.1. Insufficient Indirect Normative Legitimacy

Should we consider the standards of normative legitimate governance (i.e. the principles of the democratic *Rechtsstaat*), we may assume that the EU aspirations are becoming increasingly clear and apparent. According to Erksen and Fossum, the EU can be perceived as “building on [...] principles and rights that are uniquely European and normatively uncontroversial since every Member State subscribes to them and since these moral norms are increasingly spread worldwide”.[10] This statement implies the

[9] Abromeit Heidrun, (1998), *Democracy in Europe*. Oxford: Berghahn Books , p.32.

[10] Erik Oddvar Erksen and John Erik Fossum (2004), “Europe in Search of Legitimacy: Strategy of Legitimation

presumption that "public support will reside in a constitutional patriotism which emanates from a set of legally entrenched fundamental rights".[11] However, the EU' deficiencies in relation to these principles relate to different practices that will be discussed as it follows.

The assumption that the EU principles and rights are "normatively uncontroversial" is limited by the fact that, although the Member States adhere to common judicial bodies (i.e. The European Convention on Human Rights) their national jurisprudences are of various kinds and their valuations are consequently divergent.[12] Thus, their perception of certain rights may be embodied in different constructions. For instance, Belgium and the Netherlands regard the principles of "protecting the integrity of the individual" or of "private freedom" such as right to life in a different manner than the other Member States. Currently they are the only to allow certain forms of euthanasia and they even define and regulate them according to their own perceptions. Furthermore, the Member States may unanimously acknowledge and respect the same democratic rights but they have different political and electoral systems. Hence, their ways of interpreting i.e. citizenship rights are often divergent.[13] Therefore, we may advance the idea that although the aspiration was to see rights as transcending national differences, the Member States now seem to be shaped by them.

2.1.2. Insufficient Indirect Social Legitimacy

Requiring a sense of belonging, a sense of solidarity and common identification, the concept of social legitimacy at the level of the EU is held to be the achievement of a politically integrated system, such as the state nation. Thus, due to its deeper ties of belonging and trust, it makes possible the transformation of a collection of disjunct individuals and groups into a collective capable of common action.[14]

The fact that the EU suffers from the absence of an EU demos demonstrates low levels of popular identification with the EU, an issue that can easily lead to apathy and antagonism towards its politics. Even if one may argue that the EU created a transnational legal system which is guided by international norms of rights or that the EU citizenship is a platform to anchor an EU identity, the national influences are too strong and overrule the common identity.[15] The reason lays in the fact that citizens have the tendency of justifying their claims for rights and regard them as constraints on their compatriots and politicians.[16]

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[11] Ibidem p. 446

[12] Nic Shuibhne, "The Values of Fundamental Rights" in M Aziz and S Millns (eds), *Values in the Constitution of Europe*, Dartmouth 2005, Ch 8

[13] Richard Bellamy, "Still in Deficit: Rights, Regulations and Democracy in the EU", in *New Modes of Governance*, 2006, Project no CITI-CT-2004-506392, available at http://www.eu-newgov.org/datalists/deliverables_clusters_detail.asp?Cluster_ID=5

[14] Mauricio Viroli notes that "The language of patriotism has been used over the centuries to strengthen or invoke love of the political institutions and the way of life that sustain the common liberty of a people, that is love of the republic; the language of nationalism was forged in late eighteenth-century Europe to defend or reinforce the cultural, linguistic, and ethnic oneness and homogeneity of a people." In Viroli, Maurizio (1995), *For Love of Country An Essay on Patriotism and Nationalism*. Oxford: Oxford University Press

[15] One of the most important exponents of the view is Jurgen Habermas (1992) in *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 Praxis International, 1 and *Why Europe Needs a Constitution*, 2001, 11 New Left Review, 5

[16] Richard Bellamy, op.cit

Insufficient social legitimacy is not only due to the absence of a common identity, but it can also be perceived at the institutional level. The European Parliament is weaker and more inadequate than the national parliaments if we are to consider the means of ensuring popular input. Moreover, its role in treaty making is marginal, a fact that greatly limits popular inputs into the process. The weakness of the EP is proven not only through the underdeveloped nature of intermediary bodies (i.e. European parties) but through the absence of a consolidated European public sphere as well.[17]

The EU citizens are limited in having a clear perception on which institutional practices the EU officials will adopt and to which degree these are to reflect their interests. For instance, due to the closed, executive-driven, and technocratic nature of the process of constitution making[18], France and the Netherlands rejected its body after having submitted it to a referendum, thus reflecting the insufficient social legitimacy of the EU governing. On the other hand, due to the requirement for unanimity certain Member States may use their voting in order to leverage national interests, instead of paying the political price of having rejected the document.[19] Therefore, the social legitimacy of the European Constitution can be minimized by the tendency of the Member States to promote their national ambitions.

2.2. The Horizontal Approach: Limited Legitimacy as a Consequence of the Power Relations

The EU has grown into a huge political and economical superstructure that has the power to define the terms of sustained development which is purposively directed for its new members. Within its policies of enlargement, the fact that the EU insists on standards completely inappropriate[20] to the present stage of economic growth of the Central-Eastern European countries will eventually result in their suboptimal progress[21]. Following this argument, we may further the idea that the differentiated levels of development which delimitate different influential powers in the European policy building mechanism results in an unbalanced economic distribution, if we are to consider the position of the newly entered members.

At the same time, the centralization of political and economic decision making in the hands of the unelected bureaucracy in Brussels is often incompatible with the aspirations of the EU citizens. For instance, despite continuous complaints related to the "opaqueness of the EU law"[22] and its huge volume of regulations that bar economic prosperity, very little has changed due to the fact that the bureaucracy in Brussels sees regulation as a means of furthering its political goal of European unity only. As a

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[17] Erik Oddvar Eriksen and John Erik Fossum, *The EU and Post-National Legitimacy*, Arena Working papers, available at http://www.arena.uio.no/publications/wp00_26.htm#FOOTNOTE_6

[18] See Curtin, Deirdre (1993), "The Constitutional Structure of the Union: A Europe of Bits and Pieces." *Common Market Law Review* 30, pp 17-69.

[19] Carlos Closa Monteros, *Ratification of the Constitution of the EU: A Minefield,* available at http://www.realinstitutoelcano.org/analisis/570.asp

[20] An example of ridiculous regulation that damages economically: regulation 2257/94 specifies the size and shape of bananas that can be sold in EU. The size is limited to at least 14cm it should be free of "abnormal curvature"

[21] Marian Tupy (2003), *EU Enlargement. Costs, Benefits and Strategies for Central and European Countries*, Cato Institute, p.2

[22] "EU Legislation Unnecessarily Complex" in *EU Observer*, Sept 13, 2002, available at www.euobserver.com/index.phtm?aid=7541

consequence of these factors, the normative and the social legitimacy of the EU governance are limited by the differentiated levels of economic development and expectations of its members.

2.2.1. Limited Normative Legitimacy

Due to their different level of economic development, to which we may add a culture for democracy that evolved along with the European communitarian experience, the influence the Member States exert on the policy building in Brussels, as well as on the financial distribution is highly diversified. Therefore, the degree of justifiability of the EU regulations to the EU citizens is limited to the national dimension. As it follows, two aspects of this phenomenon will be discussed, namely the normative deficiencies observable at the levels of the EU budget and of the *acquis communautaire*, within the strategies of enlargement.

Evidence of this fact is to be easily perceived at the level of the EU budget, considering both its configuration and distribution. Firstly, the Maastricht convergence criteria for monetary union which had several negative effects on the members' economic stability engendered an atmosphere of fiscal stringency. Consequently, many of the major net contributors (i.e. Germany, Austria, Sweden, The Netherlands) to the EU budget have little desire to allocate more money and are trying to reduce the level of their payments. Secondly, the principles of budgetary distribution seem biased. Though the budget for 2000-2006 was agreed in 1999 in Berlin, the hard decisions regarding long term financing arrangements for the enlarged EU were postponed, especially the CAP[23]. We should consider that the main components of the budget are the CAP and the structural and cohesion funds, accounting for approximately 80% of the total expenditure. Furthermore, the enlargement process would provoke an annual rise in spending which was to reach in 2006 a sum of approximately €225 per head for the new members. At the same time, the budget gives Portugal and Greece €400 per head from the structural and cohesion funds in 2006[24]. Another aspect of the budgetary policy that limits the normative legitimacy of the EU governance is the fact that it promotes catch-up opportunities. In other words, the ones with a better possibility to seize the advantages are the richer members and not the others. To be more specific, the total receipts for the new members after accession are capped at 4% of their GDP. The pervasive outcome of this ceiling is the fact that more money go to the richer countries because they have a higher GDP, while the amount increases as their economies grow. Therefore, though promoting policies of sustained economic development, the EU undermines the Member States where investment needs are greater[25].

Regarding the second aspect, the EU legislation is embedded in a set of regulations concerning the majority of the social and economic aspects of the European life regulations which are embedded in the *acquis communautaire*. Among these regulations, it promotes the four fundamental freedoms of movement (i.e. capital, goods, persons and services) which were officially stated in the Treaty of Maastricht, in order to further the European goal of political and economic unity. Nevertheless, the policies applied to the newly entered members seem to disregard these aspects.

[23] Marian Tupy, op.cit

[24] Heather Grabbe (2001), *Profiting from EU enlargement*, Centre for European Reform, available at http://www.cer.org.uk/pdf/p254_enlargement.pdf

[25] ibidem

The insistence on a transitional period for Central European workers not only restricts economic integration, but it also reduces labour mobility, which is one of the prerequisites for a single currency area in order to function efficiently and effectively. Although the applicants cannot join the Eurozone immediately after accession, the introduction of more restrictions on workers runs counter to Commission and OECD recommendations that labour mobility in the single market needs to be increased. The reasons why many EU "leaders" actively required a transition period are firstly grounded in their national experiences, disregarding the community's interests. For instance, part of Germany's sensitivity[26] results from public and media perceptions that the country had taken an unfair share of the refugee burden from south-eastern Europe. To this, a general fear for loosing jobs and wage competition can be added[27]. However, factors like market potential and productivity are often forgotten. Many countries, especially the ones to enter the EU in 2007, have low productivity, to which one may add high labour cost, factors that are major deterrents to investment[28]. Due to similar factors, to which we may add the economic price that is to pay for the harmonization of taxes, these countries are unlikely to become direct competitors to the more developed EU countries unless their experience and skills develop.

2.2.2. Limited Social Legitimacy

The limited nature of social legitimacy represents the consequence of the fact the EU enlargement policies are not sufficiently inclusive as to respond to the needs of the newly entered members as well as of the expectations of older ones. Thus, the overprotective tendency of the latter does not facilitate the adjustment of the first and consequently draws their disappointment and frustration. Although the general perception of the EU enlargement process is generally positive, discussions have been marked by the accession negotiations where the EU has sometimes appeared in an unfavorable light in the agricultural or budgetary chapters, as well as on its restrictive position in free movement of workers. Therefore, the citizens of the new Member States had the feeling of having somehow been misled about the terms of accession.

As the date of accession neared, the public opinion in the 10 members to join the EU in 2004 became ever more critical. For example, the EU Commission's own poll in 2002 found that only 32% of Estonians, 35% of Latvians, 43% of Slovenes and Czechs thought that joining the EU was a "good thing"[29]. Nevertheless, the enlargement is considered to be a "fait accompli" mainly due to the fact that, despite being part of the EU may result in suboptimal growth, remaining outside the EU could be much worse. The disappointing nature of accession was emphasized by a British commentator, John O'Sullivan: "Under the EU accession package, the 10 new members are supposed to receive the headline figure of $41 billion in adjustment subsidies. But when various dues and unforeseen items have been deducted, the actual amount they will get is a mere $10.6 billion over the next four years(1003-2006). Their poor but risky economies will have to absorb job-killing regulations designed for much richer societies. And to add insult to injury, their citizens will not

[26] "Enlargement Dispute Solved", *EUobserver*, June1, 2001, www.euobserver.com
[27] Grabbe, op.cit
[28] ibidem
[29] EU Commission, *Candidate Countries Eurobarometer 2002: First Results*, http://europa.eu.int/comm/public_opinion/archives/cceb/2002/cceb_2002_highlights_en_pdf.

be allowed to migrate to existing EU members until seven years after enlargement in May 2004. All in all, the net economic benefits to the new members may be small to non-existent"[30]. Therefore, questions to the legitimacy of the EU's governance seem to grow more and more intensive. In order for Europeans to take decisions together on common policies there is need for a common understanding of the European interest and openness to cooperation.

Conclusion

Normative and social legitimacy in Europe should be based on a culture of acting together, an effort on understanding and representing each other's interests. Due to its predominantly economic policies that embed national interests the EU lacks a background presumption of settled political form supported through normative legitimacy. Despite the general understanding of the EU as promoting unity in diversity, at the level of identity, it is well-known and much discussed that it lacks strong cultural ties, traditions, history, affective symbols, and developed civil society and public sphere.

In order to cope with these legitimacy deficiencies the EU needs an economic and social model to combine the best elements from the older and the newer countries. Its aim should be to facilitate adjustment rather than protection. Measures should be prepared to take care of all members within a European framework.

[30] John O'Sullivan (2002), "Burdensome Regulations Will Strain New EU States" in *Chicago Sun-Times*, December 17, 2002

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PROCEDURAL ASPECTS REGARDING REFERENCES FOR PRELIMINARY RULINGS

Oana-Măriuca Petrescu*

Abstract. *The purpose of preliminary rulings, or the preliminary reference as it is known, can be traced directly to the need to secure uniformity in the Community legal order throughout the Member States. The procedure of preliminary rulings was mentioned for the first time by the Advocate General Joseph-Louis Lagrange 40 years ago in this Opinion in Bosch v de Geus case. Much of the responsibility for applying the rules laid down in the European Community Treaty (EC Treaty) and in Community acts belongs to the national courts of the Member States. To help safeguard the uniform application of Community law, article 234 (former art.177) of EC Treaty, therefore lays down a procedure which enables national courts to refer to the European Court of Justice questions of Community law that they have to decide before giving a judgment*.

Keywords: *Governance, justice, legal order, Court of Justice*

INTRODUCTION

The matter of taking actions for the purpose of obtaining preliminary rulings[1], is not a new one, as it was first regulated by the constitutive Treaties[2], providing "*the possibility for the Court to perform a preliminary interpretation action, upon incidental title, outside actual litigation, directly deduced before the community court, by means of recourse in interpretation, which is regulated differently by the Treaties of Rome compared to the Treaty of Paris*"[3].

Subsequently, by the Treaty establishing the European Community there was established under art. 234 par. (1)[4] that the Court of Luxemburg "*shall have jurisdiction to give preliminary rulings concerning:*

a. the interpretation of this Treaty;

b. the validity and interpretation of acts of the institutions of the Community and of the ECB;

c. the interpretation of the statues of bodies established by an act of the Council, where those statues so provide".

It was the first time that in the content of a treaty regarding this set of actions a clear delimitation was made between the **possibility** (provided by paragraph 2) and the **obligation** (provided by paragraph 3) of bringing the matter before the European Court of Justice[5] (ECJ) upon a preliminary action for the purpose of obtaining a preliminary ruling,

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[1] Ovidiu Tinca, *Drept comunitar general,* ediția a III-a, Publishing House Lumina Lex, Bucureşti, 2005, p.381-400; Fabian Gyula *Curtea de Justiție Europeană, instanța de judecată supranațională*, Publishing House Rosetti, Bucureşti, 2002, p.124; Fabian Gyula *Drept instituțional comunitar*, ediția a II-a, Publishing House Sfera Juridică, Cluj-Napoca, 2006, p.321; website: http://curia.europa.eu/ro/instit/presentationfr/index_cje.htm.

[2] Art.41 of the CECA Treaty; Art.177 of the EEC Treaty; art.150 of the Euratom.

[3] Ovidiu Tinca, quoted paper, p.381; Case C33/76 Rewe, published in ECJ Collection of 1976.

[4] Former art. 177 of the EEC Treaty

[5] On December 13, 2007, under Portuguese presidency, there was adopted and concluded the Treaty of Lisbon,

considering in the same time that such proceeding is based by a separation of functions[6].

Later on, this category of actions gained a new dimension by taking over from the national criminal law of member states and expressly consecration under the last paragraph of art. 234 from the TEC of a provision specific to criminal law, according to which "*if such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay*". Thus, by this new provision the principle was constituted of rapidly judging the criminal cases[7], which is also found in the Romanian criminal law[8], as deduced from the practice of criminal courts and jurisprudence in this field.

Although the principle is not *expresis verbis* set forth in the current national criminal legislation, it is the opinion of many authors[9], that the minimum delay or rapidness represents one of the basic rules of the criminal trial, rather a *sine quo non* condition of the efficacy and optimization of the entire judicial activity, which consists in the rapid settlement of the criminal cases, as well as in the simplification of the activity in the criminal trial, when the case, also reinforced and regulated by the Treaty of Lisbon[10].

UNDERTAKING THE MATTER OF PROCEDURAL ASPECTS REGARDING REFERENCES FOR PRELIMINARY RULINGS

Recourses[11] or references having as object preliminary rulings are part of the category of mediated or indirect actions, which we can divide into:

a. references having as object preliminary rulings, which we shall analyze in the following and
b. legal actions referring for licenses, approvals, when ECJ can rule decisions of bounding nature, although they do not refer to a certain action.

In the specialized literature[12] it is considered that preliminary rulings represent

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Portugal. Among the most important institutional novelties there was the change in the name of the European Communities Court of Justice into the European Court of Justice (ECJ), by amending art. 9, as well as the introduction of a new article 9F, stipulating that "*(1) The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed*"

[6] Stephen Weatherill, *Cases and materials on EU Law*, Oxford University press, sixth edition, 2003, p. 188 unofficial translation.

[7] This principle is also known as "*efficiency in the criminal trial", "rapidness"* or *"celerity*" - Ion Neagu, *Drept procesual penal*, partea generală, Tratat, Publishing House Global Lex, Bucureşti, 2006, p.100.

[8] Idem.

[9] Idem; Nicolae Volonciu, *Drept procesual penal*, Bucuresti, Publishing House Didactica si Pedagogica, 1972, p.71-72; Nicolae Volonciu, *Tratat de procedură penală. Partea generală,* volumul I, Publishing House Paideia, Bucuresti, 1996, p.126-129.

[10] The Treaty of Lisbon was published in JOUE series C no. 306 of 17.12.2007.

[11] According to Augustin Fuerea, when we refer to the term of "*recourse*"we shall consider its sense of "*legal action, and not means of appeal, as it is considered in the Romanian law. This sense is set forth by the Community Treaties and was taken over by most Romanian and foreign doctrinarians*" Augustin Fuerea, *Institutiile Uniunii Europene*, Publishing House Universul Juridic, Bucuresti, 2002, p.136. The same explanation is also given by Ovidiu Tinca, quoted paper, p.329. Thus, in the present paper we shall maintain the official name used by the European Court of Justice, namely "*references for preliminary rulings*".

[12] Augustin Fuerea, *Instituțiile Uniunii Europene,* quoted paper, p.142-143; Fabian Gyula *Curtea de Justiție Europeană, instanța de judecată supranațională*, quoted paper, p.124; Fabian Gyula, *Drept instituțional comunitar*, quoted paper, p.321; Ovidiu Tinca, quoted paper, p.381-400. These recourses are also referred to as: *preliminary rulings* or *Le renvoi préjudiciel*) or preliminary actions.

"*an action of community law by means of which the national courts of the Communities' member states can or have to refer to the Court of Justice asking for support by ruling on the interpretation of the origin treaties; on the validity and interpretation of the normative acts of the EEC, Euratom and ECB bodies; on the interpretation of the statutes of the institutions founded by the Council if the provisions of such allow it, as well as on the validity of the Commission's and Council's deliberations in case a pending litigation before such raises interpretation problems of the said or objecting to their validity* "[13].

The role of this action is confirmed by the Information note of the Luxemburg Court regarding references from national courts for preliminary rulings[14], according to which "*a fundamental mechanism of European Union law aimed at enabling national courts to ensure uniform interpretation and application of that law in all the Member States*". In other words, this legal action is a cooperation mechanism, establishing the participation of the Court of Justice in settling the cases filed with national courts[15].

Thus, in the procedure for preliminary ruling, the role of the Court is "*to give an interpretation of Community law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings, which is the task of the national court. It is not for the Court to decide issues of fact raised in the main proceedings or to resolve differences of opinion on the interpretation or application of rules of national law*"[16].

By applying the cooperation principle, as stipulated by art. 10 of the TEC[17], according to the European Court of Justice, national courts are called to undertake the juridical protection of the justice maker, the effect of which arises from the juridical effect of the European Union law[18].

The legal grounds of the prejudicial matters[19] can be found in the origins and derived community law. In this respect, the main texts are the following:

1. The Luxemburg Protocol of 03.06.1971 on the interpretation of the Convention of 29.02.1968 regarding the reciprocal acknowledgment of trading companies and legal entities[20];
2. The Convention regarding (trading) company trademarks of 15.12.1989;
3. The Lugano Convention of 16.12.1988 concluded between the member states of the EC and of the European Free Trade Association (EFTA) regarding the competency of courts of justice in enforcing court rulings in the civil and commercial field.

Prior the Treaty of Nice only ECJ could

[13] Fabian Gyula, *Curtea de Justiție Europeană, instanța de judecată supranațională*, quoted paper, p.124, p.321, 371 and the following.; G.Gornig, I.E.Rusu, *Dreptul Uniunii Europene*, ediția a II-a, Publishing House C.H. Beck, Bucureşti, 2006, p.79 and the following.; Octavian Manolache, *Drept comunitar,* editia a 4-a revised and updated, Publishing House All Beck, 2003, p.787-789; Stephen Weatherill, quoted paper, p. 187 and the following.

[14] Published in JOUE series C no.143 of 11.06.2005, p. 1.

[15] Case C- 16/65 Schwarze vs. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, published in Collection ECJ of 1965; Case C-13/61 Bosch vs. De Geus and others, published in Collection ECJ of 1962.

[16] Information note of the Court of Justice, published in JOUE series C no.143 of 11.06.2005, p. 2.

[17] Art.10 of the TEC stipulates that: „*(1) Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. (2) They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty*"

[18] Ovidiu Tinca, quoted paper, p.381.

[19] Fabian Gyula, *Curtea de Justiție Europeană, instanța de judecată supranațională*, quoted paper, p.372.

[20] „*Convention traité de Bruxelles sur la reconnaissance mutuelle des sociétés et personnes morales*", published in JOCE, no.2 of 1969.

issue preliminary rulings. At the present moment, article 225 par. (3) of the TEC stipulates that the Court of First Instance (CFI) also has jurisdiction to hear and determine questions referred for preliminary rulings "*under Article 234, in specific areas laid down by the Statute*". Thus, in case CFI considers that a case raised before it "*considers that the case requires a decision of principle likely to affect the unity or consistency of Community law, it may refer the case to the Court of Justice for a ruling*"[21].

In the same time, in exceptional cases "*decisions given by the Court of First Instance on questions referred for a preliminary ruling may […] be subject to review by the Court of Justice, under the conditions and within the limits laid down by the statute, where there is a serious risk of the unity or consistency of Community law being affected*"[22].

The Treaty of Lisbon[23], according to which under new article 9F, sets forth among others under paragraph (3) that the community court „*shall, in accordance with the Treaties […] (b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions*".

Thus, in applying these community norms in case of prejudicial matters, the Court of Justice shall not interfere directly by annulling or amending the rulings of the member states' courts, nor shall it settle litigation referred to the member states' courts. However, the Court of Luxemburg shall be able to interfere:

- *Either by means of recourse in interpreting European Union law*, situation in which it shall impose correct application of such by the national courts in the internal juridical order at any time it settles the prejudicial issues in interpreting European Union juridical norms;
- *Or by means of recourse in setting forth the validity of the European Union law, situation in which it shall impose* the compliance with the principle of lawfulness within the community, at any time it settles prejudicial assessment issues[24].

Prejudicial issues or preliminary rulings[25] can have as object:

1. **Law interpretation** meaning establishing the sense of the European Union norm, particularly in regard to its compatibility with the internal law. Such preliminary issue does not transfer the jurisdiction of the case from the national court to the Court, as the national judge remains seized, but it only allows for such to help the court of the member state referring to the ECJ in ensuring the primordial nature of the community law;
2. **Establishing the direct governing of the community legislation**;

[21] Paul Craig and Grainne de Burga, *EU Law, text, cases and materials*, third edition, Oxford University Press, 2003, p.432 unofficial translation.
[22] Art.225 par.(3) of the Treaty establishing the European Community.
[23] The Treaty of Lisbon was drafted in the Inter-Governmental Conference set up by the German presidency of the European Union between January 1 and June 30, 2007, following the summer European Council of June 21-22, 2007 in Brussels. The starting point was represented by the project of Constitutional Treaty, signed at Rome in October 2004, and which was not agreed by all European Union member states, France and Nederland being the countries which did not ratified such by the organized referendums. Thus, this Treaty amended the two European Union constitutive treaties, namely the Treaty on European Union and the Treaty establishing the European Community. The last mentioned one was renamed the Treaty on the Functioning of the European Union. The Treaty of Lisbon was published in JOUE series C no.306 of 17.12.2007.
[24] Ovidiu Tinca, quoted paper, p.381.
[25] Ovidiu Tinca, quoted paper, p.382 and 393.

3. **Validity of the secondary or derived community law** meaning the application of the lawfulness principle in the Community and imposing the respect of hierarchy for community norms.

Referrals having as object a preliminary ruling are *sui-generis* actions comprising elements of non-contentious proceedings, as well as characteristic elements from community normative acts annulling, yet remaining distinct from all other actions, in respect with the proceeding conditions for filing, commencing the action, as well as its functions in the community law system[26].

We also mention that the procedure of preliminary actions represents the "*connection between ECJ and the national courts, between internal law and the community law, aiming to ensure that no member state faces the crystallizing of jurisprudence inconsistent with the community*",[27] and as a principle it is similar to the one in case of direct actions, namely: written phase, verbal phase and giving the ruling.

Considering the above mentioned, we adopt the standpoint asserted in the community[28], regarding to which three categories of preliminary rulings exist, *the first* of them being incontestably regulated by art. 234 of the TEC.

The second category comprises the acts adopted by community institutions in the areas stipulated under Title IV of Part three from the Treaty establishing the EC "*Community Policies*" regarding the regime of visa, asylum, immigration and other policies regarding persons' free circulation and especially in respect with jurisdiction matters and acknowledging and enforcing court rulings. Thus, the possibility for filing a referral with the Court for a preliminary ruling only belongs to the courts settling the case in the last jurisdiction level, according to art. 68 of the TEC[29].

Finally, ***the third category*** of actions or preliminary matters is regulated by art. 35 of the TEC, referring to the entire Pillar III, regarding "*Police and judicial cooperation in the criminal field*"[30].

According to the constitutive and consolidate treaties, *active procedural legitimacy* is not for natural individuals or legal entities[31], *but only for national courts*[32] which, when raising such referral to the Court, have to suspend the pending lawsuit, because such procedure is stipulated as „*inter-court*

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[26] Fabian Gyula *Drept institutional comunitar*, quoted paper, p.372.

[27] Fabian Gyula *Drept institutional comunitar*, quoted paper, p.373.

[28] Paul Craig si Grainne de Burga, quoted paper, p.434 unofficial translation.

[29] Art.68 of the TEC stipulates: "*(1) Article 234 shall apply to this title under the following circumstances and conditions: where a question on the interpretation of this title or on the validity or interpretation of acts of the institutions of the Community based on this title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. (2) In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security. (3) The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata*".

[30] Paul Craig and Grainne de Burga, quoted paper, p.434 unofficial translation.

[31] Paul Craig and Grainne de Burga, quoted paper, p.432 unofficial translation.

[32] Consequent to interpretation of the ECJ regarding the subjects which can raise matters before the community court regarding this sort of references, the conclusion has been reached that the courts of any rank which fulfill certain material and formal conditions, also including the national supreme courts of member states, can file such references when they face difficulties in interpreting community juridical norms or when they have doubts regarding the validity of

procedure"[33].

As regards to raising such referrals to the community Court, grounded on art. 234 of TEC, the ECJ practice has not maintained "*any sacramental formula*", and such have to comprise the same elements as in the case of filing civil actions to any national court, or as in the case of filing recourses or legal actions to the community courts, namely: object, case, parties[34].

The object of the referral is different depending on whether the law interpretation or ascertaining of community law validity is pursued.

Thus, **in the case of interpreting the law**, the object of the referral consists in interpreting not only the constitutive treaties, but also the protocols and annexes to such, as well as the acts of the community institutions or international agreements concluded by the European Communities[35] (either they are mandatory or recommendations, or if they have a direct effect or not, or if they refer to the categories of acts set forth by the treaties). The interpretation of the general principles can be achieved directly or indirectly, by taking into consideration a set of community law rules which is clarified by referral to general principles[36].

In return, "*internal law of the member states cannot be subjected to the interpretation of the Court of Justice*", as mentioned in the jurisprudence of the Court and in the specialized literature[37], and neither to the acts of community institutions such as: Court of Accounts, the Economic and Social Committee (ESC), the Committee of the Regions (CoR), or the European Parliament, because such are not competent to adopt acts such as those issued by the European Commission (EC), the Council of the European Union (CUE) or the European Central Bank (ECB)[38] and the European Investments Bank, the last two mentioned ones as acts of bodies with their own legal personality[39]. Nonetheless, this measure is relative given the fact that any time "*the internal legal norm refers to the community law, and if in order to apply the said it is necessary to interpret community law, then the prejudicial matter can be subjected to the Court, which will only limit to interpreting the community law, whilst the national court remains to rule on the internal norm of the member state*"[40], according to its internal legislation in that field.

Thus, from the above mentioned it results that by the interpretations of the community law by preliminary rulings, the Court of Justice maintains upon an abstract activity, without applying the community law to one particular case or another[41].

such, and not by prosecutors' offices, administrative bodies or arbitral courts, especially those which can privately can decide *ex aequo et bono*, the labor chambers or other jurisdictional bodies - Fabian Gyula, *Drept institutional comunitar*, quoted paper, p.380-384.

[33] Fabian Gyula, *Drept institutional comunitar*, quoted paper, p.380.

[34] Fabian Gyula, *Drept institutional comunitar*, quoted paper, p.374.

[35] The first agreement of this sort concluded by the Community was with Greece Case C -181/73 Haegeman II, published in Collection ECJ 1974.

[36] Ovidiu Tinca, quoted paper, p.382; Case 240/87 Deville published in Collection ECJ din 1988.

[37] Ovidiu Tinca, quoted paper, p.384; Case 93/1975 Adlerblum vs. Caisse Nationale d'Assurance, published in Collection ECJ of 1975.

[38] By the Treaty of Lisbon, from the interpretation of these acts, were removed those of ECB, considering that they did not have the juridical power of the acts of the Commission and of the Council, in order to make object to such claims. By analogy, we consider that those of the EIB should no longer make object to such claims.

[39] Grounded on art. 108a and art.198d and 198e from the Treaty of Maastricht website: http://www.eurotreaties.com/maastrichtec.pdf.

[40] Case C-37/92 José Vanacker and André Lesage and SA Baudoux combustibles, published in Collection ECJ of 1993; case C-197/88 Dzodzi vs. Belgia, published in Collection ECJ of 1990.

[41] Ovidiu Tinca, quoted paper, p.385.

Regarding the **prejudicial matters for assessing the validity of the derived community law**, we mention that the said pursue the application of the lawfulness principle in the Community and impose for the community norms' hierarchy to be complied with. The object in this case consists in the validity of the community law norms, covering all the deeds of the community institutions (but for those issued by the Central European Bank, consequent to the recent amendments in this area, by the Treaty of Lisbon), as well as constitutive treaties and acts assimilated to such. In return, it is not admitted to verify the validity of the resolutions of the Court of Justice, because the said are not invested with the power of settled case, whilst the rulings of the CFI can be appealed by recourse in front of the ECJ, but also in this case the issue shall not be raised of their validity in front of the national courts[42].

In respect with the validity of the secondary or derived community law the question is raised if the courts of the member states are authorized (and *mutatis mutandis* the authorities) so that upon their own accountability to verify the validity of the community law norms, and potentially to deny upon legal consequences the fact that the norm has no jurisdiction in the lawsuit and would not any prohibitive effect compared to the incompatible state law[43]?

ECJ gave a negative answer to this question in the ruling in the Foto Frost case[44], by not admitting that national courts are competent to establish the invalidity of derived community law acts, jurisdiction which according to art. 234 from TEC is only for the Court. In this respect, ECJ set forth that for the courts in each member states it is forbidden to ascertain invalidity of the acts issued by community institutions and bodies (namely from the secondary community law). In return, such can verify and potentially to ascertain their validity, yet without being allowed to rule in respect with their not being valid. Therefore, if they get to be convinced that a very important regulation in making a decision is unlawful, then it can choose not to apply it only if such invalidity has been obligatorily ascertained previously by ECJ. For this purpose, the court of that state shall suspend the lawsuit and refer to ECJ by preliminary ruling proceedings (former art. 177 from TEEC) in respect with the validity question.

In the same time, "*the jurisprudence of ECJ has emphasized that the recourse regarding the validity of the community acts represents a lawfulness control modality regarding the said similar to recourse for annulment*"[45].

In assessing the validity of the acts of community institutions, the Court of Luxemburg noticed that it had to perform a lawfulness exam both from a formal and from a material standpoint, by assimilating validity with lawfulness.

Thus, the ruling by which the Court ascertains the validity of a community act bounds the court of the member state to apply such. The ascertaining of invalidity will determine the said or for the national acts issued grounded on it to not be enforced, and any national judge shall "*deem that act as not being valid for the decision he is about to rule*" considering that the community institution having "*issued the invalid act is obliged to*

[42] Ovidiu Tinca, quoted paper, p.394.

[43] Website: http://www.scoala.fxhigh.com/referate/detail/php/Drept/www.referat.fxhigh.com%20-%20DREPT_ECUNITAR_-_NOTE_DE_CURS5095d29a8.php.

[44] Case C-314/85 Foto Frost vs. Hauptzollamt Lübeck-Ost, published in Collection ECJ of 1987.

[45] Ovidiu Tinca, quoted paper, p.395.

conform to the ruling and, hence, to withdraw that act from the juridical circuit"[46].

"*The effects* [our note of the preliminary rulings] *can affect only a part of the community act (partial effect) or it can affect the entire referred act (total effect)*", their effects are retroactive and as a principle they are binding for the case in which ECJ has been referred. In the same time, they cannot be objected by internal or community means of appeal, "*whereas it is a ruling of ECJ, which is the higher court in the community law*". We consider that such preliminary rulings have a similar effect such as those of unitary interpretation ruled by the higher courts of member states, as in the case of the rulings issued by the United Sections of the Higher Court of Cassation and Justice, as per the provisions of Law no. 56 of 1993[47] on the Higher Court of Justice. Also, the ruling of the Court of Justice is equally binding for the other national courts referred to by identical matters[48].

Moreover, in case the European Court of Justice is seized by a preliminary referral, the interpretation ruling has a limited *erga omnes* effect, while the resolution by which the unlawfulness of an act is ascertained has an extended *erga omnes* effect[49].

In case the national court fails to comply with the provisions of art. 234 of TEC, avoiding referring to ECJ for a prejudicial matter in order to obtain a preliminary ruling, then the European Commission shall apply the provisions of art. 226-228 from TEC, being entitled to initiate the procedure for ascertaining the breach of the community obligation by a member state, whereas the liability of that state is engaged by the action and inaction of one of its internal body, among which the court of law[50].

CONCLUSIONS

From the aspects analyzed herein, it results the particular importance the referrals for preliminary rulings have played in the general actions by which community courts can be called to rule, from the moment when the said were regulated in the constitutive treaties and until the most recent amendments marked by the adoption and ratification of the Treaty of Lisbon, by 11 member states, out of which the last one has been Denmark, on April 24, 2008.

In the present paper there has been attempted to briefly present the matter of referrals for preliminary rulings, the consequences of such, and the action possibility against a member state benefiting from the ruling any times it is ascertained that it has breached the community obligation in its charge.

In the same time, we have attempted to briefly mention the most important proceeding aspects governing this category of mediated actions, which can be usually filed with the ECJ and as an exception with the CFI.

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[46] Ovidiu Tinca, quoted paper, p.397.

[47] Published in Official Gazette Part I no. 159 of 13.07.1993 as subsequently amended and completed, republished in Official Gazette Part I no.56 of 08.02.1999.

[48] Website: http://curia.europa.eu/ro/instit/presentationfr/index_cje.htm

[49] G.Gornig, I.E.Rusu, quoted paper, p.82.

[50] The first action of this type was initiated in 1985 by the Commission against Germany, consequent to the repeated refuse from Bundehfinanzhof to comply with prejudicial decisions of the ECJ Ovidiu Tinca, quoted paper, p.398; Fabian Gyula, *Drept institutional comunitar*, quoted paper, p.387.

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- Case C-37/92 José Vanacker and André Lesage and SA Baudoux combustibles, published in Collection ECJ of 1993
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- Case C-314/85 Foto Frost vs. Hauptzollamt Lübeck-Ost, published in Collection ECJ of 1987

2008 - SOME GLOBAL ISSUES AND THEIR IMPACT ON THE PROSPECTS OF FURTHER EUROPEAN UNION INTEGRATION

Florin Bonciu*

Abstract: *The paper analyzes the implications of some global trends and developments on the prospects of further European Union integration. The transfer of attributes from member states to community institutions is a long term process which confronted numerous set-backs and re-launches. The hypothesis discussed in this paper refers to the fact that current developments in the global arena require fast decision making mechanisms involving very sensitive issues and these developments tend to shift the balance towards member states institutions.*

Keywords*: globalization, EU integration, energy prices, food prices, Western countries' policies, banking sector, climate change*

Global issues and European integration evolution have been in close interaction. Globalization and technological change have already determined an ever higher connection among all participants in the world economy and the rise of prices for such elementary inputs as foods and energy put the issue of balance of power on the global arena in a new (and at the same time old) perspective. This is a time of change and this change will influence to a large extent the architecture of the European Union.

In this context, European integration understood as a deepening of the transfer of national decision making prerogatives towards community institutions has, in our view, much dimmer prospects than a decade ago. In the following analysis, we shall try to substantiate this statement and present it for debate.

Without any intent at covering all major issues of the world economy as of mid 2008, we can nevertheless list some of the essential ones[1]. After a brief presentation of these issues an assessment of their impact on further European Union integration will be made.

The trends perceived as having the greatest impact in today's world are:

- Globalization and the need to deal with more competition and conflict;
- High energy prices;
- High food prices;
- Significant transfer of wealth to the Middle East and Pacific area;
- Need for a change in Western domestic policies;
- Need for a new approach regarding banking sector;
- Climate change;
- Technological trends and their implication for business.

Globalization and the need to deal with more competition and conflict

As a result of some events which accentuated since the beginning of this

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[1] Irwin Stelzer, "Prepare for Change as World Tilts to the East", *Sunday Times*, June 22, 2008.

decade (such as the impact of US foreign policy in certain areas, the economic rise of China and India, the increase of energy prices, the re-consolidation of the Russian Federation's status in the global arena, etc.) the world is increasingly shifting towards a multi-polar structure characterized by international competition (almost in all respects) among great powers.

This new multi-polar structure brings about not only an economic competition but also a competition among ideologies. If at the beginning of the '90s, with the collapse of the centrally planned economic systems, the free market, minimal state and free enterprise seemed to become the only options tested and validated by practice, now, towards the end of the first decade of the 21st century, one can notice a diversity of approaches: liberalism, isolationism, nationalism and even autocracy in a modern sense (for instance in specific forms in Russia and China and, maybe, in a much different way, in Venezuela).

An issue which was far less present in the early '90s is the need of the Western countries to deal with radical Islam in the global arena.

A new development as of beginning of fall 2008 is the mentioning for the first time in decades of the possibility of a new “cold war” between the Russian Federation and the Western world. Even if the concept is currently mentioned only as a remote possibility, the very fact that it was used is a serious event in itself.

Dealing in an efficient and effective way with all these developments and trends increasingly requires fast decision making mechanisms, strategic thinking and unity of command. Whether such features can be found with existing European Union institutions and mechanisms is questionable, if only one considers the reactions vis-à-vis the conflicts in former Yugoslavia some years ago or in Georgia in 2008, the positions vis-à-vis Iraq or Iran and the reactions towards the Russian Federation in today's context regarding energy supply.

The apparent conclusion from the all the above-stated is that a trend towards a multi-polar world, with more competition and conflicts, tends to strengthen the national governments approach and to make less relevant community positions and therefore such global evolutions do not favour, at least for the time being, a deepening of European integration. This conclusion can be further supported by the fact that the developments in the world arena often have different effects on the European Union member countries and therefore the national interests and reactions may not converge in all cases.

On a contrary note, one may say that the rise of serious threats (like a cold war, energy issues or climate change) may determine European Union member states to carefully consider being more united as a block, but our perception is that this situation will generate additional consultations among member states and more decisions taken at national level. It may seem paradoxical, but this may mean more individual decisions (i.e. less integration) and decisions made with more awareness as regards the position of the other member states (i.e. more integration in communication, negotiation, dialogue).

High energy prices

The year 2008 in particular has been characterized by steep increases in energy prices although remarks and comments referring to the possibility of such trends had already been made in 2007. On medium and long term, this trend towards higher and higher energy prices has an objective component, as classic fuels are limited in quantity and their reasonable availability is decreasing fast.

But, at the same time, if we refer to current

evolutions, there is a lot of subjective influence, be it from speculators or from implications of the evolutions in the Middle East, Russian Federation or Venezuela, or even from some meteorological phenomena that influence oil production.

This rise in energy prices also puts in question the structure of energy prices for end-users, particularly for oil, in most developed economies, particularly in the European Union. The increase of energy prices brought about a very sensitive discussion on the percentage of taxes in fuel prices; because if in the EU, an average of more than 60 % of the prices paid by car drivers to the pump goes to taxes (compared to about 29 % in the US), can that be still considered a market economy?[2] To be more precise, the taxes vary from 76 % in Great Britain, to 74 % in France, 73 % in Germany and 63 % in Spain. And can we speak about high prices when more than 60 % of the prices are not the result of the classic supply and demand ratio?[3] To go along with these questions would imply to question the very foundations of modern economies' finances, but it is not unlikely that this unpleasant exercise will have to be done quite soon.

Until then, higher energy prices have an impact on the automotive industry, on air transport, but also on accelerating research on new energy sources as well as on information technology & communication technology (by increasing the trend towards tele-conferencing and tele-working) and on management which has to rethink entire economic processes in order to accommodate the higher energy prices.

Higher energy prices mean sensitive issues with both industrialists and population and therefore an increase of the role of local and national politicians. At least for the moment, this trend is not favourable to further European integration. Higher energy prices also affect farmers and from this point of view again the European Union member states present very different situations and therefore different positions.

An interesting observation is that higher energy prices may have as effect the increase of regional trade vs. global trade (a phenomenon which also took place in the '70s when US trade with Latin America increased due to higher transport costs) as well as an increase in the number of conflicts[4]. The rise of energy prices may lead to a redistribution of wealth, to more competition on resources, including in military form, and to an increase of nation state decision-making mechanisms.

High food prices

The increase in food prices, particularly in 2008, took place, on the one hand, because of temporary problems in Australia, Ukraine and some other places, but, on the other hand, it took place because of long term problems such as: unequal rise of income in developing countries, increase demand for bio-fuels, trade/export restrictions on foods, etc.[5]

A particular point refers to the impact of the support provided for stimulation of production of technical plants used for bio fuels (an area championed by the EU) on the production of foods. According to several studies prepared in the last 2 years by international organizations, the biggest long term cause of increases in food prices is the use of agricultural products to make fossil fuel

[2] Data valid as of June 2008 according to www.gaspricewatch.com

[3] Peter Ford, "Gas prices too high? Try Europe", *The Christian Science Monitor*, August 26, 2005.

[4] Rana Foroohar, "The Coming Energy Wars", *Newsweek*, June 9, 2008.

[5] High food prices: Impact and recommendations, Paper prepared by FAO, IFAD and WFP for the meeting of the Chief Executives Board for Coordination on 28-29 April 2008, Berne, Switzerland.

substitutes[6,7]. While it is difficult to quantify exactly the contribution of this decision to the increase of food prices, the role of the EU in generating this issue is important and the lesson is that such decisions may require more careful consideration in the future. Until then, a reaction can be to rely less on European Community wide decisions and rather try to adapt them to the specific conditions of each member country.

At the same time, at a global level, this situation requires better policies in developing countries and better international cooperation. This in turn may resume debates on the issue of world population and migration since demographic trends are very different in developed and developing countries. And last but not least, the high food prices may put into a new perspective the issue of genetically modified organisms (GMOs) which were opposed for a long time by various EU institutions but which may represent a solution for fast increase of agricultural output in high population countries.

Significant transfer of wealth to the Middle East and Pacific area

Globalization and the rise of new economic powers, as well as the revenues generated after the increase in price of energy and raw materials, have determined major shifts in the money flows world wide. This also determined the rise of sovereign wealth funds which originate to a large extent in oil countries and represent the interests of the national governments. As these funds own more and more of the debt and assets of Western countries they have a higher say in decision making and this adds a global (and very different) dimension to policies, which is difficult to control and assess[8].

In 2008, more money is being transferred to oil/energy producing countries. At the same time, more money is being generated and directed towards transnational corporations from China, India, the Russian Federation and some other countries, as well as more investors from these new economic powers are coming to Western economies, in the context of higher competition on resources with the new developed states and a much more complex situation in international negotiations and politics[9].

The key word regarding the above developments is diversification (of economic powers, of origin of transnational corporations, and in essence, of interests). The diversification of centres of economic power and its implications on a global scale may also lead to the spreading of ideologies and values which are different than Western ones and which may require more tailor made approaches to various situations in comparison to a decade ago.

Diversification in the global power centers and in interests is likely to bring about diversification and not centralization of decision centres. Such a trend is, in our opinion, very likely to be less favourable to European integration.

Need for a change in domestic policies of most Western countries

The realities of 2008 (economic slowdown, banking sector crisis, high energy prices,

[6] OECD-FAO AGRICULTURAL OUTLOOK 2007-2016, edited by OECD/FAO 2007.

[7] Rising food prices: Policy options and World Bank response, paper prepared in April 2008, www.siteresources.worldbank.org

[8] Nadeem Walayat, "Sovereign Wealth Funds - Saviours or Harbingers of Economic Apocalypse?", January 7, 2008, http://www.marketoracle.co.uk

[9] Enrique Portaluppi, "The Globalization Security Dilemma: How Globalization will Renew Great Power Competition", *American Chronicle*, September 2, 2008.

demographic trends, etc.), and most presumably of the coming years, require from the part of governments some long delayed and difficult actions.

In the spring of 2008 the perception in the EU Commission was that Europe finds itself at a crucial crossroads, facing both internal and external pressures and there is an urgent need to prepare European societies and economies[10]:

- for an economy based on knowledge rather than manufacturing;
- for an ageing and declining population;
- and for an intensely integrated and competitive global arena in which natural resources are declining.

As result of this situation, changes are required in several areas. Among them, there is a need for:

- a new approach to taxation (that will encourage investment and will discourage consumption);
- a new approach to transport of commodities in favour of less energy intensive means of transport;
- a new approach to incentives for research directed to bringing energy efficient technologies to large scale use;
- and last but not least, a new approach to education (as response to a need for a better educated work force as well as for a more energy and environment cautious generation).

As these necessary changes are to be decided and applied within the national contexts (which are different as level of development, structure of economies, levels and structure of taxation systems, etc.) One may expect a tendency towards a diversification of reactions and approaches which will not eliminate a common position but rather be in favour of nuances and differentiation.

Need for a new approach regarding the banking sector

The crisis in the banking sector that started in the US and spread out gradually in the global banking network requires some actions as result of the lesson learnt: not only commercial banks have to be more regulated, but also investment banks.

This new situation is characterized by the fact that the days of very high returns are over. At the same time, the presence of foreign investors will be higher. And the banks will have to look for stability in a period of change.

This trend is not affecting the European Union in a particular way, but because the banking and financing sectors are so integrated at a global level the impact is felt in all countries and the new regulations will have to be applied everywhere[11]. The major aspects in the years to come are related to both the increase of concentration (particularly for large intermediaries) and the higher presence of non-EU financial institutions as result of globalization and emergence of new economic powers.

The existence of the Euro zone and the gradual increase in the number of participating countries will determine an increase of integration but this will refer mostly to the relations between the European Central Bank and the Central Banks of the participating member states rather than to other EU institutions.

[10] Joaquín Almunia, European Commissioner for Economic and Monetary Policy, "Structural economic policy priorities for Europe", OECD Conference on Structural Reform in Europe Paris, 17 March 2008

[11] "The new challenges for the European banking system", Speech by Gabriel Quirós on behalf of Eugenio Domingo Solans, Member of the Executive Board of the European Central Bank, at a seminar organized by Ambrosetti and Getronics, Vienna, 12 April 2002.

Climate change

According to the United Nations Framework Convention on Climate Change (UNFCCC), climate change refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods.

The risks posed by climate change are real and more and more people have felt its effects already. As a proof of the reality of this risk, the United Nations Organization estimates that all but one of its emergency appeals for humanitarian aid in 2007 were climate related. As a result, in 2007, the UN Security Council held its first debate on climate change and its implications for international security.

In its Fourth Assessment Report (AR4)[12], published in 2007, the Intergovernmental Panel on Climate Change (IPCC) projects that, without further action to reduce greenhouse gas emissions, the global average surface temperature is likely to rise by a further 1.8-4.0°C this century, and by up to 6.4°C in the worst case scenario. Even the lower end of this range would take the temperature increase since pre-industrial times above 2°C - the threshold beyond which irreversible and possibly catastrophic changes become far more likely.

Climate change is often perceived as a threat multiplier which exacerbates existing trends, tensions and instability. The core challenge is that climate change threatens to overburden states and regions which are already fragile and conflict prone. The main types of threats determined by climate change are[13]:

- Conflict over resources;
- Economic damage and risk to coastal cities and critical infrastructure;
- Loss of territory and border disputes;
- Environmentally-induced migration;
- Situations of fragility and radicalization;
- Tension over energy supply;
- Pressure on international governance.

Despite a number of evident effects in the area of climate change there is a need for a more consistent understanding of the phenomenon and for a better evaluation of the implications on food, health, economy, territory, etc. In this respect it is to be noted that some authors are more moderate in their evaluation, mentioning the existence of alternative sources of energy, the possibility of energy conservation and the numerous measures already taken to alleviate the effects[14].

The financial and budgetary implications of climate change have been the subject of numerous studies, all characterized by complexity and great uncertainty. Such financial implications are related to average annual cost estimates ranging from 0.6% to 1.6% of total gross domestic product worldwide or between about €230 and €614 billion annually (based on global GDP for 2006). The estimated share of the EU in global costs is estimated to be at around €60 billion annually, and reaches up to €194 billion in the high-cost scenarios[15].

The active role of the EU in the international climate change debates and negotiations has been significant up to now. Thus, the EU is committed to reducing its

[12] "Climate Change 2007", IPCC Fourth Assessment Report, http://www.ipcc.ch/ipccreports/ar4-syr.htm

[13] "Climate Change and International Security", Paper from the High Representative and the European Commission to the European Council, Paper S113/08 14 March 2008.

[14] Roy W. Spencer, *Climate Confusion*, Encounter Books, New York London 2008.

[15] Arno Behrens, Jorge Núñez Ferrer, Christian Egenhofer, "Financial Impacts of Climate Change: Implications for the EU Budget", CEPS Working Document No. 300/August 2008

overall emissions to at least 20% below 1990 levels by 2020, and is ready to scale up this reduction to as much as 30% under a new global climate change agreement when other developed countries make comparable efforts. It has also set itself the target of increasing the share of renewable energy use to 20% by 2020.

Due to its far reaching implications, climate change is one of the factors that may increase both consultations and common actions from the part of the EU member states and therefore it is a factor favourable to integration. The issue is more sensitive than it may appear at first sight because the initiatives taken up to now determined both food price increases and negative reactions from the part of automotive industry but also spurred research in energy conservation and renewable energy.

Technological trends and their implication for business

The current global economic arena is re-shaped by some megatrends which are manifested in technology. In fact, these trends are so comprehensive that they include all points discussed above and have an impact on all components of economic, social and political life.

Among these trends that will shape the world well into the next decade, the following can be mentioned[16,17,18]:

1. A new level of technological connectivity wherein knowledge is increasingly available and, at the same time, increasingly specialized. Knowledge production itself is growing: worldwide patent applications, for example, rose from 1990 to 2004 at a rate of 20 percent annually. The most obvious manifestation of this trend is the rise of search engines (such as Google), which make an almost infinite amount of information available instantaneously. New models of knowledge production, access, distribution, and ownership are emerging. Due to the rise of open-source approaches to knowledge development communities, not individuals, become responsible for innovations.

2. New global industry structures are emerging. In response to changing market regulation and the advent of new technologies, non-traditional business models are flourishing, often coexisting in the same market and sector space. In many industries the new structures have a few big companies on top, very few in the middle, and a large base of smaller, fast-moving companies at the bottom. Corporate borders are becoming less clear cut and replaced by networks of suppliers, producers, and customers.

3. A global battle for skilled labour characterized by a change from the migration of jobs to low-wage countries to a global competition for high skilled labour.

The impact of these trends on the EU is complex because it creates a fuzzier picture in which both national and community structures are eroded and replaced by an informational, knowledge-based megastructure with a continuously variable geometry. Against this technological background EU institutions and mechanisms may regulate more and become less and less relevant.

Although these trends are all well beyond the control of the EU, they can be influenced by the EU to a certain extent, only if EU succeeds to manifest as a coherent economic actor.

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[16] Ian Davis, Elizabeth Stephenson, "Ten trends to watch in 2006", *The McKinsey Quarterly*, January 2006.

[17] "New IBM Report Identifies Six Megatrends Reshaping Governments and Societies Around the World", Market Wire, June 2008.

[18] "The future of global government global mega-trends, eGovernment thoughts and speculations from an Australian perspective", July 22, 2008.

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- www.gaspricewatch.com

NATIONAL MINORITIES IN THE LAW OF THE EC/EU

Daniel Šmihula

Abstract. *In the law of the EC/EU the protection of national minorities is still a marginal matter. The EU has relied on general international law and on a European regional system of international law and, in case of necessity, accepted their norms. But in the 1990s there began a process of "de-economisation of the European integration" and the importance of national minorities became higher. Protection of the national minorities has not become a generally accepted legally binding principle of the EU, although in several legal acts issues of national minorities are mentioned. On the other hand, the political relevance of national minorities´ protection is very high. The importance of protection of national minorities in the future will probably grow. It is a result of the adoption of the Charter of Fundamental Rights of the EU (2000) and of the discussions regarding the European constitution and the Treaty of Lisbon.*

Keywords*: national minorities, EU law, European Charter of Human Rights*

1. Introduction

The Law of the European Communities (or European Union) is a special branch of law which formed until the end of 1960s.[1] Unlike international law, several of its legal norms are applicable directly. They need no transformation on a national level. Addressees of this law are not only states but also individuals. The jurisdiction of the European Court is much larger than in the case of classical international tribunals and it is often obligatory.[2]

When the original three European Community Treaties were signed in 1950s, they contained no provisions concerning the protection of human rights.[3] The integration process has primarily been an economic project -despite the fact that it always had political aspects[4] and the Schuman declaration dealt more with political vision than with the economy.[5] Probably, the emphasis on economic integration provided in the 1950s a camouflage for the great integristic visions of Jean Monnet, Robert Schuman and Konrad Adenauer in order to obtain public support.[6]

Therefore the direct role of the European Union in the area of protection of national minorities is still very limited (likewise the

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[1] Köck, Heribert Franz: Rechtsfragen an der Jahrtausendwende, Akten des 22. Österreichischen Völkerrechtstages, Linde Verlag, Wien, 1998: Fischer, Peter: „Die Einheit des Europarechts als dogmatisches und didaktisches Problem.". p.55.

[2] Fischer, Peter, Köck, Heribert, Franz: Völkerrecht, Linde Verlag, Wien, 2004, p.47.

[3] Craig, Paul, Búrca, Gráinne de: The EU Law (text, cases and materials), Oxford University Press, Oxford, 2003, p.317.

[4] Weatherill, Stephen, Beaumont, Paul: EU Law, Penguin Books, London,1999, pp. 32-33.

[5] Declaration of 9 May 1950, http://europa.eu/abc/symbols/9-may/decl_en.htm.

[6] Craig, Paul, Búrca, Gráinne de: The EU Law (text, cases and materials), Oxford University Press, Oxford, 2003, p.8.

general protection of human rights). The EU has relied on general international law and on a European regional system of international law and, in case of necessity, accepted their norms.[7]

But in the 1990s there began a process of "de-economisation of the European integration". At the same time, the importance of national minorities increased also on a national level. Some states (Greece, France) for political and nationalist-historical reasons, had for a long time denied that they even had any minorities. Only in recent years did this attitude change: for example, France for a long time did not regard Article 27 of the International Pact on Civic and Political Rights as applicable in France.[8] This was not, of course, a manifestation of adversity towards national minorities. It was a result of the revolutionary republican tradition of equality and unity eliminating any form of segregation of citizens into ethnic or other communities.[9]

The fact that the EC is not a classic international organisation but a supranational one[10] implies that within the European integration framework it is more difficult to resort to watered down solutions which stand somewhere in between political and quasi-legal instruments. In contrast to traditional international organisations, and apart from the requirement that every single EC act needs to be founded on a particular article in the EC Treaty (due to the so-called principle of conferred powers), EC law also defines the legal forms and effects of the acts which may be adopted on the basis of an eventually introduced provision in Primary law (Treaties).[11] Therefore some states may reject the authority of the European Court and other EC/EU institutions to adopt a decision in the case of the national minorities' agenda, as not having a basis in the provisions of Treaties.[12] This is expressed also in the principle of subsidiarity, according to which the EC/EU can act only in areas that member states have entrusted it.[13]

The reality is that the question of national minorities was for many years out of the authority of the EC/EU. Until the Amsterdam Treaty (signed on 2 October 1997 and entering into force on 1 May 1999), there had not been a single treaty provision dealing with the protection of minorities (apart from some indications in the Accession Treaties of the UK and Austria, Sweden, Finland, Norway) in the Primary Law of the EC/EU.[14]

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[7] From this point of view the most important was the Article 6/2 of the Treaty on the EU („...2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."), See further: Lang, 2001, Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.243.

[8] Blumenwitz, Dieter, Gornog, Gilbert: Der Schutz von Minderheiten und Volksgruppenrechten duch die Europäischen Union, Verlag Wissenschaft und Politik, Bonn, 1996 , p.26.

[9] Matscher, Franz : Wiener Internationale Begegnung zu aktuallen Fragen nationaler Minderheiten, N.P.Engel Verlag, Kehl, Strassburg, 1997 (col.of papers): Leuprecht, Peter: "Minority Protection in Europe-Problems and Prospects", p.9.

[10] It is not easy to describe the EU and EC by terms of traditional international and constitutional laws. See: Craig, Paul, Búrca, Gráinne de: The Evolution of EU Law (collection of papers), Oxford University Press, Oxford, 1999: Curtin, Deirdre M., Dekker, Ige F.: "The EU as a "Layered International Organization: Institutional Unity in Disguise ", pp.83-136.

[11] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, 2000, p.1.

[12] The autrohity of the Court is restricted only on duties resulting from the Treaty (see Articles 226-228 of the Treaty).

[13] Fischer, Peter, Köck, Heribert, Franz, Karollus, Margit Maria: Europarecht, Linde Verlag, Wien, 2002, p.470

[14] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for

On the other hand, many provisions and measures of the EC/EU also have some indirect effects on the position of national minorities. This is especially the case when some part of the national minorities' agenda is relevant to the implementation of the fundamental principles of the EU. But activities of the EC/EU relating to minorities have been rather scarce until now.

However, in connection with the Treaty Establishing the Constitution for the European Union (although not ratified) and European Charter of Human Rights, the law of the EU is also increasingly dealing now with matters of national minority rights.

In a very general sense, even such principles of the European law as the free movement of persons, inherently contain some elements of national minority rights' protection (equal treatment as a fundamental principle).

Nevertheless, we should not regard the entire process of raising the importance of protection of national minorities as a one-way process, i.e. granting more and more rights to national minorities. For example, several provisions present in various national laws in favour of national minorities were considered to be against European law.[15]

2. Human rights in the Law of the EU/EC

Human rights, including the protection of national minorities- as mentioned above- were for a long time outside the scope of the EEC, EC, European Union etc. (This means all those organizations that dealt with the European economic integration).[16] These institutions relied on the Council of Europe and OSCE for the human rights agenda[17], and also on the constitutional mechanism of protection at the level of member states.[18] The EEC, Euratom and ECSC defined themselves originally as almost entirely economic organizations:[19]

"Although the Treaty of Rome of 1957 sought to establish specific freedoms of an economic nature, such as the free movement of workers, no general reference to human or fundamental rights was made in the Treaty *(in its original version, D.S.)*"[20]

Until the 1990s there was no direct obligation in the norms of the EU/EC stipulating the respect of rights of national minorities.[21]

As soon as political cooperation in the European Communities was strengthened, ground had to be identified for cooperation on a human rights agenda and on defining basic

(its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, 2000, p.2.

[15] Judgements of the European Court of Justice in the cases Bickel v. Franz (C-274/96 [1998] ECR, I-7637) decided on 25th November .1998. About regional provisions aiming at the protection of the German minority living in the Autonomous Province of Bozen (South Tyrol in Northern Italy).

[16] Tichý, Luboš, Rainer Arnold, Svoboda, Pavel, Zemánek, Jiří, Král, Richard: Evropské právo, *(European Law)*, C.H. Beck, Praha, 1999, p.693.

[17] Alston Philip: The EU and Human Rights, Oxford University Press, New York, 1999, p.v.

[18] Tichý, Luboš, Rainer Arnold, Svoboda, Pavel, Zemánek, Jiří, Král, Richard: Evropské právo, *(European Law)*, C.H. Beck, Praha, 1999, p.693.

[19] Pan, Franz: Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien,1999, p.101.

[20] Janis, Mark, Kay, Richard, Bradley, Anthony: European Human rights Law, Oxford University Press. New York, 2000, p.504.

[21] Blumenwitz, Dieter, Gornog, Gilbert: Der Schutz von Minderheiten und Volksgruppenrechten duch die Europäischen Union, Verlag Wissenschaft und Politik, Bonn, 1996, p.11.

standards. Cooperation in the area of justice and home affairs is impossible without a common framework in the protection of human rights.[22] The importance of the human rights and also of the national minorities' agendas in the EU can only increase.[23] The principle of equal treatment played a crucial role in including human rights aspects in the law of the EC/EU.[24] The antidiscrimination law opened a door in EC/EU law for the human rights agenda.[25]

Some experts divide the history of the EU/EC with respect to the national minorities' agenda in two periods[26]:

1) the period during which the national minorities' agenda was essentially ignored ("blindness as regards national minorities")

2) the period after May 1st, 1999 when the Amsterdam Treaty came into force[27].

But this milestone is for guiding purposes only because this change was actually a process and changes in legislation are only the formal signs of the change.

The first institution of the European Community/Union operating with a notion of **fundamental rights**[28] was the European Court of Justice.[29] It took its definition of human rights for Community purposes from common, international sources, mostly from the European Convention on Human Rights, which in 1974 was ratified by all Community states.[30] The Court of Justice over the years has declared that "general principles of EC law" include protection of fundamental rights which are part of the common constitutional tradition of Member states, including international human rights treaties.[31]

On the other hand, the development of the human rights agenda inside the EC has not been solely the work of the European Court of Justice. In 1977 (on April 5th), the European Parliament, Commission and Council adopted a joint declaration which stressed the importance of fundamental rights, derived in particular from national constitutions and the European Convention on Human Rights.[32]

After 1979 several members of the European Parliament tried to draw attention to the minority agenda. For example, in 1979/80, MP Franz Ludwig Graf Stauffenberg wanted

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[22] Craig, Paul, Búrca, Gráinne de: The Evolution of EU Law (collection of papers), Oxford University Press, Oxford, 1999: Curtin, Deirdre M., Dekker, Ige F.: "The EU as a "Layered International Organization: Institutional Unity in Disguise ", p.126

[23] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001, Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.239.

[24] Craig, Paul, Búrca, Gráinne de: The Evolution of EU Law (collection of papers), Oxford University Press, Oxford, 1999: More, Gillian: „The Principle of Equal Tretment: From Market Unifier to fundamental Right?", pp.531-533.

[25] Craig, Paul, Búrca, Gráinne de: The EU Law (text, cases and materials), Oxford University Press, Oxford, 2003, p.355 and 389.

[26] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001, Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.239.

[27] The Article 13 incorporated by the Amsterdam Treaty authorized the Council to „...to fight against discrimination based on gender, racial or ethnic origin, religion, disability, age or sexual orientation."

[28] A term close to "human rights".

[29] Klučka, Ján, Mazák, Ján a kol.: Základy európskeho práva, *(Introduction to European law)* IURA EDITION, Bratislava, 2004, p.241.

[30] Janis, Mark, Kay, Richard, Bradley, Anthony: European Human rights Law, Oxford University Press. New York, 2000, p.504.

[31] Craig, Paul, Búrca, Gráinne de: The EU Law (text, cases and materials), Oxford University Press, Oxford, 2003, p.317.

[32] Janis, Mark, Kay, Richard, Bradley, Anthony: European Human rights Law, Oxford University Press. New York, 2000, p.506.

to draft a proposal for a charter of rights of national minorities.[33] His initiative was refused, because at the same time, a similar attempt was underway at the Council of Europe.[34] In the 1980s, the agenda of national minorities was under the competence of the Committee for Culture.[35] MP Graf Stauffenberg in 1988 put forward a draft of a new document (Charter of Rights of Ethnic Groups in Member-states of the European Communities).[36] None of these initiatives were very successful.

The minority agenda acquired significant importance only as part of the external relations of the EC/EU,[37] involving negotiations with third or candidate countries.

The importance of having a serious "national minority policy" resulted therefore from European activities in the area of foreign relations and security policy. The attempts to solve the conflicts in Yugoslavia created pressure even on "domestic" EU policy to clearly define "minority rights".[38]

The first time the human rights agenda was mentioned in a fundamental (and legally binding) document was in the 1992 in the Maastricht Convention and its amendments. (currently art. 12, 13, 136, 141 of the Treaty on establishing EC and art. 6 and 7, 29, 49 of Treaty on EU- See Appendix XVII. and XVIII.)

Article 12 of the **Treaty Establishing the European Community** deals with the prohibition of discrimination based on state citizenship: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.[…]".[39]

Article 13 provides the right of the Council to adopt measures to fight against discrimination based on gender, racial or ethnic origin, religion, disability, age or sexual orientation: "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[40]

In a very general sense, from both these articles we can deduce the principle of equality of all citizens of the EU, regardless of their individual characteristics, including racial and ethnic origin. Article 13, together with several acts of the secondary law of the EC, are basic norms of EC protection of national minorities.[41] Article 136 expresses the obligation of the Communities to respect the European Social Charter: "The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment,

[33] Pan, Franz: Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien,1999, p.102.
[34] Ibid., p.102.
[35] Ibid., p. 102.
[36] Ibid., p.103.
[37] Blumenwitz, Dieter, Gornog, Gilbert: Der Schutz von Minderheiten und Volksgruppenrechten duch die Europäischen Union, Verlag Wissenschaft und Politik, Bonn, 1996, p.28.
[38] Ibid., p.12.
[39] Article 12, Treaty on establishing EC.
[40] Article 13, Treaty on establishing EC.
[41] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001: Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.253.

improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."[42]

This article does not deal with national minorities directly, but social matters concern even the life of national minorities. Several national minorities or groups of immigrants live in different conditions than the majority of the population. Therefore the request for a minimal standard of material equality is legitimate.

Article 141 stipulated equality between men and women (at least in pay for work):

"1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, «pay» means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value […]".[43]

Again, those above-mentioned articles do not concern the minorities' agenda directly, but they introduced at least the question of human rights into the law of the EU/EC. Nobody can claim that the EC/EU is only an economic organization or that it is or should be only a free-trade zone.

The elimination of the human rights aspects (including, at least partially, the national minorities agenda) from the scope of EU/EC activities would mean a return to the level of the 1970s in the process of European integration. However, as soon as the process of economic and other forms of integration begins, the relations between states become increasingly tighter, and sooner or later the states also have to proceed to integration in the other areas.

Article 151 speaks about cultural values. It obliged the Community to:

"[…] contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore." [Art. 151(1)]

[42] Article 136, Treaty on establishing EC.
[43] Article 141, Treaty on establishing EC.

This means to contribute even to the development of the cultures of national minorities. The Community shall support [Art.151(2)]:

1) improvement of the knowledge and dissemination of the culture and history of the European peoples,

2) conservation and safeguarding of cultural heritage of European significance,

3) non-commercial cultural exchanges,

4) artistic and literary creation, including in the audiovisual sector.

According to Art. 151(4), the Community is also obliged:

"[…] to take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures".[44]

In the **Treaty on the EU** only three articles are directly related to human rights: (6, 7 and 49, see Appendix XVIII).

Article 6 commits the EU to respect human rights, fundamental freedoms and fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms. This Convention in this way definitely became a part of the EC/EU - law.

"Article 6

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

3. The Union shall respect the national identities of its Member States.

4. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies."[45]

In practice, by means of this article the EU definitively adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms within the law of the EU/EC.

Article 7 presents the procedure that must be applied in case the main principles and objectives (including human rights and freedoms) are at risk.

In the case of breach of the principles of Article 6(1) the Council may:

1) address appropriate recommendations to that State [Art.7(1)]

2) suspend certain of the rights deriving from this Treaty to the member State (including the voting rights of the representative of the government of that Member State in the Council [Art.7(2)].

The initiator of this process may be the Commission or the European Parliament, but the decision-making body is the European Council.[46]

In this article, rights of national minorities are not mentioned directly, but the following Article (49) speaks about the obligation of potential members to respect human rights (including basic respect for the rights of national minorities). Only the European states that respect the principles of human rights may become members of the EU.[47]

Article 29 deals with cooperation in criminal matters and with the struggle against racism and xenophobia[48], obligations which

[44] Art.151, Treaty on establishing EC.
[45] Article 6, Treaty on the EU.
[46] Article 7, Treaty on the EU.
[47] Article 49, Treaty on the EU.
[48] Article 29, Treaty on the EU.

also have some relevance to the national minorities' agenda.

No regulation of the primary legislation deals with the rights of national minorities directly. But the fundamental principles can be deduced from the provisions about the struggle against discrimination, racism and xenophobia, and from provisions about accepting the standards of the Council of the Europe as basic principles of the human rights oriented policy of the EU.[49] They form an important basis for the equal treatment of members of national minorities. (Most states understand racism in a more general sense, as discrimination is based not only on race in a strict anthropological meaning but also on ethnic origin, language, religion etc.[50]) There is an obligation for the EU to promote the rights and status of the people who are "others" in an ethnic sense. It opens a door for claims by ethnic minorities for recognition at the European level. If the EU intervention in the issue of gender equality was very successful, the case of ethnic, racial and national minorities is much more complicated.[51] The methods of "positive discrimination" may be used by individual member states, but only if they are not forbidden by the EC- and EU-laws (a ban on discrimination).[52]

The human rights agenda in the law of the EU subsumes different groups of norms. We could speak of four groups. (In case of group III, we may suspect that they do not really belong to the law of the EU). But those pillars must be distinguished from the pillars of the Treaty of Maastricht:

I.	II.	III.	IV.
Community law	International law	Constitutional law of individual states (If reference is made to them in acts of the communities and the Union)	External agreements of the EU

In group I we can identify:

1) Primary law:
   Treaty Establishing the EC,
   Treaty on the EU
2) Secondary law:
   Directives, regulations, etc (mostly in the area of free movement, acceptance of diplomas, social security, etc.)
3) Practice of the Court of Justice:
   This is a system developed from basic principles.
4) "Soft law"
Resolutions, recommendations, opinions (not binding).
5) Sui generis acts:
   Communitarian Charter of Fundamental Social rights of Employees (1989),
   Charter of the Fundamental Rights of the EU (2000)

And in group II.

   The European Social Charter (1961),
   The European Convention on Protection

[49] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001: Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.253.
[50] Alston Philip: The EU and Human Rights, Oxford University Press, New York, 1999: Conor A Gearty: "The Internal and External Other in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", p.336.
[51] Ibid., p.349.
[52] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001: Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.254.

of Human Rights and Fundamental freedoms (1950)

3. Secondary law of the EC and EU

From secondary law, the most important act is **Directive No. 2000/43 EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin**.[53] This Directive of the Commission is based on Article 13 of the Treaty[54] and is relevant also to the protection of national minorities.[55] It defines not only direct and indirect discrimination on the grounds of racial or ethnic origin, but also harassment. The Directive refers not only to national laws, regulations or administrative practice, but also to any provision contained in individual or collective contracts, agreements, and internal rules of undertakings or non-profit associations (Article 14). In this document the EU rejects theories which attempt to determine the existence of separate human races. Following the Preamble, the use of the term "racial origin" in this Directive does not imply an acceptance of such theories (Preamble 7). Maybe this is too courageous a statement. It presents a political solution to a problem of anthropology and genetics. We may doubt that it is a real solution.

Regardless of problems concerning exact definitions, discrimination based on racial or ethnic origin (Preamble 9) is defined as an obstacle to the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.

This directive has forbidden any form of direct or indirect discrimination based on racial or ethnic origin (Article 2).

A direct discrimination is defined as a situation, when "one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin" [Article 2(2)(a)].

An indirect discrimination is a situation when "[…] an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary" [Article 2(2)(b)].

The Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to conditions for employment and self-employment, access to all forms of training, working conditions, organisations of employees, social protection, education, access to goods and services etc. (Article 3) However it is not applied to the situation of persons with citizenship of third (non-EU) countries. But this directive accepted positive discrimination (positive action, Article 5). The standard laid down by this directive is a minimal standard (Article 6). Measures taken by states can be more favourable for individual persons.

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[53] Unofficially called the "Race directive".

[54] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001: Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.241.

[55] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, see OJ No. L 180, 19.07.2000, pp. 22-26 and Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, pp.23-24.

By this Directive Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them [Article 7(1)].

Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive [Article 7(2)].

The burden of proof is put on the respondent to a person who considers himself wronged because the principle of equal treatment has not been applied (Article 8)- although many legal experts may consider this provision wrong [(Article 8(1)]. Member States shall introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint (Article 9). States shall encourage dialogue between social partners and with non-governmental organisations in the area of struggle against discrimination (Article 11 and 12). Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin [Article 13(1)]. Any laws, regulations and administrative provisions, provisions of contract, internal rules of undertakings, rules governing profit-making or non-profit-making associations etc., which are contrary to the principle of equal treatment, are abolished (Article 14).

We are again able to notice that national minority rights consist of three main aspects:

1) protection against discrimination for individuals belonging to the national (racial, religious, ethnic) minority.

2) some form of special rights which the rest of the population does not have (mainly because they as the majority do not need them).

3) some form of special treatment and positive discrimination in the area of education, training, access to work opportunities, special social support programs etc.[56]

For existing European law the most important is the first aspect. The principle of equality and non-discrimination are fundamental principles of the EU. The "fathers" of European integration were fully aware the level of the hate, exclusion and xenophobia existing in European society.[57] This xenophobia was oriented not only against citizens of other (member) states but also against "traditional" minorities and later also immigrants in the first place immigrants with different colour of skin and different cultural habits (Muslims, Hindus etc.).

The third aspect shall support the elimination of discrimination in social life and providing access to work opportunities in the first aspect. Special rights which support cultural life of persons of different racial or ethnic origin are, still from the point of view of present EU law, a less important matter.

But it is interesting that this "Race Directive" omitted references to religious discrimination - often closely related to discrimination on a racial or ethnic basis.[58]

[56] This last one aspect is not always accepted by everybody.

[57] Alston Philip: The EU and Human Rights, Oxford University Press, New York, 1999: Conor A Gearty: „The Internal and External Other in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", p.327.

[58] See: Boris Tsilevich: EU Enlargement and the Protection of National Minorities: Opportunities, Myths, and Prospects, http://www.eumap.org/journal/features/2001/oct/euenlarge.

However, in specific situations we can define the religious specific characteristic of some community as its cultural features forming a distinct ethnic group. Probably there is no religious minority which in reality would have only religious specificities. Any religious minority usually has its own specificities in cultural and material life. And therefore, this could also be applied to religious minorities without direct reference.

In practical policy, the measures which have been taken by the EU/EC can be divided into four groups[59]:

1) measures of a **mainly political characte**r, developed by the European Parliament and characterised by a normative approach;

2) measures undertaken by the European Commission, the Council (and the Parliament), characterised by a functional, i.e. **financial approach**;

3) measures taken within the framework of the EC/EU's **foreign relations**, which differ from the already-mentioned two groups as they are not directed at the internal sphere of the EU (which does not, however, mean that they could not also have internal implications);

4) policies and programme-type measures (not treated here), which are **not minority oriented,** but which still are relevant to minority issues. These include areas such as human rights policy, anti-racism policy, asylum policy, refugee policy, the attitude towards third-State nationals, the role of the regions in the EU, etc.

4. The European Court of Justice

The system of the law of the EU is to some extent similar to Anglo- Saxon common law and decisions of the Court of Justice play an important role in it.

The Court does not pay significant attention to the problems of national minorities. They are a matter of concern only if they have some relevance to fundamental principles set in the Primary Law.

For example, the cases Bickel/ Franz (25.11.1998)[60] and Angonese (06.06.2000)[61] regarded regional provisions aiming at the protection of the German minority living in the Autonomous Province of Bozen (South Tyrol in Northern Italy). The Court declared that linguistic restraints in this province were against community law.[62] Mr.Bickel and Mr.Franz were Germans from Germany and Austria who demanded to have criminal proceedings conducted against them in German, as the trial was held in South Tyrol where the German language has the same position as Italian. The Italian Government contended that the only nationals upon whom the right in question is conferred are those who are both residents of the Province of Bolzano and members of its German-speaking community, the aim of the rules in question being to recognise the ethnic and cultural identity of persons belonging to the protected minority. Accordingly, the right of that protected minority to the use of its own language need not be extended to nationals of

[59] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, pp. 1-3.

[60] The judgement in this case C-274/96 was issued on 24 November 1998 (see under http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en).

[61] The judgement in this case C-281/98 was issued on 6 June 2000 (see under http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en).

[62] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.2 and C-274/96.

other Member States who are present, occasionally and temporarily, in that region.

The Court in its judgement declared that such a position would favour nationals of the host State (the Germanspeaking community in South Tyrol) by comparison with nationals (German-speaking) of other Member States in exercising their right to freedom of movement, and would therefore run counter to the principle of non-discrimination laid down in Article 6 of the Treaty:

"[…] the protection of such a minority may constitute a legitimate aim. It does not appear, however, from the documents before the Court that that aim would be undermined if the rules in issue were extended to cover German-speaking nationals of other Member States exercising their right to freedom of movement." (line 29 of the Judgement)

The Angonese case dealt with an Italian resident in South Tyrol who studied in Austria and therefore did not posses a required certificate in order to prove he was bilingual. Thus, he was denied participation in a work competition. The Court later declared it as a contradiction with the Article 39 of the Treaty:

"Article 48 of the EC Treaty (now, after amendment, Article 39 EC) precludes an employer from requiring persons applying to take part in a recruitment competition to provide evidence of their linguistic knowledge exclusively by means of one particular diploma issued only in one particular province of a Member State."[63]

5. Sui generis acts and "Soft" law of the EU

Beside the rules existing in the EU-law, there are many documents which are not strictly legally binding, but nevertheless create a political and moral "atmosphere" in which the policy of the EU is performed.

The most important role in this matter was played by the European Parliament.

Probably the first documents concerning the national minorities' agenda was The European Parliament's **Resolution on a Community Charter of Regional Languages and Cultures** and on a **Charter of Rights of Ethnic Minorities** (16th October, 1981).[64] This Resolution requested national, regional and local authorities to allow and promote the instruction of regional languages and cultures in official curricula from nursery school up to university level; to allow and to ensure sufficient access to local radio and television; and to ensure that individuals are allowed to use their own language in the field of public life and social affairs in their dealings with official bodies and in the courts (paragraph 1).[65]

This Resolution demanded, furthermore, that regional funds should provide assistance for projects designed to support regional and folk cultures and regional economic projects (paragraphs 4 and 6). Finally, the Parliament called on the Commission to review all Community legislation or practices which discriminate against minority languages (paragraph 5).

In 1983, the Parliament passed a **Resolution on Measures in Favour of Linguistic and Cultural Minorities** [11 February 1983 (OJ 1983 No. C 68, p. 103)][66]. The Parliament underlined the importance of the above-mentioned resolution of 1981, and again called upon the Commission to continue and intensify its efforts in this area.

Another one of the first documents

[63] http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=698J0281#SM.
[64] OJ 1981 No. C 287, p. 106.
[65] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm , p.4.
[66] Ibid., p.4.

dealing with the rights or status of ethnically different people was a **Joint Declaration against Racism and Xenophobia** issued by the European Parliament, the Council and Commission (1986, O.J. C158/1).[67]

The **Resolution on the Languages and Cultures of the Regional and Ethnic in the European Community** [the so-called *Kujpers Resolution*, 30 October 1987, (OJ 1987 No. C 318, p. 160).] was adopted by the Parliament in 1987 as a result of a lack of progress in this matter.[68] In this Resolution the Parliament provided different recommendations to the Member States in the field of education, the mass media, cultural infrastructure and economic and social life, as well as in the field of State administration and jurisdiction.

Furthermore, the Parliament recommended:

1) to provide a direct legal basis for the use of regional and minority languages, in the first instance in the local authorities of areas where a minority group does exist,

2) to review national provisions and practices that discriminate against minority languages',

3) to use also national, regional and minority languages in decentralised and central government services in the areas concerned.

4) to recognise surnames and place names expressed in a regional or minority language.

5) to provide consumer information and product labelling in regional and minority languages.

6) to use regional languages for road and other public signs and street names.

A new attempt to draw the attention of the European parliament to the problems of national minorities was the initiative of the MP Siegbert Alber in 1993 (a draft of the Charter of ethnic groups). His initiative was unsuccessful because of the coming elections in 1994 and the substantial progress in the Council of Europe as regards the protection of national minorities, which put his initiative in question.[69]

In 1994, the Parliament adopted a **Resolution on Linguistic Minorities in the European Community**[70] on the basis of the so-called 'Killilea report', which again referred to the previous resolutions and pointed out that the Member States should recognise their linguistic minorities and create the basic conditions for the preservation and development of these languages and cultures in the spheres of education, justice and public administration, the media, toponomics and other sectors of public and cultural life (paragraph 4).[71]

The Parliament, furthermore, called upon national governments and parliaments to sign and ratify the Council of Europe's Charter on Regional Languages- another proof of a mutual interconnection between the EU and the Council of the Europe and their normative systems. In this resolution, the Parliament

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[67] Dashwood, Alan, O´Leary, Síofra: The Principle of the Equal Treatment in E.C.Law, Sweet and Maxwell, London, 1997: Elspeth Guild: „EC Law and the Means to combat racism and Xenopobia", p.189.

[68] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.4.

[69] Pan, Christoph, Pfeil, Beate Sibylle: National Minorities in Europe, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien, 2003, p.141.

[70] OJ 1994 No. C 61, p. 110.

[71] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.6.

appealed to the Commission to propose a multi-annual action programme in this field and to ensure proper budgetary financing.

In 1999, the EP adopted the **Resolution on racism, xenophobia and anti-Semitism and on further steps to combat racial discrimination**.[72]

In this resolution the Parliament states that combating discrimination against immigrants and religious minorities is "[…] integral to any comprehensive policy against racism and xenophobia". Indeed, the Parliament says that it attaches great importance to "[…] the participation of cultural, racial and ethnic minorities in both social and political decision-making processes." The question of autochthonous national minorities is connected with the question of modern immigrants.

Some resolutions of the EP touched the minority agenda in a very marginal way.

For example, the **Resolution on the role of public service television in a multi-media society** calls on public service broadcasters "[…] to enact real equal opportunities to improve the representation of women and ethnic minorities in all television employment."[73] The Parliament's **Resolution on poor conditions in prisons in the European Union** makes special reference to "[…] particular groups requiring specific treatment: women, immigrants, homosexuals, and members of ethnic and religious minorities."[74]

But these resolutions and recommendations did not lead to legally binding acts of the EC/EU. Probably the main reason was that this question was successfully solved at the level of the Council of the Europe and the EC/EU wanted to avoid duplication.

The European parliament was more active in the area of protection of national minorities than other EC/EU institutions. A majority of these initiatives depended on the activity of individual members of the European Parliament. For such initiatives, the period of the 1980s and 1990s was more favourable than previous periods. They were oriented towards the traditional struggle against discrimination of persons belonging to national minorities and the protection of their linguistic and cultural rights.

The **Charter of Fundamental rights of the European Union** (adopted in Nice in 2000)[75] is a special *sui generis* document. There was a chance that it would become a part of a new "European Constitution".[76] But that has not happened. Its current legal status is not absolutely clear, "[…] but it is certainly not without any legal influence or effect. A range of institutional actors has already made use of its provisions."[77] The question of the legal character and obligation of this charter will probably be definitely solved in the so-called Reform Treaty, the text of which was adopted at the summit of the European council on 21-22 June 2007 in Brussels and signed on 12th December 2007.

In its Preamble this document confirmed

[72] OJ 1999 No. C 98, p. 48 and Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.8.

[73] OJ 1996 No. C 320, p. 180 (§ 27).

[74] OJ 1996 No. C 32, p. 102 (§ 4).

[75] Craig, Paul, Búrca, Gráinne de: The EU Law (text, cases and materials), Oxford University Press, Oxford, 2003, p.359.

[76] Klučka, Ján, Mazák, Ján a kol.: Základy európskeho práva, *(Introduction Europen law)* IURA EDITION, Bratislava, 2004, 2004, pp.270-272.

[77] Craig, Paul, Búrca, Gráinne de: The EU Law (text, cases and materials), Oxford University Press, Oxford, 2003, p.362

all previous efforts to constitute a system of protection of human rights in the framework of the EU:

"[...] This Charter reaffirms, with due regard for the powers and tasks of the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights."[78]

The EU/EC confirmed in this Preamble (at least declaratorily) several sources for its human rights agenda:

1) the European Convention for the Protection of Human Rights and Fundamental Freedoms

2) the Social Charters adopted by the Union and by the Council of Europe

3) the case law of the Court of Justice of the European Union

4) the case law of the European Court of Human Rights

This Charter of fundamental rights also involves a number of provisions dealing with national minorities' issues. Of course, the Charter also involves absolutely basic provisions dealing with non-discrimination[79], which therefore should be presented first:

"Article 21

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited."[80]

Article 22 emphasizes the value of cultural and linguistic diversity:

"The Union shall respect cultural, religious and linguistic diversity."[81]

Diversity (in itself) was promoted to the level of respected value in the Charter. In several places above it had already been noted, that after many changes in value orientation, the question changed from the original "how to eliminate negative consequences of diversity" to a new one "how to protect diversity as a specific value."

Religious identity is frequently related to ethnic identity. Therefore the Article dealing with freedom of religion has its place in discussion on national minorities. In the case of this Charter it is Article 10(1):

"Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance."[82]

But to the provisions relevant to the national minorities' agenda we may also add the article dealing with right to family right and children (Article 9):

"The right to marry and the right to found a family shall be guaranteed in accordance with

[78] Preamble, The Charter of Fundamental rights of the European Union.

[79] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001: Reiner, Arnold: „Europäische Union und Minderheitenschutz", p.250.

[80] Article 21, The Charter of Fundamental rights of the European Union.

[81] Article 22, The Charter of Fundamental rights of the European Union.

[82] Article 10(1), The Charter of Fundamental rights of the European Union.

the national laws governing the exercise of these rights".[83]

There are two reasons for this:

The first one is that this right is not such a matter of course as it may seem, especially in the situation when some minority has a different birth rate from the majority population (Rroma people) or comprises immigrants from culturally different areas (for example, Africa or Asia). In this case there may be plans or wishes to regulate their natality by administrative and medical methods or to prevent them from inviting the relatives into country where they actually live.[84]

The second reason is that in many cases the way or conception of family life (and of social life as general) is different from the social and family life of the majority of the population. Then the state has to solve the problem: to what extent should it tolerate and accept this? Cases in point are the Rroma population and the immigrants, but also for example, nomadic populations (Sama-people in Scandinavia). They must not be an object of "social engineering" or social experiments- e.g. of a forcible removal of their children to special dormitory schools etc. The state probably should even, at least to some extent, respect the special forms of wedding or family life of those marginal populations. On the other hand, how far this should go? Sometimes in the Rroma-community in Romania, Slovakia and Hungary, it is claimed that the state should acknowledge that 13-14 years is regarded as the age of sexual maturity in this population, and therefore the state should recognize marriages of 13 year old girls (frequently with 20-30 year old partners!) Or states should be more tolerant of sexual relations between relatives in those Rroma communities. Of course, that is not possible because it is in contradiction to more important principles which the state should follow.

A general freedom of the media and freedom of expression as well as other freedoms in the Charter help national minorities, which can make use of them in order to develop their social, cultural and political life (Article 11). Everyone has the right to freedom of expression. This right includes freedom to hold opinions and to receive information and ideas without interference by public authority and regardless of frontiers (of states). It also allows for the distribution and presentation of information and ideas in the language of the minority, by members of the minority and for members of the minority. They have a right to do so even beyond the borders of the state where they live. The mass-media of national minorities are allowed to take their place in the wide spectrum of existing media [pluralism, Art.11(2)]. Freedom of arts and sciences (Art.13) has a similar character. The arts and scientific research shall be free of constraint. This means that also specific research oriented to national minorities (ethnography), or serving the needs of national minorities or run by its institutions (universities, organisations), is "[…] free of constraint."

The right to education (Article 14) means not only a right to have access to education organized and paid by the state and public authorities, but also a right to establish non-state educating institutions (for example by organizations of national minorities) and "[…] the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions." (Of course, in accordance with the national laws governing the exercise of such freedom and right.)

[83] Article 9, The Charter of Fundamental rights of the European Union.

[84] For example, Slovenská národná poslpolitosť declared such intentions at their meetings. Slovenská národná poslpolitosť (the Slovak National Community) is an extreme right-wing nationalistic uniformed organization active in 2002-2006 in Slovakia. Its activity is today restricted by the police. See: http://www.pospolitost.sk/.

Political participation of persons belonging to national minorities and the political life of minorities and their self-organisation, would be restricted without the freedom of assembly and of association (Article 12). This guarantees the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters.

The **Community Charter of Fundamental Social Rights of Employees** (adopted during the summit in Strasbourg on 9th December 1989) declares in its Preamble a fight against all form of discrimination, including racial, in the specific area which it applies to.

The European Monitoring Centre for Racism and Xenophobia in Vienna (est. in 1998)[85] issued **Declarations on the fight against racism, xenophobia and anti-Semitism in the youth field and on respecting diversity and combating racism and xenophobia**.[86]

At the same time (1998), the EU Consultative Commission on racism and Xenophobia adopted a **Charter on European political parties for a non-racist society**.[87] It calls on democratic political parties in the European Union to act responsibly when dealing with issues related to race, ethnic and national origin and religion. It encourages political parties to work towards fair representation of racial, ethnic, national and religious minorities within and at all levels of their party system. The Charter paves the way to rid political campaigning and discussions of the scourge of racism and xenophobia. Parties can only sign the Charter if they are committed to its principles and have shown in their activities that they are working positively to bring to life the words of the Charter.[88]

This problem was also referred to in **Resolution on racism, xenophobia and anti-Semitism**[89] (B4-0108/98) of the European Parliament (1998).[90]

In this resolution the European Parliament condemned racism, xenophobia and anti-Semitism and called for effective measures to fight it.

6. National minorities in external agreements and external relations of the EC/EU

The human rights agenda, including rights of national minorities, may have played (and this is very strange!) a more important role in the past in external relations with third counties (for example associated and candidate) than in the internal policy of the EU/EC.[91] The European Commission since the 1980s´ and 1990s´ has made cooperation with third countries conditional on their progress in the areas of democracy and human rights.[92]

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[85] From 1 March 2007 the European Monitoring Centre on Racism and Xenophobia (EUMC) became the EU Agency for Fundamental Rights (FRA). See: http://eumc.eu.int/eumc/index.php.

[86] Alston Philip: The EU and Human Rights, Oxford University Press, New York, 1999: Conor A Gearty: „The Internal and External Other in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", p.331.

[87] Ibid., p.331.

[88] Charter of European Parties for a Non-Racist Society, http://eumc.eu.int/eumc/index.php?fuseaction=content.dsp_cat_content&catid=3ef0500f9e0c5.

[89] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=51995IP1239&model=guichett&lg=en

[90] Alston Philip: The EU and Human Rights, Oxford University Press, New York, 1999: Conor A Gearty: „The Internal and External Other in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe", p.332.

[91] The democratic character of member states was seen as a matter of course.

[92] Regersberger, Elfriede: de Schoutheete de Tervarent, Philippe, Wessels Wolfgang: Foreign Policy of the European Union (collection of papers), Lynne Riner Publishers, Inc., London, 1997 : Cameron, Frase: Where the European Commission comes in: From the Single European Act to Maastricht, pp.104-105.

It has also started to support the democratic process in third countries with financial resources.[93]

The wars in Yugoslavia after 1991 were a real test of the capacity of the EU/EC to manage international crisis. Now we may state that the countries of the EU/EC did not do their best. But for our purposes it is worth mentioning that with the exception of initial reactions in Summer 1991[94], in any attempt to solve this crisis they paid attention even to issues of the rights of national minorities.[95] (Carrington-plan, Vance/Owen plan, etc.)[96] The Council of Ministers of the EC on 17th December 1991 in amendment "Guidelines on the Recognition of New states in East Europe and in Soviet Union" in its "Declaration to Yugoslavia" required among other conditions that the rights of national minorities are respected.[97]

Also, the well known Copenhagen criteria, adopted at the summit in 1993, were oriented to third countries and to potential candidates from East and Central Europe who wanted at that time to join the EU/EC.[98] The whole enlargement process was a good opportunity to form clear requirements in the area of human rights.[99]

In the human rights aspects of foreign policy and external relations the European Parliament was usually more progressive and radical than the European Commission or the European Council.[100] Maybe because its resolutions rarely had direct impact on relations with third countries. In documents regarding human rights policy, cross-border co-operation, treaty revision, or racism, the Parliament usually mentioned also minority aspects as an important aim. This goes also for the resolutions of the EP, in which the political situation of specific countries is commented upon.[101]

For example, in its "**Resolution on human rights in the world in 1997 and 1998 and European Union human rights policy**", the Parliament noted that violent conflicts around the world involved problems related to minorities. It called for a redoubling of international efforts to end large scale discrimination against religious, national, linguistic or ethnic minorities and to help resolve inter-ethnic conflicts and for greater

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[93] Ibid., p.105.

[94] Regersberger, Elfriede: de Schoutheete de Tervarent, Philippe, Wessels Wolfgang: Foreign Policy of the European Union (collection of papers), Lynne Riner Publishers, Inc., London, 1997: Edwards, Geoffrey: The potential and Limits of the CFSP: The Yugoslav Example, p.174.

[95] Pan, Franz: Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien, 1999, pp.139-41.

[96] Peace plans of EC and UN for Bosna in 1991-94, http://en.wikipedia.org/wiki/Peace_plans_offered_before_and_during_the_Bosnian_War.

[97] Pan, Franz: Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien, 1999, p.139.

[98] Lang, Peter: Minderheitenschutz in Mittel und Osteuropa, (collection of papers) Gerrit Manssen/Boguslaw Banaszak Hrsg., Wien, 2001: Reiner, Arnold: „Europäische Union und Minderheitenschutz", pp.242/43.

[99] Regersberger, Elfriede: de Schoutheete de Tervarent, Philippe, Wessels Wolfgang: Foreign Policy of the European Union (collection), Lynne Riner Publishers, Inc., London, 1997: Lippert, Barbara: Raltions with Central and Eastern European Countries: The Anchor Role of the EU, pp.197-198.

[100] Regersberger, Elfriede: de Schoutheete de Tervarent, Prhilippe, Wessels Wolfgang: Foreign Policy of the European Union (collection of papers), Lynne Riner Publishers, Inc., London, 1997: Grunert Thomas: The Association of the Euroean Parliament: No longer the Underdog in EPC?, p.109-113.

[101] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, 2000, p.7.

recognition and protection of communal rights, and in particular of the rights of indigenous people.

Further, it called for the strengthening of international monitoring mechanisms in relation to minority rights and for the just treatment of minorities in Central and Eastern European countries, with strict observance of fundamental rights and freedoms and the principles of equality and citizenship, without undermining their identities, particularly in candidate countries (at that time including Slovakia).

In the **Resolution on respect for human rights in the European Union** (1997)**,** the EP stated that accession to the European Union is out of question for states

„[…] which do not respect fundamental human rights, and calls on the Commission and Council to lay particular stress on the rights of minorities (ethnic, linguistic, religious, homosexual etc.) at the time of enlargement negotiations.“ [102]

In Resolutions on specific countries the Parliament from time to time mentioned a specific problem related to the protection of national minorities.[103]

For example, in the **Resolution on the political situation in South America** (1989), it underlined the importance of equal access for all sections of society to training and education.[104]

In the **Resolution on the violation of political and human rights in the Islamic Republic of Iran** (1996) the EP demanded guarantees for equal rights to religious minorities.[105]

The **Resolution on Burma** (1999) laid stress on the dialogue between the government and local national minorities.[106]

The **Resolution on the situation of human rights and indigenous minorities in Argentina** (1997)[107], **Resolution on the political rights of minorities in Albania** and **Resolution on the protection of minority rights and human rights in Romania** (1995)[108] have a similar character.

The EC/EU incorporated human rights agenda in its external trade in the 1980s. The first trade agreement containing a human rights clause was the LOMÉ IV. in 1989.[109]

Since then different types of human rights clauses, varying in content as well as in enforcement, have been developed. The human rights dimension plays a role also in the Mediterranean partnership, in cooperation with post-Soviet states, ASEAN-countries and Latin America countries.

Minority protection is to be found in the Convention concluded between the African, Caribbean and Pacific States and the Community, in Agreements on partnership and co-operation, in Council regulations on assistance to and co-operation with developing countries in Asia and Latin America etc. Minority protection is also a general element of reports on third countries.

In 1991 the EC made recognition of any

[102] OJ 1999 No. C 98, p. 279 (§ 10).
[103] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.8.
[104] OJ 1989 No. C 47, p. 28 (§ 10).
[105] OJ, 1996 No. C 96, p. 295 (§ 4).
[106] OJ 1999 No. C 219, p. 405 (§. 6).
[107] OJ 1997 No. C 115, p. 171.
[108] OJ 1995 No. C 249, p. 157.
[109] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.14.

new state in former socialist countries conditional on guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE.[110] On 16 December 1991 the Foreign Ministers issued, within the framework of European Political Co-operation, a Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union and the Declaration on Yugoslavia.[111] The EC thereby introduced minority protection as a new element within the spectrum of conditions for the recognition of statehood.

Since 1995 the agreements have contained reference either to the Universal Declaration of Human Rights or, when the partner State is an OSCE State, to the OSCE principles.[112]

But as soon as the EU/EC incorporated in its external relations an agenda of national minorities, it was criticised for „a double standard", because the Community still ignored, at least formally, the issue of minority protection within its own borders.

The situation regarding protection of national minorities was thoroughly investigated in the case of candidate countries (which joined the EU in 2004 and 2007). Now Turkey, Croatia and Macedonia are being monitored in regard to this aspect.

At the meeting held in Copenhagen in June 1993, the European Council established conditions for countries in Central and Eastern Europe to be fulfilled before accession. The so called Copenhagen criteria were political, economic and administrative and legal (the capacity to adopt the acquis). One of the political criteria of Copenhagen (besides democracy, rule of law and human rights) is the respect for and protection of minorities.[113] The Amsterdam Treaty transposed all the Copenhagen-criteria - except the one concerning minority protection - into Primary law. Many exclusion of minority-criteria proves that this agenda is extremelly sensitive for several states and it is not easy to reach a compromise in these questions. „Old members states" are willing to question candidate countries or "new member states", but in this absolutely sensitive matter they themselves do not want to admit an intervention of the EU. France, UK and Spain for example consider their problems with Northern Ireland, Corsica and Basques as internal problems.

Clearly, in legal terms the regular conditions for accession are found in Primary Law, and the minority provision of the Copenhagen-criteria has a political nature, being adopted in the conclusions of the European Council. Nevertheless, in a indirect sense they might be seen as binding in as far as they reflect already existing political wills.

„Hence the question whether *«respect for and protection of minorities»* is part of the *acquis* or not, should indeed be raised. If no legal Community standard is identified, the standard applied in the course of eastern enlargement has to be of a(more or less) political nature."[114]

During the accession process the

[110] Ibid., p.15.
[111] See further: Rich, Roland : Recognition of States: The Collapse of Yugoslavia and the Soviet Union, 2000?, http://www.ejil.org/journal/Vol4/No1/art4.html.
[112] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.16.
[113] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.16.
[114] Ibid., p.18.

Commission presented its Opinions as to whether and to what degree the applicant States fulfilled the conditions for being admitted to accession negotiations. It discussed the respective minority situations in detail, using a broad definition of both minority groups as well as of minority protection. Since November 1998, the Commission has issued its regular reports in which it analysed whether, in the light of the Copenhagen criteria, the reforms announced or indicated had in fact been implemented. The Accession Partnerships (APs) adopted in 1998 indicated certain short-term priorities, including also minority items for each candidate state. Slovakia was requested to adopt legislation on the use of minority languages and Latvia and Estonia were to facilitate the conditions for the naturalisation of non-citizens. In the medium term it is recommended that "the Czech Republic, Hungary, Bulgaria and Romania improve the integration of the Rroma population".[115]

The criteria for minority protection also became a crucial element of the EU's policy towards South-Eastern Europe.

Romania is in many aspects close to its central European neighbours and therefore it has usually respected the rights of its national minorities (mainly Magyars and Germans). The problem of Roma people is more painstaking and similar to the situation in Slovakia or Hungary. In Bulgaria the problem of Pomacs, Gypsies and Muslims was solved (at least formally) by political participation of representatives of those minorities in ruling coalitions. In the case of Turkey, an armistice and negotiation was a crucial condition for opening negotiations. But in the Turkish case there are many issues relating to national and religious minorities: the problem of the Armenian genocide, the position of religious minorities etc.

In its external activity, the EU also pays attention to questions of indigenous peoples.[116] The EU has already established a framework for its activities in this area through a working paper presented in 1998, which was reaffirmed by a Development Council Resolution adopted in the same year.[117]

For this activity three guidelines were defined:

1) integrating the concern for indigenous peoples into all Union policies, programmes and projects.

2) consulting indigenous peoples in policies and activities that affect them.

3) providing support in key thematic areas.

Questions concerning indigenous peoples have been integrated into a series of agreements and strategic documents concluded with the EU's partners, mostly from ACP-group (African, Caribbean and Pacific countries) and in the Initiative for Democracy and Human Rights (EIDHR).

On the other hand, the EU policy towards indigenous peoples within the borders of the Union is not so clearly defined. However, for example, we can view in this light also an Aim 6 of structural and cohesion policy (a support of regions of low density of inhabitants in Sweden and Finland).

As there is an interrelationship between the internal and external dimensions of the EC/EU, the development of the protection of rights of persons belonging to national minorities in external activities necessarily contributed to progress also in internal politics.[118]

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[115] In reality the `Partnerships` are not a bilateral instrument (as the name would suggest), but mere communications of the Commission (see OJ 1998 No. C 202, pp.1-97).

[116] See Report from the Commission to the Council of 11 June 2002 „Review of progress of working with indigenous peoples“ COM(2002) 291.

[117] Conclusions of the Development Council- 30th Nov.1998.

[118] Craig, Paul, Búrca, Gráinne de: The Evolution of EU Law (collection of papers), Oxford University Press, Oxford, 1999: Cremona, Marise: „External relations and External Competence: The Emergnce of Integrated Policy“, p.137.

7. Financial and organizational measures of the EU

In addition to legal acts the institutions of the EU also organize some practical steps in favour of minority cultures and languages.[119]

The Commission, for example, financially supports a non-profit organisation, the European Bureau for Lesser Used Languages (EBLUL), which represents EU citizens who speak autochthonous languages.

In 1982 the EP and Commission started co-financing of projects aimed at improving the quality of learning and the instruction of regional and/or minority languages, as well as preparing a future dissemination of information, experience and expertise in the field of regional/minority languages.[120] The languages which may benefit from this budget are the indigenous languages traditionally spoken by part of the population in an EU Member State. Dialects, migrant languages and artificially created languages are excluded.

The Commission has also supported several studies on the situation of minority languages through the MERCATOR programe which consists of a net of research institutions. For example, in 1984 the Commission published a study on the situation of the lesser used languages in the European Community, in 1990 a study on the situation of linguistic minorities in Greece, Spain and Portugal.[121]

The biggest research project was the EUROMOSAIC (1993/94)[122] activated by the European Commission to map the situation of minority or regional languages in the EU. In 12 states of the EU it identified 43 regional or minority languages.[123] The result of this work was published in 1996 as a report on **The production and reproduction of the minority language groups in the European Union.**[124]

The EU's eastern enlargement (2004) gave a special impetus to look beyond the linguistic dimension of minorities in Europe, giving the minority question a clear political (and legal) dimension. However, this new approach seems to be limited to the minorities in Central and Eastern Europe.[125] Old member states often find it difficult even to admit that they have some „minority problem“ in which the EU can intervene.

The European Commission (within the PHARE Programme) co-financed a Joint Programme entitled **Minorities in Central European Countries** together with the Council of Europe, which included seminars on “minorities and media“, „minorities and education“, „minorities and participation in decision-making processes“.[126]

Also the multi-annual programme to promote the linguistic diversity of the Community in the information society (MLIS) aims (also) at promoting a multilingual Europe and partly funds MELIN (Minority European

[119] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm , p.9.
[120] Ibid., p.9.
[121] Ibid., p.10.
[122] See further: Euromosaic, ?, http://www.uoc.edu/euromosaic/.
[123] Pan, Franz: Der Minderheitenschutz im Neuen Europa and seine historische Entwicklung, Wilhelm Braumüller, Universitäts-Verlagsbuchhandlung, Wien,1999, p.142.
[124] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm, p.10.
[125] Ibid., p.11.
[126] Ibid., p.11.

Languages Information Network).[127] This program provides information in four minority languages: Irish, Welsh, Catalan and Basque.[128]

The EC and EU also provide financial support for minority-relevant situations such as, for example, the translation and dissemination of works of contemporary literature in lesser used languages,[129] the conservation of regional culture[130] and the promotion[131] of research on minority languages.

The Treaty of Maastricht (1992) supported a process of de-economisation of European integration and gave it a political dimension. Cultural aspects started to play a more important role in European integration.

Culture and other new Community competencies such as education opened up new legislative possibilities. One has to point out that cultural measures had already been taken in times in which the integration process was formally limited to the economic dimension.

8. Treaty Establishing the Constitution for the European Union

The Treaty Establishing the Constitution for the European Union signed on 29th October 2004[132] (See Appendix XX) in Rome never came into force. This project was abandoned, and institutional reform of the EC/EU will be realized in another way. But this treaty dealt with the national minority agenda much more than previous treaties. It was another example of the important shift in thinking which came about in the 1990s. It is an expression of changes which occurred at that time. This document was also an attempt at a wider democratisation of the EU. It was a product of the work of the European Convention in 2003-2004.[133]

Almost right at the beginning, the second Article (I-2), dealing with values, confirms the importance of the minorities in the EU:

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons **belonging to minorities**. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

The definition of the Union's objectives also confirms the fight against discrimination:

"It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child." [Art. I-3(3)].

This Article also states that the EU "[...] shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."

The principle of non-discrimination is again confirmed in part III. According to Article III-118:

"In defining and implementing the policies and activities referred to in this Part, the Union

[127] Toggenburg, Gabriel: A Rough Orientation Through a Delicate Relationship: The European Union`s Endeavours for (its) Minorities, European Integration online Papers (EIoP) Vol. 4 (2000) N° 16; http://eiop.or.at/eiop/texte/2000-016a.htm , p.14.
[128] See Melin homepage: http://www.ite.ie/melin.htm.
[129] Community programme ARIANE (OJ 1997 No. L 291 and OJ 1999 No. L 57).
[130] RAPHAEL programme (see OJ 1997 No. L 305).
[131] KALEIDOSCOPE programme (see OJ 1996 No. L 99 and OJ 1999 No. L 57).
[132] Fischer, Peter: Zmluva o Ústave pre Európy, *(Treaty on Constitution for Europe)*, BVSP, Bratislava, 2005: Fischer, Peter: "Európsky konvent a Ústava pre Európu: Fenomény politickej transformácie ", p.25.
[133] Ibid., pp.11-13.

shall aim to combat discrimination based on sex, **racial or ethnic origin, religion** or belief, disability, age or sexual orientation."

Article III-124 grants authority to the Council to establish the measures needed to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. The Council shall act unanimously after obtaining the consent of the European Parliament. European laws or framework laws may establish basic principles for Union incentive measures and define such measures, to support action taken by member states in order to contribute to the achievement of these objectives.

The European Union in this basic document would have fully and definitively accepted the European Convention for the Protection of Human Rights and Fundamental Freedoms and also the Charter of Fundamental Rights which constitutes Part II. The human rights agenda (including minorities' issues) would have thereby become definitely an integral part of the EU-law (Article I-9):

1) The Union shall recognise the rights, freedoms and principles set out in the **Charter of Fundamental Rights** which constitutes Part II.

2) The Union shall accede to the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. Such accession shall not affect the Union's competences as defined in the Constitution.

3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the **constitutional traditions common to the Member States**, shall constitute general principles of the Union's law."

If this draft of the Constitutional Treaty had been accepted, the three sources of human rights would have been defined:

1) Charter of Fundamental Rights of the EU (a result of development in the framework of the EC(EU)

2) European Convention for the Protection of Human Rights and Fundamental Freedoms (with roots in international law)

3) The constitutional traditions common to the Member States. By that I mean the general principles which have developed in European legal thinking and which have gradually been enforced in the national law of member states.

The Union would have thereby inherited all the tradition of protection of national minorities which is part of the systems mentioned above.

However, like today, there would have been no body representing minorities at the EU-level.

On the other hand, the Committee of regions could to some extent play this role:

"The Committee of the Regions shall consist of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly"- [Art.I - 32(1)].

The Union in accordance with the draft of the constitution, would have been obliged to respect the status of religious organizations. (Article I-52). And as we know in many cases religion is closely related to an ethnic origin different from that of the majority population in a given state For example: Jews, Muslims, Greeko-Catholics or Orthodox people in Poland, Slovakia etc. Respect for the religious specificity helps to preserve also the specific ethnic character. By this article the Union should respect the status under national law of churches and religious associations or communities in the Member states. Equally, philosophical and non-confessional organizations should be respected. The Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

This article re-confirmed the respect for

religious freedom declared in the Charter of Fundamental rights adopted by the European Parliament, Council and Commission during the conference in Nice on 7th December 2000, which is Part II of the draft "European Constitution":

Further, Article III-280 and 281 should serve to promote cultural cooperation and tourism, from which even minorities can benefit.

After the French referendum of 29th May 2005, in which the Treaty Establishing the Constitution for the European Union was rejected by the French voters, the idea of the "European constitution" was abandoned definitively at the summit on 21-22 June 2007 in Brussels.[134] But it could have represented a significant step forward in an effort to promote the human rights and national minorities agenda at the level of the EU.

The attempt to adopt an "European constitution" is now history. The effort is concentrated now on so called institutional reform and a Reform Treaty. This Reform Treaty should definitely provide a legal obligation to the Charter of Fundamental Rights and to define a new goal for the EU respect for cultural and language variety and respect for a cultural heritage.[135] These two changes would have some important impacts also on the position of national minorities and their protection in the EU.

9. Actual questions

It is not possible to reduce the ethnic (or national) minorities problem to the language question, but it (usually) constitutes the main problem.

At the level of the EU, in the near future we will have to cope with some challenges.

The traditional schema is that each member state has its own official language: each state has one and only one. In some cases two or more states have one common language- for example Germany and Austria. Those languages are equal at the EU level (at least formally).

However:

1) What shall we do in a case of official bilingualism, trilingualism etc. in a member state? Shall we accept that one state will have the privilege to bring with it two official languages? Until now the EU has had "good luck" because in all cases of official bilingualism (Finland, Belgium), one or both languages were an official language of some other member state (France, Sweden, Netherlands, etc.). In the case of Ireland this state for a long time accepted English as the only language representing it. But this has now changed - on 13 June 2005 the Council of the EU (GAERC-formation) decided that Irish would be 21st official language of the EU. This decision came into effect on 1st January 2007. On this day also Romania and Bulgaria joined the EU.[136] Therefore, as from that date we have 23 official languages.

But in the future this problem will emerge. Maybe in Bosnia, Ukraine or in the Baltic states, if the status of the Russian language is changed.

2) The language policy of the EU as a whole is now questionable.[137] Do we really

[134] Brussels European Council, Presidency Conclusions, 21-22 June 2007 http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf.

[135] See: Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the Euroepan Community, Brussels, 24 July (2007), CIG 4/07

[136] http://en.wikipedia.org/wiki/Languages_of_the_European_Union.

[137] For the language policy of the EU see: Fischer, Peter, Köck, Heribert, Franz, Karollus, Margit Maria: Europarecht, Linde Verlag, Wien, 2002, pp.386-388 and Tichý, Luboš, Rainer Arnold, Svoboda, Pavel, Zemánek, Jiří, Král, Richard: Evropské právo, (European Law), C.H. Beck, Praha, 1999, st.136-137.

need for example, language equality of all official languages? In practice it is not ensured. In particular the languages of smaller and newer members are frequently ignored. And if we accept the necessity of reduction of the language "Babylon", which languages should stay as "the main languages of communication"? Now we have two or three such languages: English, French, and less officially even German. But why do we need 3 or 4 such languages? - if the main purpose is communication and not national prestige... Is it not *one* more than enough? For example, a somewhat simplified English? (The language which has actually "won" in the international framework.) And if we accept French or German because of the tradition and maybe the frustration of those nations, why not likewise accept Italian, Spanish, Polish, and then Swedish, Slovak etc? And the "Babylon" is back here…

From the experience of multilingual states or empires (Belgium, Soviet Union, Finnland, Austro-Hungary, Czechoslovakia, Canada, South Africa, India, etc.) we know, that in spite of the declared equality of two or more official languages, in practical use one language has always prevailed.[138]

3) The challenge most connected with the topic of this thesis is the status of minority languages. To what extend should the EU (and its member states) accept the languages of national minorities as official or semi-official languages at the EU level? This problem is topical because the Spanish government in 2004 demanded a special semi-official status for 4 minority languages- (Basque, Galician, Valencian and Catalonian).[139] These languages are also referred to as not nation-wide official languages. Initially this initiative did not find approval from other member states. But on 16 October 2005 the Committee of regions approved the use of Catalonian, Galician and Basque (but not Valencian) in addressing the EU institution, with interpretation provided by the European commission interpreters.[140] On 3 July 2006 the European Parliament´s Bureau approved a proposal by the Spanish state to allow citizens to address the European chamber in Basque, Catalonian and Galician. One can say that these three languages have indirectly obtained the status of "semi-official" languages. However, such recognition could start a wave of similar demands on the part of other minority or regional languages. Even in the present EU there are about 20- 40 languages which could ask for the same status. Many of them have a long tradition of literature, use in political life and in published newspapers etc. Another potential candidate for a special "semi-official" status might be Russian. Russian is the native language of about 1.5-2 million Slavs living in the Baltic states of Latvia, Estonia and Lithuania.[141] It is the dominant spoken language in Riga, Daugavpils, Narva and some other areas. These states do not recognize Russian as an official or minority language and Estonia and Latvia hinder ethnic Russians from obtaining citizenship of these countries. But this policy may be relatively quickly changed, because it is in conflict with the human rights policy of the EU and the Council of Europe. There are together about 6 million people living in the EU who consider Russian as their native language. The proportion of the EU population speaking Russian as a mother or foreign

[138] It is out of the scope of this thesis but it would mean that any effort to reduce a dominating position of the English language in Europe is useless.

[139] Memorandum by the Spanish Government, Request for official recognition in the European Union of all languges with official status in Spain. 13-XII-2004.

[140] http://en.wikipedia.org/wiki/Languages_of_the_European_Union.

[141] Ibid.

language is about 10%. Russian is therefore is the 7th most spoken language in the EU.[142]

Probably we should accept the solution that on the level of the EU only such languages are to be admitted as official which in any given member state are used officially on its entire territory. The use of minority or regional languages or even not nation-wide official languages should be within the competence of a member state.

4) In the near future a great challenge will emerge on the level of the EU but also of the national states in the case of so called non-recognised minorities. This means minorities of later immigrants and their non-indigenous languages. They are people who came to the European states in the 20th century and do not enjoy the status of traditional minorities with the wide scope of rights belonging to traditional minorities. The question is whether this differentiation is ethically and legally sustainable…

10. Conclusions on protection of national minorities in the EU

If we study the attitudes of the EU to legal protection of the national and ethnic minorities we reach the conclusion that:

1) Protection of the national minorities **has not become a generally accepted legally binding principle of the EU,** although in several legal acts issues of national minorities are mentioned.

2) On the other hand, **the political relevance of national minorities´ protection is very high.**

3) In this matter **the EU relies more on other international organizations which are more oriented to protection of human rights** (Council of Europe, OSCE etc.). The EU in practice took over their norms.

4) In external relations, protection of national minorities became **one of the main criteria for cooperation with the EU or even for accession**.

5) The importance of protection of national minorities **will probably grow** in the future. Minority protection is not yet a part of the *acquis,* even if developments are currently moving in this direction.

6) In the European Union and its member states we can identify **several categories** of regional, minority or simply other than official **languages**:

a) Minority languages specific to a region of one or more member states. This would cover languages (and minorities) like Basque, Breton, Catalan, Ruthenian etc.

b) Languages spoken by a minority in one member state but which are official languages in another EU country (Magyar in Slovakia, French in the Vallée d´Aosta, German in southern Denmark). People speaking these languages are an ethnic minority in a state in which they actually live, but on the level of the EU their language is not in the position of a minority language and they do not feel any handicap on the EU-level regarding the access to EU-documents or institutions.

c) Non-territorial minority languages such as those of Rroma or Jewish or Armenian ethnic groups. These languages and minorities are respected and protected, but on the other hand it is difficult to secure a right to communicate with public authorities in their languages for the members of these ethnic groups because in any territorial unit within the State they do not form a relevant quota of population.

d) Non-indigenous languages- languages of recent emigrants who came to EU-member states as “Gastarbeiter”, mostly after the 1950s. All states respect their human dignity and right to develop their culture and use their languages, but without official recognition of

[142] Ibid.

their languages (Turkish, Urdu, Arabic, Hindi etc) as minority languages and without any official support and specific regime regarding their use in public and in communication with official authorities.

f) Dialects of official or minority languages. They do not have any official status, but in several countries (Italy, Slovakia) dialects are widely used by the country´s population and sometimes even books or newspapers are published in local dialects. There is no exact border between a dialect and official or minority language. Often it is only a political decision or a result of historic development.[143]

The EU cannot back down in the area of protection of national minorities. All that is in question is the speed of the process of incorporation of the human rights and national minorities agenda in the acquis and Primary law of the EU. It is obviously connected with the future tendency of development of European integration. The so-called deeper integration means above all integration in questions of administrative, judicial and human rights cooperation and unification of standards. (Besides defence and foreign policy, it is the only area where there are reserves for unification).

The first period of an increased interest in the rights of national minorities was characterized by resolutions of the European Parliament on the linguistic heritage of minorities. Then in the 1990s the enlargement dimension had minority protection as a typical aspect. The EU concentrated more on national minorities in candidate countries than within its own territory. But the main obstacles to starting a discussion about the position of national minorities in the agenda of the EU were overcome. At this time minority protection was reduced to the external sphere of the EU.

But this situation was changed. During the years 2000-2006 we were able to speak of an introduction of the national minorities agenda in the discussions on European integration. It was a result of adopting the Charter of Fundamental Rights of the EU (2000) and discussion about a draft of European constitution and Lisbon Treaty.

European integration (originally an economic project) obtained a significant political dimension. Therefore it is only a question of time before protection of national minorities becomes a steadfast part of the whole system of the EU.

[143] Dutch has sometime been seen only as a German dialect, Slovak as a local version of the Czech language and recently one dialect "Ruthenian" was promoted from the position of an Ukrainian dialect to an independent language.

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ESSENTIALS OF PUBLIC SECTOR REFORM: A CASE STUDY OF CROATIA

Farhad Analoui*

Abstract. *This paper explores the challenges faced by developing countries and countries in transition in their attempt at reforming the inherited bureaucratic public service. The paper explores how the public sector in Croatia has managed to come this far after the turbulent years of political and technocratic dislocation. Croatia is determined to reform its public sector to become eligible for joining the European Union (EU) in near future. This has posed a major challenge for top senior officials and consultants alike. Adopting 'action research' as both a methodology and a strategy, a programme of intervention for change was designed and implemented in the Ministry of Finance. The overall results suggest that for the successful implementation of public sector reforms in the 21st century, attention should focus on strategic issues including systems thinking, HRMD, behavioural and attitudinal change, skills and competencies development and, above all, honest and responsible transformational leadership.*

Keywords: *Croatia, Public Sector Reform, European Union, Leadership, Open System, Human Resource Management and Development*

INTRODUCTION

There is an implicit agreement, in the public management literature, that the two decades spanning 1975-1995 witnessed a near universal re-definition of the relative roles of the government, business and the market in both developed and developing countries. Evidence from the United States, United Kingdom and Europe suggests that the New Public Sector Management (NPM) is but the latest response to the on-going process of change in public administration and governance since 1770. This period, up to present, has witnessed three great transformations in the context of governance and public administration. First, the transformation from the era of mercantilism to that of laissez-faire capitalism (1770's-1830's - 60 years), second, from the laissez-faire capitalism era to modern mixed economies (1830's-1970's - 140 years), and finally, a third great transformation with a significant change in the scope, culture, management and economic roles of governments (1975-1995 - 20 years) (Roschenthaler and Thompson, 1998). Indeed, the HRM-reform envisaged under NPM has been highlighted as a doctrine and set of practices that are compelling governments and public sector organizations to become learning organizations.

This paper draws on the experience of the author in his endeavour to establish a state of reform in the Ministry of Finance (MoF), a flagship Ministry in Croatia. First, it reviews the different paradigms and their necessity for an effective reform, then uses the author's experience to describe how the intervention for reform was planned, implemented and how it yielded results in MoF. Based on the experience, a practical model for the use of practitioners and the academia will be

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introduced. Finally, relevant conclusions will be drawn.

NEW PUBLIC SECTOR MANAGEMENT

Historically, two doctrines, namely 'the Public Interest' and 'the Public Choice' have influenced the changes indicated above. The Public Interest or Market Failure paradigm stated that the market failed to provide socially and/or economically acceptable results. Thus, alternative instruments or working rules were sought: regulation, taxation, subsidy, public ownership, competition policy, self-regulation and civil law - government are seen generally as supporters and fixers (Dunleavy, 1991).

Generally, the public interest model has been criticized for failing to provide systematic, historically acceptable explanations for many failed public policy interventions in the economic realm. Thus, by the 1960's, the theoretical and empirical foundations had been laid for an alternative model: the public choice paradigm (Buchanan and Tullock, 1962). The new model sees public sector failure as an expected consequence of self-interest behaviour in individuals, interest groups, political parties, politicians, governments and public administrators or employees.

The pursuit of 'unearned wealth' is described as 'rent seeking' and mimics the traditional or conventional 'tragedy of common problems' (i.e. that individuals can freely dip their hands into the public purse- a situation quite common in many post-colonial independent African countries) (Down, 1957, 1967). The change in the relationship between government and the market during the first two transformations was less noticeable, because they focused less on their change, were much more spread in time among nations and were not documented afterwards.

However, the third great transformation that ushered in the NPM reform is quite different from the previous two. In the case of the current change, the fundamental forces are all quite similar, virtually all industrialized and advanced developing countries are affected, though the rate and extent of change vary considerably, and the time frame is very short: 1975-1995. This has been the case because

*"While rapid technological, social and economic changes have occurred in the past, the failures of government were not so quickly, so closely, so measurably, so visibly, so pervasively, and probably so selectively observed by and analyzed for the public at large. The communications or the information revolution has dramatically reduced the information cost disadvantages often faced by stakeholders likely to be the losers from public policies in place or propose" (*Roschenthaler and Thompson, 1998: 69-70)

As the world moves on with the fourth transformation epoch (i.e. from 1995 onwards), and in the 21st century, the new mindset is one of increased skepticism as regards the government. Many observers believe that governments, on account of the systemic-learning disability reason, lacked the ability, the will or the commitment to learn and/or adapt to circumstances of rapid change such as those experienced during the last twenty years. This has been partly due to governments suffering from another learning-failure-described as *'the parable of the boiled frog'* (i.e. Because the frogs internal apparatus for sensing threats to survival is geared to sudden changes in its environment, not to slow, gradual ones). Evidently, governments tend to experience difficulties in early diagnosis of the problems, selecting policy directions, designing effective and efficient programmes, rectifying problems, and avoiding what is commonly referred to as public sector failure. This has been the problem of many poor countries pursuing donor-driven reforms since the 1980's.

CROATIA AND REFORM

Croatia is no exception to this rule. After years of destruction and economic depression, it has begun to develop as a new state. It has largely been successful when compared to some other developing countries, however, the political leaders have recognized that in order to recover and become fully integrated into Europe, Croatia has to join the EU and necessary begin the reform process of its public sector to become eligible for membership. Nevertheless, as mentioned by a senior figure, this "[...] has not been and will not be easy". Croatia has inherited a bureaucratic public sector from its troubled past. Faced with internal and external demands, the process of reform began in the public services sector. A large EU grant was meant to facilitate the reform. However, the reform has been extremely slow. Whilst one or two Ministries, such as "defense", have begun to show some improvement, others have lagged behind. These setbacks however have not deterred the "visionary leaders" to bring about reform, using their own initiative. What follows is the account of such an 'intervention' in the Ministry of Finance (Analoui, 2001; 2007).

SCOPE OF THE WORK

Modernising the Directorate of International Relations

The Government of the Republic of Croatia received several loans from international Banks and Aid Agencies to help finance the Technical Assistance broad Project for Institutional and Regulatory Reform for the Private and Public Sector Development with emphasis on the former rather than the latter. The visionary top management of the Ministry of Finance, following consultations with a 'Management Consultant', decided to modernize one (out of 18 Directorates in the Ministry), of the important and high profile Directorates (International Relations) in order to improve the organization and performance of the staff in line with the principles of public sector reform, and in anticipation of joining the EU.

The vision for change belonged to a member of top Management (Secretary) who supported the recruitment of a young, well educated and visionary senior manager (Assistant Minister). The Assistant Minister (thereafter referred to as AM) had just returned from the USA after working in an International Finance Institution and had realized the need for change in her Directorate and the Ministry as the whole. She understood that the single most crucial challenge to be addressed is, and will be, the establishment of a learning public sector with the capacity, both in terms of systems and human resources, and especially the management, to successfully and effectively embrace the "accession" to the European Union.

Since the Directorate for International Relations, with its new and inspiring leadership acted as a flagship for the rest of the departments in the Ministry of Finance, the decision was made that the reform of the structure and performance should begin in this Directorate so that it could provide a role model for improved effectiveness and efficiency for the entire ministry, and maybe the public sector as the whole.

METHODOLOGY AND SCOPE OF THE WORK

Reform in its wider sense means planned change, thus all aspects of the change management are also applicable to reform. However, as acknowledged by writers in the field, there are multiple dimensions to organizational change. The two most important ones are the different levels and time scales on which the change operates

within the organization (Buchana and Huczynski, 1985; Wilson, 1990). As Analoui aptly explains, 'when considering levels besides individual, team, organization and sectors, other nationals and cultural contexts need to be considered' (Analoui, 2007, p. 262). The author (the consultant and researcher) acknowledged the importance of one factor, namely Culture. As suggested by Hofsted (1991, 2001) issues such as 'Power distance: Acceptance of power', 'Uncertainty Avoidance', 'Individualism', and 'Masculinity' are treated differently in different cultures. In Croatia these issues had to be considered in detail.

Constrained by the time and scope of this project, based on past experience, a simplified form of action research model was adopted. Hayes (2007, p. 291) asserts that 'action research' a form of intervention, is widely acknowledged as an effective means for bringing about change'. The action research model he describes comprises five steps: data gathering for diagnosis; data feedback to the client team; discussion of the data and diagnosis of the problem; action planning; implementation of action plan.

Preparation

To begin with, a workshop of all senior management concerned was organized, in which the plans for modernization of the Ministry and its departments were discussed. The aim was to allow involvement and participation and to create 'commitment' on the part of the stakeholders involved (Analoui, 2007).

1. Department of International Relations (DIR) headed by a progressive and proactive AM was selected as a point of entry. DIR is a high profile department where most foreign investments, loans, development programmes are dealt with.

The consultant first carried out a survey of the management and staff of the department as well as an assessment of the organization/management system, in order to:

- Identify the present “constraints and opportunities” perceived by the staff which would inhibit or facilitate change.
- Design and organise a series of interventions in the form of consulting/training workshops for the staff and the management of the department.

The analysis of the information generated concerning the “Constraints and Demands” indicated that there were a number of difficulties, not uncommon in the public sector organizations. However, the conclusion reached was that the most challenging aspect of change in relation to reforming a public sector institution into a learning and effective organisation was not listing the difficulties and/or even implementing the systems, but rather the change of attitude and culture of the organization in which the work is carried out (Analoui and Karami, 2003).

In all four categories of constraints and demands were identified. These were:

- Lack of inadequate or inappropriate work related and management *systems* and standardized procedures to deal with operations and human resources.
- Lack of planned opportunities for the staff (especially in the past) to embrace new responsibilities with clear lines of accountability in the context of an open system management and organization.
- Lack of an established *HR system* (in particular HRD and Performance Appraisal) to provide the *ability, skills and competencies* necessary for utilising opportunities within a well established training and career development scheme.
- Inappropriate work-related culture resulting from past managerial

inadequacies, lack of vision and the inability to act as managerial role models for others to follow (This is the most fundamental issue at the heart of any reform and change, and the department has only recently benefited from its presence).

The consultant then carried out interviews to determine the opportunities present in the department which would support and facilitate change. This is based on the assumption that "in any change situation there are always factors for and against change. The important step is to find them". During the interviews the staff commented on the opportunities which have been made available to them under the new management practices and that would encourage, empower and enable them to contribute to the envisaged programme of reform for a modern organisation. The findings were particularly revealing. The main categories of opportunities which have recently been initiated or created by the new AM were reported as follows:

- *Quality of work relationship with senior management*. This is particularly striking since all comments made referred to the lack of a positive and supportive attitude on the part of the senior management in the past. The staff felt that this one single factor most encouraged them to move towards achieving better results.
- *Opportunities in training and development, secondment, attending seminars, and the opportunity to learn English and IT.* Again, it was reported that almost all such opportunities have been initiated by the new management of the department and they are highly appreciated by the staff of the department.
- *Working overtime and attending seminars*. The combination of these new opportunities indicated that there is a need for finding a solution for the existing inadequate reward system. The staff perceived receiving overtime and attendance to professional seminars as new initiatives by the new senior management.

Action plan for implementing change

It was evident that the establishment of Human Resource Management was a necessity in order to achieve reform (Wilson, 1991; Analoui, 2007). This required, on the one hand, system intervention and creation, while, on the other hand, it required empowering and enabling staff to work effectively under new management systems and more importantly maintaining the work flow. While the HR and Management needed to consider new standardized procedures and practices, it was simultaneously necessary to train and develop staff and management to enhance the department performance. Therefore, it was recommended that a combination of the establishment of systems, targeted training and development programmes is considered. The proposed actions to be taken were the following:

- The senior management of the department should *restructure and establish* four divisions including an HR Unit.
- A *Management Core Team* consisting of the Chief (Assistant Minister), three heads of departments and an HR task manager should be formed to deal with strategic issues related to the present and future work of the Directorate.
- Establishing *Division Teams* to meet regularly and function as *Quality Circles* to enhance the communication, allocation of work, resources and responsibilities amongst the members with a clear line of accountability, with the aim of continually improving the quality of work and life for the members.

- Establishing a system and procedure for meetings, both at department and division levels to deal with all issues related to work.
- Establishing an integrated HRM system to monitor and operate the total activities of the department and to act as guidance for the management to formulate policies and procedures for new opportunities and/or the routine tasks.

This involves:

- Establishing and monitoring the working of the new structure and communication systems (see below).
- Establishing plans for short, medium and long term HR.
- Monitoring the process of "Recruitment and Selection" and creating a system for for this purpose
- Putting in place a comprehensive HRD (training and development) strategy, policy and procedure to cover the entire department.
- Establishing a fair system of career development, and encouraging staff and management to relate these plans to other aspects of work.
- Monitoring reward and opportunity system at departmental level.
- Creating and maintaining a modern appraisal system to replace the "evaluation" as has been exercised in the past.
- Providing documentation to achieve Total Quality Management.

To achieve the above the CORE MANAGEMENT TEAM (including the HR manager) were expected to work closely together to simultaneously implement the following short and long-term interventions. These included:

- Implementing and enabling the programme by organising a series of management training workshops, seminars and individual coaching.
- Preparing documentation to establish the HR system with the potential to be reviewed, revised, maintained and duplicated in other parts of the ministry if the top management wish to do so.
- Communication of the changes made and other departmental achievements to all staff and stakeholders.

Implementation

The result of the survey was first discussed with AM in order to assess the required degree of intervention. Then, in a general meeting, the proposed steps to bridge the gap between the present and desired situation were discussed. The consultant asked each member to make comments on the changes in order to ensure the commitment of the staff and management, as well as to reduce the uncertainty and resistance commonly associated with the phenomenon of change. After several meetings with the management and key organisational members, the following actions were undertaken.

1. A series of training seminars were designed and carried out to improve communication and establish new procedures for conducting effective meetings.
2. A team building program was established which included the creation of new teams and quality circle procedures in the context of the new structure in the department.
3. A proposal for implementing a new "integrated" appraisal system involving 'development' issues was prepared and submitted to the management to supplement the traditional annual evaluation exercise.
4. A training workshop held for both *staff*

(appraisees) and the *Core Management Team* as appraisers.

5. The Core Management Team was established to meet regularly to deal with strategic and operational issues including the review of the results of the implemented change.
6. Preparations were made for the documentation to establish HR management systems.
7. A programme was designed for achieving effective incremental and planned training in HR and career development for the staff.

In order to facilitate the effective implementation of the change, the management and consultant agreed to a programme of collaboration consisting of regular meetings with the Core Management Team and consultation with heads of departments, teams and staff throughout the process of the reform.

Cascading the Results

The Ministry of Finance has a special position amongst the other Ministries since it deals with the issues of finance and, as such, the Directorate of International Relations plays an important role in dealing with international and European organisations concerning the forthcoming "accession" and the need for closer co-operation with the EU and all that this entails. The staff of the Ministry, in particular the staff and management of the International Relations Directorate, are implicitly and explicitly charged with the responsibility for modernisation of the whole system.

Not surprisingly, change, in whatever form, especially within the public sector creates anxiety and requires careful planning, implementation and management. The detailed consultation with the staff, ensuring their active participation in the process of planning and implementing the necessary steps, training and development of the staff and management in all aspects related to reform, and finally, the creation of the HR Unit ensured that effective and efficient human resources and systems began to emerge and operate side by side. The management also discussed with the staff the related issues and the vision and challenges ahead and ensured that a sustainable programme of capacity building for performance improvement was available to the staff and management of the Directorate.

The close co-operation and collaboration between management, consultant and the staff achieved the required high commitment and continuity on the part of the members involved.

A year on, the programme of reform has been successfully implemented. The Directorate operates as an efficient and high performance organisation. The changes to the structure of the department and the formation of the divisions, team structure and communication system have proved beneficial and have been cascaded to other departments. The HR Unit has been established and the HR task manager is working closely with the Core Group Team to prepare the HR functional documentation to ensure the necessary future learning. A recent report by the HR managers has indicated that staff morale is high and that they have successfully completed their first round of appraisal in their Directorate. This is the first time that a Directorate within a Ministry has incorporated a performance appraisal system with their traditional evaluation.

SUSTAINED REFORM

One of the most challenging aspects of reform is paying attention to its sustainability. It is all too often reported that the process of reform has begun in earnest but lost

momentum there after. In 2006, the Ministry adopted the 'good practices' learnt and:

- Modernized the HR department
- Created a new performance appraisal system that could be run along side the traditional system and could complement it.
- Considered a reward system to reform the old salary structure
- Received funds to modernize the Ministry and transform it into a learning organization and an example.

EMERGENCE OF A MODEL FOR REFORM

The authors' work with MoF over a period four years has been based on the incorporation of a new set of organizational realities with associated assumptions into action research and intervention in reforming public sector. The experience in MoF in Croatia formed the basis for construction of a model (See Figure One). In constructing this model the following issues were given particular attention. It is believed that a realistic approach to reform requires, as shown by the model, that the following components are taken into consideration;

1. Dissatisfaction with the present state.
2. Preparation: Creating Awareness, Adopting Strategy, Forming an Action Plan
3. Intervention (Implementation): Establishing New Systems, Enabling (Competences) and creating new perceptions and value systems
4. Apprising new work practices, Attitude & behavior, and finally
5. Maintaining the desired state: Satisfaction with employee relationship, QWL, constantly maintaining and improving services to clients (public).

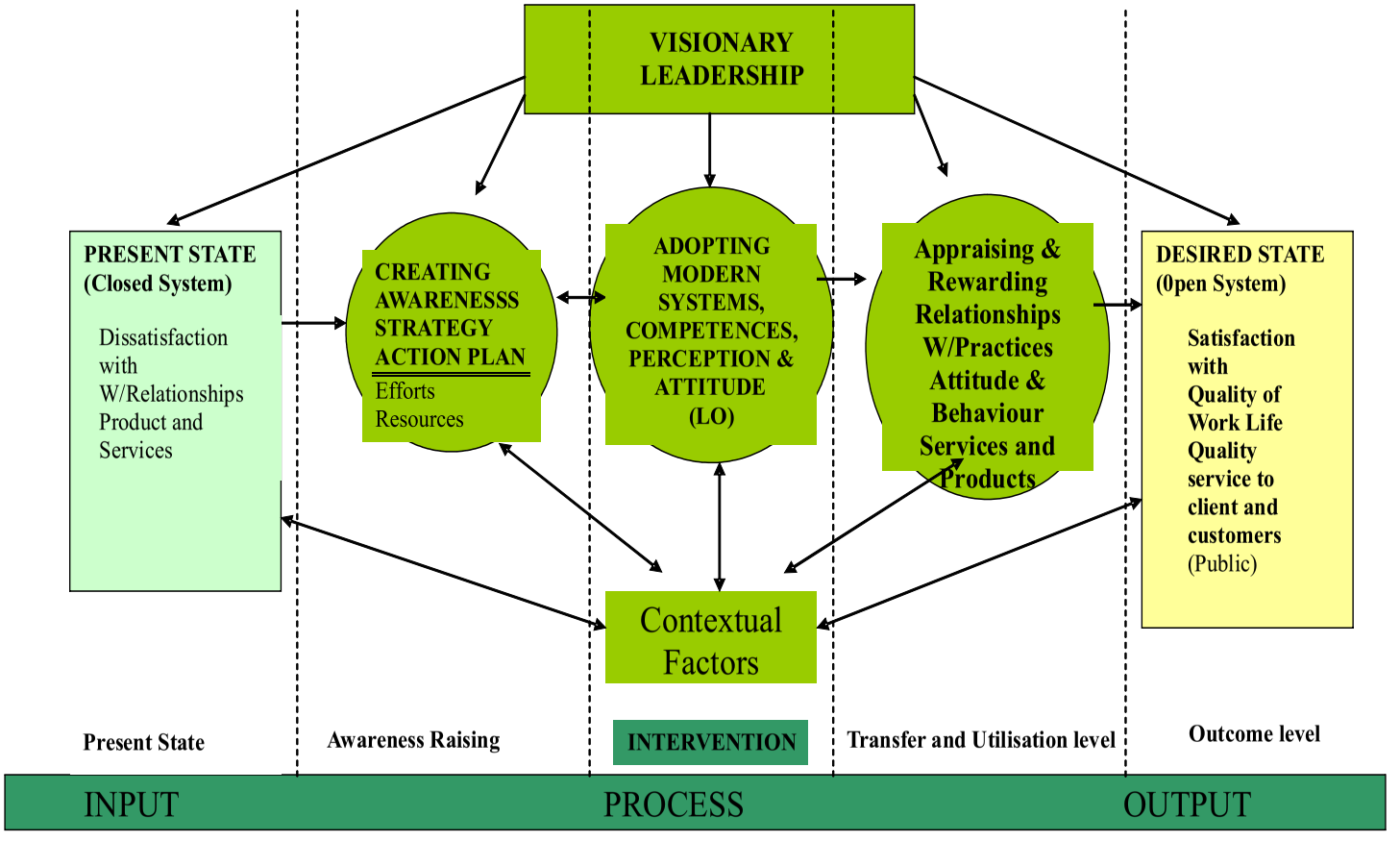
OPEN SYSTEMS THINKING

As shown in Figure One, there is a need for adopting a system approach, which incorporates the internal and external factors and sub-systems. In using a system approach to understand a phenomenon, it is important to begin by identifying the individual parts and then seek to understand the nature of their collective interaction in order to make the whole unique - it is the whole, not the parts alone that count (See Figure 2).

Systems theory is premised on the assumption that organizations, private or public organizations, have similar characteristics with other living organisms (Hanna, 1997). A system is generally defined as an arrangement of interrelated parts. The words *arrangement* and *interrelated* describe interdependent elements forming an entity that is the system (Jackson and Schuler, 1999; von Bertalanffy, 1950). In the same way that the public sector in Croatia is comprised of Ministries, Agencies and Institutions, the MoF itself is comprised of Directorates which form its subsystem. Creation of Teams was an attempt to extend system thinking to all parts of the Ministry.

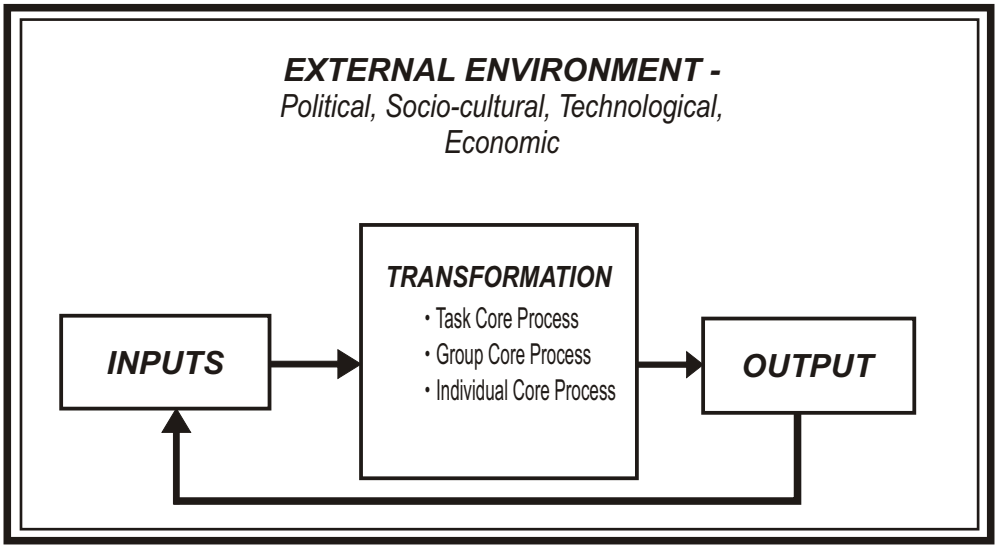
An open system depends on its external environment for inputs that are transformed during throughput to produce outputs that are exchanged in the environment. The dissatisfaction with the present services, quality of life and work is the trigger for reform. Equally, there is a need for 'Effort' and 'Resources' to bring about the change. Both the dissatisfaction and resources required come from within and outside environment and are necessary for reform. However, as discussed earlier, without vision and understanding, transformation does not take place. Within the MoF, the visionary management and the consultant provided the impetus for change.

Figure One: Open System Model of Reform through Planned Intervention



The awareness raising was obtained by involving the senior management and gradually the entire organization through workshops, discussions and seminars. Within the context of organizational theory, HRD is conceptualized as a sub-system of HRM, which is embedded in a larger organizational system.

Figure 2: Model of an Open System



Wright and Snell (1991) have used it to describe a competent management model of organizations. They treated 'skills and abilities' of employees as inputs from the environment; employee behaviours as throughput and their satisfaction and performance as outputs. Chalofsky and Reinhart (1988:31), argue that an effective HRD function as a sub-system should have a highly professional staff; close relationships with line and staff management; and a track record of high quality products and or services. This implies the capacity to acquire, utilize, train and develop, retain and displace the needed competencies for the organization concern.

The intervention in MoF clearly showed the importance of the role of the HRD in the realization of both awareness and the necessary competencies required for new behaviour and practices at work.

CREATING A LEARNING ORGANIZATION

In the management literature, it is generally agreed that in order to be effective over time, an organization must have the ability to adapt to the dynamics of change. It is within this context that Peter Senge argues that the organization must achieve some '*reasonable level of competence in five learning disciplines to become a learning organization* (Peter Senge (1990). The need for transformation of the Ministry into a Learning Organization was acknowledged at early stages of the project and the strategy adopted was formed by it. Learning organizations, as originally proposed

by leading management thinker, Peter Senge (1990) and his colleagues, were the results of over a decade of persistent, painstaking studies with the 'Systems Thinking and Organizational Learning Programme' at the Sloan School of Management, the Massachusetts Institute of Technology (MIT). Learning organizations are simply defined as *Organizations:*

- Where people continually expand their capacity to create the results they truly desire**;**
- Where new and expansive patterns of thinking are nurtured;
- Where collective aspiration is set free; and
- Where people are continually learning how to learn together.

It was recognized by senior management that creating a learning organization goes beyond provision of training for the staff. A learning organization facilitates the learning of all its members and continuously transforms itself (Peddler, et al, 1986). In a practical sense, building a learning organization is possible because humans have the natural capacity and potential to learn, to grow and to develop. Thus, learning is seen as an essential ingredient to the very survival of organizations and society at large (Armstrong, 2001). However, as it is aptly argued by the proponents of developing learning organizations, this will not happen as a matter of course. Rather, conscious efforts must be made to identify five new 'competent technologies', which provide the vital dimensions in building organizations that can truly learn. These are commonly referred to as five-learning disciplines, namely ***'Systems Thinking, Personal Mastery, Mental Models, Shared Vision and Team Thinking'***. These formed the basis for creating a HRD strategy to ensure both the realization of the new behaviours, practices and attitude at work and its sustainability in order to ensure a successful reform. Indeed, it was believed that reform is only sustainable in context of a learning organization.

In an effort to help public sector employees acquire the necessary level of competencies, the five-learning disciplines outlined above should be considered and adhered to earnestly as inter-related and systemic, in the context of pursing NPM-style HRM-reform. Experience of living and working in a world of increasing change, has justified the need for continuous effort to become 'learning' or 'intelligent' organizations' (Pinchot, 1993). Most NPM writers are of the view that people in the public sector organizations must become adept at learning, be able not only to transform their institutions, but also invent and develop institutions that are 'learning systems' capable of bringing about their own self-sustaining transformation. Even moving further towards opening avenues to exploring the extent to which private and public organizations; social movements and governments could become transformed into effective learning systems (Schon, 1983; Broad and Newston, 1992).

Empirical studies of senior public management effectiveness in Zimbabwe (Analoui, 1990), India (Analoui, 1997), Ghana (Analoui, 1988) and more recently in Iran (Analoui and Hosseini, 2002) confirm the need for revitalization of the role of training and development to include creating “awareness” of one's own and others' perceptions, knowledge, skills, weaknesses and strengths in order to achieve managerial effectiveness. Given the tremendous importance of learning, as highlighted, leaving the necessary learning to random opportunities would be acting irresponsibly. This is what the learning organization model seeks to profess. By integrating and applying the five-disciplines together, public organizations would be setting the appropriate leadership precedent as guidance of the state common property. The

situation in Croatia is not far from those experienced in other developing countries. However, it was observed that 'increased awareness was shown by management and employees towards adopting the learning disciplines and arriving at 'Desired Stage', which is a reformed organization with reformed systems, practices and, most importantly, reformed people.

LEADERSHIP CHALLENGES

It has been noted earlier that one of the critical factors for success in developing a learning organization is 'building a shared vision'. Nurturing a shared vision has for centuries depended on 'leadership', with the capacity to clearly articulate such a future, which can bind people together around a common identity and a sense of destiny. The effectiveness of leadership is contingent upon the leader's style and situational favorableness, the degree in which the situation offers the leader potential power and influence over the followers' behaviour (Hersey and Blanchard, 1982).

Many commentators have observed that the leadership literature has a rich tradition of categorizing different leadership types. For example, the path-goal theory has suggested four distinct styles of leader behaviors *supportive, directive, achievement-oriented and participative leadership* (Kakabdse, et al, 1987). In recent years, the transactional-transformational leadership concept has formed the most popular explanation for the differing behaviour of leaders based on their style and gender in different work-related contexts (Bass, 1985). However, the adequate evidence that is available suggests that generally effective leaders need to develop certain skills, competencies and styles in five areas of management, including ***directive-leadership-skills, transactional-leadership-skills, transformational-leadership-skills, empowering-leadership-skills, and change-management-leadership-skill*** (Pearce, et al, 2000).

The challenges faced by the leadership of the MOF were many. In the first place, they themselves had to realize the need for adopting a more pro-transformation, enabling and empowering style before sharing their vision of reform with others. It was on account of this reason that a series of workshops were designed and provided for the senior management of the MoF. These included:

- Strategic Management
- Transformational Leadership
- Empowering others
- Strategic HRM for Reform, and
- Communication and relating to others.

EFFECTIVE LEADERSHIP: A KEY REQUIREMENT FOR MANAGING REFORM

Change is often perceived as going against the vested interests of powerful entrenched individuals and groups in a society. Genuine sustainable reform, therefore, cannot be imposed on a society from outside, but requires domestic champions. This must come from within and be advanced by home-grown or indigenous sincere leaders with a vision of how to transform their nations into creative, innovative, adaptive and flexible competitive societies (Weisenfeld, 2003: 326).

In a way, the reform at MoF has provided the Champion and role model for other public sector organizations. It is not surprising to hear that the office of Central Civil Service has already adopted some of the principles of performance management which was developed in MoF. These changes have been incorporated into a new version of employee annual evaluation form. Indeed, developing nations need visionary, well-balanced strong leaders at this critical time in the 21st century to bring the people together with a common

vision to achieve a common goal.

The author's as well as the MoF's visionary leadership conviction is that educated people already have the drive to pursue and support reform given their level of enlightenment. The reality is that we either act sincerely and carry the people through or perish in perpetual under-development.

CONCLUDING REMARKS

Public sector reform has been regarded as a necessity for creating the conditions to achieve better efficiency and effectiveness in the sector. There is no doubt that despite the cynicism there is an urgent need for reform. However, many attempts have ended in failure. Whilst there are numerous reasons for such failures, it is often observed that the process of reform is not taken in a holistic and open system context. Mechanistic reform is not sustainable and therefore as much as it is necessary to bring about desired change, it is also imperative to maintain the established systems, attitudes and behaviours.

The work in MoF in Croatia adequately illustrates the need for adopting a holistic approach, one which is based on planned intervention founded on the principles of the open system.

The adopted Action research strategy involved the stake holders in the reform process while also creating the basis for establishing a learning organization. This success however could not come about without the support of a visionary and supportive leadership. It was this conviction to change and reform that led to efforts for achieving a better quality of work relationship, service and improved quality of life as the whole.

Finally, it must be remembered that since no two organizations are alike and their resistance to change is also different, there is a need to adopt a tailored made approach, one which recognizes the cultural and organizational realities as a prerequisite to embarking on a change programme.

** Although this case study is real and the writer has been directly involved in the case in the capacity of consultant, attempts have been made to protect the identity of the individuals involved.*

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