WHY LEGAL TRANSPLANTS INSTEAD OF MORE ADAPTATION WITHIN THE PROCESS OF LEGAL APPROXIMATION IN THE CENTRAL-EASTERN EUROPEAN MEMBER STATES OF THE EU AND THE CANDIDATE COUNTRIES?

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Abstract: *The paper discusses the strategy of the EU in designing and implementing the legal approximation process in the candidate countries, on one hand, and the possibilities and constraints of the candidate countries in framing this process under their domestic conditions, within the European context. It questions, whether could have been feasible other alternative strategic solutions both for the EU and the candidates for achieving a less costly and more effective functional compatibility between the conditionalities of the candidates and the integration mechanisms of the EU?*

At the very heart of the problem there are the function of law, in general, and the function of legal approximation or other methods of legal unification of market regulations, in changing market conditions. In this context the analysis defends a strong case for the interdisciplinary research of the 'effectiveness' of the legal-institutional approximation process highlighting the limits of market regulations in generating convergence of the market conditions and institutional culture.

INTRODUCTION

There are many unanswered questions concerning the effectiveness of the legal-institutional approximation process in the CEE candidate states, the Member States of today, although at the moment of their accession, the EU considered that there was functional compatibility at systemic level among the economies, legal systems and institutional frameworks of the candidate countries and the rest of Member States. Thus, we tend too much simplistically to consider that the legal approximation process as such has been completed, subject to the commitments undertaken in the accession treaties by the candidates to further improve effectiveness.

The central question is whether the very same market regulations do produce in the new Member States the same market outcomes as in the western European Member States, in spite of the differences in market conditions, legal culture and institutional culture. One may ask the same question in many different ways, depending on from whose point of view the process is assessed, each defending its case according to its own methods and interests. The issue of 'effectiveness of legal approximation' has therefore different meanings and values (i) for the Western European private sector, (ii) for the domestic

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undertakings of the new Member States, or (iii) for the other domestic social groups being affected by the approximation process, all tending to consider the consequences of legal approximation almost exclusively from point of view of micro-efficiency. The (iv) domestic political decision-makers, (v) regulators, (vi) and the judiciary view effectiveness from different political and social angles, more embedded in social-justice considerations and macro-economic interests, (vii) whereas for the EU institutions the success of the process is assessed mainly in relation to its benefits for trans-national trade creation. The approaches and the results of the assessments can thus be very different, even conflicting, although the regulatory aims and purposes of the EU legislation that has been transposed into the domestic legal system of a Member State are clearly defined in the text of the Internal Market regulations and by the subsequent interpretations of the EU institutions and the European Court of Justice.

However, EU laws are implemented in the Member States and are affected by the domestic environment, and therefore the issue of effectiveness of the Internal Market regulations manifests both intrinsically and extrinsically, at the level of legal compliance, implementation and enforcement. The Internal Market regulations have different functions at micro and macro-economic level than the domestic market regulations; they promote different market and non-market values and therefore they may give raise to conflicts between the transposed Internal Market regulation, the domestic legal framework and sectoral policies. Domestic and European regulatory policies are continuously confronted by heterogeneous interests and preferences, from both domestic and European level. Such incompatibilities are thus not a typical Central-Eastern European problem, which appeared or became acute in the context of Eastern Enlargement. It is outstandingly important to clearly delimit in relation to the effectiveness of the pre-accession process and the costs of Eastern Enlargement, what the consequences of the conditionality of the new Member States and/or of their political and regulatory failures are. On the other hand, it should be also acknowledged the limits of the pre-accession instruments of the EU and of the integration instruments, in general, in promoting economic, legal and institutional convergence at European level.

Lawyers' society finds itself in-between these competing interests and diverging developments when trying to assess the regulatory values of the EU type market regulations at domestic and/or at a wider European level, according to legal criteria. The question of assessing effectiveness of harmonized domestic market regulations in the context of European integration and Enlargement becomes increasingly complex, because during the pre-accession period the quality of legal approximation was assessed according to the accession conditionality; approximation was treated by the domestic policy makers as an external conditionality, and as a predominantly political question, rather than a complex economic-legal-social undertaking. The EU as well, measured the achievements of the candidate countries predominantly from a legislative and institutional point of view and less on the basis of a "functional" approach,

although the concerns regarding the low effectiveness of implementation and enforcement of the approximated legislation was constantly present in the Regular Reports of the European Commission. However, the EU never provided the candidate countries with a clear set of criteria for assessing 'effectiveness' because effectiveness of legal transposition, in terms of implementation and enforcement was not assessed in the Member States. There is no best practice in this regard concerning the Member States or instruments of monitoring, except the judicial review by the European Court of Justice in case of breach of community obligations by the Member States.

The result of the pre-accession legal-institutional approximation processes is the creation and strengthening of a strong regulatory state, whereas the other forces, the private sector and non profit sector, which also shape the European regulatory policy and reception of regulations at national level, did not develop sufficiently and were not actively involved in the process of designing and implementing the legislative approximation strategy during the pre-accession period in the candidate countries. By accession the expectations of the European institutions suddenly have changed. The approximation process is assessed upon 'market values', that of transnational trade creation, and not from the point of view of the commitments or/and achievements undertaken by state authorities. The place of political instruments, which have been proven so efficient in pursuing legislative, administrative and judicial reform in the candidate countries, is now taken over by the community principles and legal instruments that assure legal compliance by state authorities, undertakings and citizens of the Member States. From EU's viewpoint the effectiveness of the legislative approximation process is assessed in terms of economic efficiency considerations, namely whether the community law and the national law are being applied in such a way as to abolish the non-tariff entry barriers on the domestic markets of the new Member States. Effectiveness is measured in terms of regulatory costs that the market regulations, as applied by the implementing and judicial authorities, involve for the undertakings of other Member States under trade liberalization.

There occurs, upon accession, a shift in qualifying the very same achievements of the pre-accession period from a political-legal-institutional approach onto an economic one, and from a formal assessment onto a more functionalist one, while the instruments of monitoring and sanctions change as well. Therefore, in the new Member States soon upon accession it should occur a paradigm shift concerning the regulatory values of pre-accession preparation process and the effects of the pre-accession strategy at domestic level. In this context there is a constant debate about the issue of legitimacy of the pre-accession strategy from the point of view of both the EU and the candidate countries. Integration theorists and the private sector in the former and new Member States often question in relation to the costs of approximation and its socio-economic consequences whether it was the right approach to simply transplant the EU laws into the domestic economic, legal and institutional environment of the

candidate countries, instead of a higher degree of adaptation of the regulatory solutions to the domestic conditionalities of these countries. Accusations for 'copying' because of 'imposed external conditionality' are often used by EUskeptics in criticizing the pre-accession process. But would there have been feasible other alternative strategic solutions both for the EU and the candidates for achieving a less costly and more effective functional compatibility between the conditinalities of the candidates and the mechanisms of the EU? This paper discusses the strategy of the EU in designing and implementing the legal approximation process in the candidate countries, on one hand, and the possibilities and constraints of the candidate countries in framing this process under their domestic conditions and within the European context.

At the very heart of the problem there are the function of law, in general, and the function of legal approximation or other methods of legal unification of market regulations, in changing market conditions. Thus, the process of legal approximation shouldn't be viewed as an aim in itself, but as an instrument, which has context related outcomes. Both the European law and the domestic legal systems of the Member States, as a consequence of its effects in framing the principles, concepts and institutions of the domestic legal institutions, through its formal and informal rules (soft laws), demand interdisciplinary assessments.

The assimilative capacity of a legal culture is so much bound to the economic conditionality of market regulations, and economic integration is so embedded in the political culture of the Member States that comparative legal studies are no long sufficient for legal framework assessments when effectiveness of a certain solution is at stake. The rules and principles of legal interpretation need reconsideration and openness for the solutions of European integration studies of economics, sociology and political sciences. Legislative techniques and strategies cannot be assessed exclusively through the spectacles of legal values or social justice either in the CEECs, because the Internal Market regulations and the wider EU law are the result of mostly micro-economic considerations and goals, unlike the traditional fields of private law in continental Europe. In such a context the debate on the positive and negative effects of transplant of foreign solutions into the legal system of another country and the issue of adaptation must go beyond the instruments and tools of comparative law, and should handle the issue of effectiveness from an interdisciplinary point of view, at least a legal-economic one.

The reverse of the problem is true, as well. From the point of view of economic analysis, regulatory costs assessments should also go further than the classic assumptions of international economics, which states that enacting uniform laws would necessarily bring to less transaction costs, economies of scale, and significantly reduce asymmetric information and externalities. This is true from a micro-efficiency point of view, but not in general, and for all legal fields and for all Internal Market policies, and especially not if we consider that location decisions by undertakings are taken upon a complex assessment of the costs of regulations and together with the rest of

competition factors of the specific market. The cost of regulations is only one component of market entry costs. Therefore, the effects of the very same EU type market regulations may be strengthened, weakened or even annihilated by the socio-economic and legal institutional environment in which they are implemented, regardless of the community instruments that assure uniform application of the community law. Accordingly, the cost of harmonized regulations will vary depending of the costs of legal compliance, market surveillance and legal enforcement of the specific market. Thus, 'effectiveness' and 'EU compatibility' are not inter-changeable, in debating the issue of 'transplant' versus 'adaptation'.

Effectiveness of the EU law in the new Member States bears the consequences of the approximation process before accession. The consequences of the 'voluntary approximation' and over-performance are irreversible not only for the new Member States, but also for the future of the regulatory policy of the Internal Market. The community instruments can hardly remedy regulatory or political failures from both sides. Therefore, this paper starts the debate on the issue of legal transplants by analyzing first, in Section 1, the specific nature of legal approximation in the candidate countries in comparison with the process of legal approximation in the EU, looking for reasons (legal technical and legal policy) in understanding the pre-accession policy of the EU concerning the candidate countries.

Section 2 debates the legislative technique of legal transplants from the point of view of comparative legal theory, and highlights the limits of legal approximation in changing market conditions and legal cultures in the context of European economic and political integration, in general, and within the conditionalities of the Central-Eastern European Member States, in particular.

SECTION 1

The characteristics of the legal-institutional approximation process in the CEE candidate countries

As argued in the introductory part, from a comparative legal point of view, it is difficult to assess 'effectiveness', because the Internal Market regulations shouldn't be reduced to a pure legal point of view assessment, since they require a multidisciplinary approach, which needs to combine legal, economic and policy assessments, and because the assessment criteria of the EU cannot be viewed from a pure legal point of view either.

The comparison of the regulatory strategy of the EU on legal approximation in the candidate countries should start with a review of the regulatory policy framework of the process from both the standpoint of the candidates and the EU. A closer look at the pre-accession strategies of the candidates and the EU regarding the legal-institutional approximation shows that in fact the approaches converge in their legal policy considerations. Both treated the legal-institutional reform from the point of view of strong political consideration and of political internalization, which had specific costs and benefits for both parties. The EU assessed the legislative activity mostly in terms of the formal compatibility of laws in comparison to what was the best practice in the EU Member states,

and not in their market outcomes and social outcomes in the specific context of the candidate country. Effectiveness of institutional reform was limited to the setting up of such institutions which had similar competences as those implementing community policies and rules in the Member States. The regulatory policy commitments of the candidate countries' governments prevailed and not the temporal effects of the legislative and institutional measures. The Copenhagen criteria of accession were assessed upon a piece meal basis, and not in their interaction. Although general in its wording, the criteria indeed aimed at pursuing the candidates towards a functional approach. However, this was mostly marginalized by the candidate countries. Thus the EU is not to be blamed for the regulatory failures of the candidate countries. The domestic political interests, driven by the domestic political and legal culture, which was more or less similar in the candidate countries, turned the process of 'voluntary approximation' into a formal and not functional process, which was not the EU's approach. The Copenhagen criteria clearly mentioned the 'capacity of the candidate countries to cope with the competitive pressure coming form the Internal Market.

However, it seems that for the candidate countries transplants proved to be less costly and more comfortable. Gradual adaptation, in cases where it happened, caused more costly subsequent social and political compromises. 'When transmigration occurs and elements from different internal logics come together[2], differences are as to structure, substance or culture'.[3] The political reputation of donor, the desire to belong to or to harmonize with a particular group, or ease of access are casual factors that seem to determine the pattern of transmigration of legal ideas and structures'.[4] This factor was the strongest in shaping the speed and context of the legal approximation strategy in the candidate countries. Evans says that 'force exerted by a foreign model on domestic policy can be two fold: push and pull and that in the context of relation between the Community and third states in Europe, the force seems to be of both kinds'.[5] The third state is pulled by its desire for closer relations with the Community and is pushed be its own traders who see voluntary harmonization as essential for easing their access to community market'. [6]

Legitimacy and acceptance of an un-adapted solution is easier to achieve if presented as an external conditionality than that of an adapted solution, which would have satisfied multiple or even contradicting domestic preferences. From the point of view of domestic acceptance of the approximation process and preferences

[2] E. Örücü *'Internal Logic of Legal Cultures'* (1987) 7 Legal Studies, p. 310

[3] E.Örücü, *Law as Transposition,* in International and Comparative Quarterly, vol. 51, April 2002, p. 212

[4] F. Schauer, '*The Politics and Incentives of Legal Transplantations'* Law and Development Paper No2, CID Working Paper No 44, April 2000, Center for International Development at Harvard University, at 8-12, http://www.cid.harvard.edu/cidwp/044.htm

[5] A. Evans*, 'Voluntary Harmonization in Integration between the European Community and Eastern Europe,* (1997) 22 El Rev, p. 202

[6] Ibidem

related to the legal reform process, this option definitely caused less political costs than adaptation. However, the cost of transplant for the private sector and non-profit sector were much higher than harmonization by more gradual adaptation. This is especially due to the short time-length, speed of approximation, and often the lack of adaptation period to for those regulated and those being affected by regulation to prepare. Unlike at EU level, where in case of directives, there use to be a periodical reassessment of the effects of the common regulatory solutions, and at a three dimensional basis (private sector, non–profit sector and state administration), we can not find in the legislative approach of the candidate countries a correspondent approach. Even so, though, the high political costs of the legal and institutional reform in the former candidate countries in CEE shows that has been extremely low the capacity of governments to successfully transpose the accession conditionality into domestic micro and macro economic goals, in promoting those reform needs which regardless of EU accession would have been needed to be implemented. From the point of view of the candidates it seems that transplants without adaptation were the most feasible strategy from financial and political point of view.

Not the legal, but political arguments prevailed in the approximation strategy, in defining the terms of sequences and timetable of transposing the *acquis* into the domestic legal system. The legal doctrine did not have time to develop before the entering into force of the transplanted EU laws and the implementing and enforcing authorities did not have the time to develop the necessary skills.

The effectiveness of the harmonized rules in the new Member States was also influenced by the transplant approach in other areas of legal reform, not affected by the *acquis.* The general legal reform in these countries evolved mostly along the traditional line with the main continental legal families, either the French law (as in the case of Romania) or German/Austrian law (in case of Slovenia, Hungary, Poland, Slovakia, Czech Republic) but there were borrowed legal solution from the best practices of the specific legal field, even from other legal families and some times from Common law. The legal institutions specific to business law in these countries were not generated and designed by the specific regulatory needs of their markets.' However, the fact that the legal systems of these countries are no longer so purely embedded in the national legal culture has two-fold consequences on the effectiveness of harmonized rules and EU norms, if we consider implementation and enforcement. On one hand, these economic laws are not so homogenous, and thus it should be expected that they are more flexible to changes that economic and market developments require. However, it shouldn't be ignored that at the level of enforcement and administrative implementation there is a contrary trend because the development of administrative laws and procedural laws and practices in these countries are far behind the developments of substantive law, especially that of business law'.[7]

[7] M.Jozon, `*Market Integration on the enlarged Internal Market: the costs of market entry and the "level playing field" in the Central Eastern European Member States'* Conference Paper presented at the International Conference 'The Wider Europe: Institutions and Transformations' Kyoto University, November 24-26, 2005, p. 8

'On the other hand, the legal systems of the new Member States are less responsive to the economic and social regulatory needs than the legal systems of the Western European Member States, as the legal solutions are not always created by the domestic regulatory needs'.[8]

'Legislative approximation in the candidate countries was very different from the process of harmonization in the Member States. We may state that the paradox of legislative harmonization in the candidate countries is that it was deeper and at the same time more superficial than it is in the Member States of the EU. Harmonization was more extensive because of the *sources of EU law, which have been transposed* into the domestic legal system of the candidates *and the field of application of the harmonized rules.* The harmonization process in these countries include the provisions of primary law, directives and regulations, as well as the soft laws and even some of the definitions and principles developed by the case law of the Court of Justice and the doctrine on EU business law. The candidates transposed these rules as substitutes for domestic rules, and these rules are applied also for pure internal matters. This is the reason why harmonization in these countries may be considered more intensive as in the EU. Thus, as a result of the legislative harmonization with the *acquis communautaire*, the domestic legal systems of these countries are far more Europeanized than the laws of the rest of Member States. The impact of EU law on the regulatory reform of the new Member States is without precedence in the history of the EU.' [9]

The effect of the transplant approach is strongly reflected also at the level of the preparation of the implementing authorities and courts for the EU-conform interpretation and application of the harmonized rules. The trainings as well could be characterized as 'transplants'. The assessment criteria of the EU and preparation of the implementation authorities and courts mostly focused on the political criteria, strengthening independence and quality of the management. The main problem with the courts' capacity in correcting regulatory failures and assuring the systemic compatibility of the EU laws with the rest of the domestic legal framework is that during the pre-accession period the administrative authorities and courts were less trained for how to understand and interpret the *acquis* within the domestic legal-institutional context. The context related training was missing from the technical assistance projects, although a high number of local experts were continuously involved in the process. Thus the skills required, in order to apply the EU law or the approximated national laws in such a way as to be compatible with the specific regulatory aim of the community regulation were not sufficiently developed. This can only partially be attributed to domestic regulatory failures, because even in the EU, in the case of former Member States, the process of developing uniform executive and enforcement practice was a long lasting process.

Internalization of the transplanted rules will be a long lasting process also

[8] Ibidem

[9] M.Jozon, *The Enlarged EU and Mandatory Requirements,* European Law Journal, Vol. 11, No.5, September 2005, p. 554

in the new Member States, as it still is in many other Member States. However, the processes differ in many aspects, mainly because of the institutional culture inherited and because of the interaction between the state organization and market. It is questionable how far legal approximation and the community principles and mechanisms assuring uniform interpretation and application of the community laws and policies may change the state administration. Legal and institutional approximation didn't succeed even in the founding Member States of the European Economic Community to produce the same types of capitalism and market economies. Then it would be unrealistic to expect that this may happen or happened in the new Member States during 10-13 years of legal approximation. Market regulations have limited effects on state administration, hence the state administration is strongly culture embedded, and historically defined. Politics driven institutional, legal and economic issues can be changed easier by regulations and laws than those deeply culture embedded or strongly economic driven. 'The reduction of barriers, or different government interventions on the market, has highlighted the importance of the different socio-economic structures in which markets are rooted.'[10]

However, in spite of the values and costs of transplants different legal solutions may converge intrinsically or/and extrinsically even inside different national legal systems, led mainly by three factors:

a) market forces under trade liberalization may pursue diverging national regulatory preferences in the same direction,
b) court practice,
c) political factors, external conditionality.

However, the social forces (private sector and non profit sector) which contribute to the legislative and economic strategy making related to integration, work differently in the new Member States and candidate countries than at EU level or in the Member States. The private sector and non-profit sector was not actively involved in the pre-accession strategy and is still weak to have a balancing role at domestic level or on the European scene to contribute in the depolitization of the legislative and integration related policy and legal process. These differences have two-fold effects on the future regulatory policy of the Internal Market, because they may restore the imbalance between market values and non market values/social justice which has been increased by the market creation considerations, promoted by the private sector, strongly represented in the European law making process. However, the risk for political decision failures and regulatory failures were much high than in the Member States of the EU and thus an adverse effects evolved.

Last but not least, it is worth to mention in this context that as the legislative policy of the candidate countries focused strongly on the transplant of the EU laws, they little dealt with the developing and strengthening of the national capacity to successfully defend domestic regulatory solutions by invoking upon accession

[10] C.G. Molyneux (1999) "*The Trade Barriers Regulation: The European Union as an Active Player in* the *Globalization Game* ", European Law Journal, Vol. 5, No.4, December 1999, p. 378

the exemptions granted by the EC Treaty or those developed by the European Court of Justice. 'This also means that the strengthening of the capacity of the private sector to cope with the competitive pressure of the Internal Market supposes such a domestic regulatory approach, which fulfils four requirements. Domestic regulation should be compatible with at least one of the aims promoted by the Treaty and should stand the test of proportionality, and should be convertible into the regulatory values of the other Member State in order to be acceptable under the principle of mutual recognition'.[11] 'Different cultural and social values may generate different regulatory needs for the market as it has been argued above. In addition, the new Member States also have to learn to assess the market function of foreign legislation in order to avoid infringement of Article 28 EC by imposing double burden on the foreign product. This is a tremendous task not only for the legislative, but also and especially for the executive and judiciary'.[12]

Over-performance and transpositions without constructive criticism and adaptation (even ignoring the room given for adaptation by the EU law) during pre-accession does not necessarily mean that the new Member States will act as promoters of further approximation in the EU, after the incentives of getting membership have disappeared by their accession. Legal compliance by the private sector and state institutions in the new Member State may thus be lower because the effects of the community legal instruments than was as a result of the political conditionality and political instruments on which the relations between the candidates and the EU institutions were based during pre-accession and which were effective in the given context. Transplants have costs for both the new comers and the former Member States, especially for the private sector. However, the costs of non–tariff barriers which continue to exist on these markets, in spite of approximations, because of the difference in administration and enforcement practice, will be less significant for location decisions of foreign undertakings, if compared to the rest of competition factors of these markets, such as the competitive structure of the markets, labor costs, taxation. For the domestic private sector, however, the transplants imply much higher regulatory costs than for the foreign undertakings acting on their domestic markets. They will have costs, political and regulatory costs, also for the EU, because a functional approach in the political culture of those domestic regulators and political decision markers, which participate in the EU-level law and policy-making process will evolve slowly.

From the point of view of the EU, transplants were easier to control, and to assess in comparison with the best practice in the Member States and easier to 'impose' as external conditionality. The EU opted in fact for a customary legislative policy approach, based on the specific dynamism of laws and the social reality they regulated. In some instances governments and supranational organizations intervene in the functioning of the market by

[11] M.Jozon, *The Enlarged EU and Mandatory Requirements,* p. 564

[12] Ibidem

adapting rules to the specific regulatory needs, whereas in other instances the laws are enacted to precede and promote certain market developments. Given the sharp differences between the state of market economy development and the state of business law reform in the CEECs, at the moment, when the legal-institutional approximation has started, first under the umbrella of the Association Agreements, and later under the Copenhagen criteria, transplants were the most efficient solutions for deregulation and depolitization of the economy.

The question remains: whose information asymmetry affects more the transplant approach, of the insiders or of the new comers? There are no losers and no winners in this process, because harmonization itself generates a different type of legal-institutional diversity that is new for both the western European and Eastern European Member States. The costs of the harmonized laws and of the EU laws having direct effect and direct applicability definitely will stay for a period as non-tariff market entry barriers. The very same Internal Market rules generate different market outcomes, and a different type of 'level plying field' on the Central Eastern European markets. Differences are the result of the institutional culture, which laws cannot change, and of the assimilative capacity of the economies of the new Member States. 'Legal harmonization by legal transposition or legal transplants may be viewed also as a natural monopoly in the EU'.[13]

There are also such views in the legal-economic literature on EU enlargement, which question whether an approximation of law is necessary for making enlargement profitable for the EU? They argue that there are neither necessary nor sufficient conditions for making enlargement work.[14] It has been also argued by this line of thoughts that' though would also reap benefits from an approximation of law without immediate enlargement, these benefits might be smaller than those from allowing countries to become new members, even if they not perfectly adopted the *acquis*.'[15]

SECTION 2

The standpoints of comparative legal theory on legal transplants

Legal borrowing is not the exclusive domain of legal approximation in the context of EU Enlargement. A closer look at the legislative developments of the 19th and 20th century both in the continental and oversee countries shows that most of the national legal solutions were developed in other legal systems, or even completely different legal families. The EU law itself has borrowed legal institutions from the American law, the most successful undertakings in this regard being competition law and products liability. Legal systems, including the Central–Eastern ones have thus

[13] On legal culture as legal monopoly see A. Ogus, *Legal Culture as (natural?) Monopoly*, in The Economics of Harmonizing European Law, Eds. Alain Marciano, Jean-Michel Josselin, Edward Elgar Publishing, 2002, pp. 77-84.

[14] D. Schmidtchen, A. Neuzig, H.J. Schmidt-Tenz, *Enlargement of the European Union and the Approximation of Law: lessons from an economic theory of optimal legal areas*, in The Economics of Harmonizing European Law, Eds. A. Marciano, J-M. Josselin, pp. 235-236

[15] D. Schmidtchen, p. 235

developed their culture specific assimilative capacity, which only to limited extent may be influenced by external conditionality. It is worth to consider in this context how far the EU law has succeeded to become internalized by the legal culture even in the founding Member States; or whether integration requires such internalization, whereas the EU law is not a substitute of the domestic legal system but coexists with the domestic laws and institutions.

Legal culture is defined as 'those historically conditioned, deeply rooted attitudes about the nature of law and about the proper structure and operation of a legal system that are at large in the society.'[16] 'It is true that under certain conditions, a dominant legal culture may properly be regarded as a natural monopoly. That, of course suggests that while its existence may be tolerated, its adverse effects should be controlled'.[17]

Legrand defines legal culture as 'the framework of intangibles within which an interpretative community operates, which has normative force for this community… and which, over the *longue duree*, determines the identity of a community as *a community*'[18]

When applying this definition for the context of the effects of EU law on domestic legal culture, we should observe first that the EU law does not define the European citizens or the business sector acting on the Internal Market as a community. There is no such community because there is no EU identity. Thus, the very essence of the relationship between the domestic legal culture in the new Member States or in the candidate states and the acquis that has been transposed into their legal system is not a typical Central-Eastern European problem, but a Europe-wide phenomenon that manifests more or less similarly in every Member State. In spite that a certain legal solution is borrowed without any change, it should not be ignored that 'law does indeed move, connect, disconnect, change and contribute to change.'[19]

Therefore, the problem of adaptability should not be over-dimensioned as it happened in the context of Eastern Enlargements, either because of legal policy and political considerations, or from point of view of legal theory. Legal theory, especially in the CEECs, provides us only half answers for how to achieve better quality regulations and laws, and how to deal with the issue of effectiveness, because legal theory reasoning views the regulatory value of a certain legal provision outside of its socio-economic context and on the basis of the traditional private law approaches, which focus on those regulated, and not on the effects of a specific legal institution on those affected by the specific legal solution. It will be a tremendous task for domestic regulatory decision makers to marry the political and social-justice arguments with the

[16] J.H Merryman, D. C. Clark, *Comparative Law: Western European and Latin American Legal Systems (1978)*, p. 29

[17] A. Ogus, p. 71

[18] P. Legrand, *Fragments on Laws –as –Culture* (1999), cited by Ogus in Legal Culture as (natural?) Monopoly, p. 75

[19] E. Örücü, *Law as Transposition*, in International and Comparative Quarterly, vol. 51, April 2002, p. 205

pure economic efficiency regulatory aims of the EU laws in developing effective administrative and court practice at domestic level, as well. The arguments of comparative legal theory as well oscillate between extreme views, which are suggestively manifest at the level of the terminology. We find in the legal literature on legal culture and legal transposition terms as legal irritants, implantation, infusions, contaminants, and legal transplantation.[20] The debates either defend the values of transplants, or marginalize them.

In the context of globalization and European integration, the choice of borrowing and that of how borrowing is no longer a pure legal policy matter. If, in relation to the legal reform measures the risks of regulatory and political market failures are high, if the market dysfunctions have high externalities, the sources of which is rather political than of economic nature, then borrowing legal solutions and exploiting external conditionality in favor of transplants by avoiding domestic pressures and preferences, may drive to a higher quality regulation. All this is true if the borrowed market regulations have an adequate economic policy background. The economic policy reform in the candidate countries has evolved much slower and more exposed to the pressure of political and social interest groups, and, therefore, it worked in many cases as counterforce for legislation. Typical example is the case of state aids regulations, because of industrial, fiscal, and social policies of the candidate states were not on line with the regulatory aim of the EC competition policy and EU law on state aids. In other cases, as well, the cause of weak implementation and enforcement is to be found not in the legislative technique and the suitability of legal transplants to achieve the same regulatory outcomes as have been settled by the regulatory needs and legal policy preferences of the system which has developed the legal solution, but in the economic policy and political environment of the recipient legal system.

Nevertheless, the comparative legal theorists, besides this political conditioning should not ignore that the dynamism of market development generates multiple regulatory needs and legal solutions, regardless of externally imposed regulatory policy developments, as the result of the nature of economic influences that shape the market and the domestic economy under trade liberalization. The informal rules brought into the domestic legal-institutional culture by the foreign market actors acting onto the domestic market, may also have strong influences on the domestic legal compliance culture. Thus, law in context, whether as transplanted or adapted legal solution, will manifest differently, also as a consequence of the informal rules which govern business culture and which determine state institutions to develop surveillance and control mechanisms suitable to achieve the best result in implementation and enforcement of formal rules. Artificial transplants are followed by a natural assimilation of the laws, which first are modeled in their effects by the business culture, and then by institutional culture. Both change and evolve along the

[20] E.Örücü, *Law as Transposition*, p. 207

requirements of the new substantive legal solution. Even in cases when the legal institution, which has borrowed from another legal system has also a set of institutional and procedural provisions among the substantive ones, it may still not be able to generate the same administrative and court practice, even if the same types of institutions with same competences are set up, because of the different institutional culture of the recipient legal system is the result of the ways in which state and market interacts.

The case of internalization of EU law in the new Member States differs form the case of former enlargements, although in both cases it is mostly a post-accession process, because the other acceding countries had their market economies closer to the level of development of the insiders' regarding the institutional structures of the economy, and well-settled business and market regulations. The role of the market actors and other social forces in shaping EU integration strategy was different; their pre-accession strategies were more market led than in the case of the CEECs. In these countries, unlike the CEE candidate states, the internalization started much earlier and during the accession period, because of the more active participation of the domestic private sector in the development of trade liberalization. Internalization of legislation, which defines effectiveness also strongly depends on how difficult it is and how much time it will take to compensate the costs of approximation for the private sector and the society as a whole. The issue of internalization, however, should not be over-dimensioned either.

Uniform application and interpretation of European law is assured by the community instruments and not because of the internalization of community laws in the domestic legal system. The high number of cases at the European Court of Justice shows that both private entities and state authorities continue to stay bound to domestic legal and institutional solutions. In fact domestic and EU law coexist and subsist. However, the situation in the CEE differs because many EU rules were transposed as substitutes for missing domestic rules, but without being internalized. This can be misleading. This type of internalization, however, is an artificial one that ignores that the community law has a different regulatory function that of abolishing the regulatory costs caused by different national rules under trade liberalization and does not necessarily perform the functions that the same legal institution it has in a domestic economy. National legal solutions, even in the case of market regulations, focus much more on the non-market values in balance with market values. The EU market regulations' market values are related to trans-national trade creation, which do not necessarily correspond even to the domestic micro or macro economic regulatory needs. Therefore, we cannot call this internalization. Internalization supposes assimilation of the rule, at the level of its regulatory and socio-economic goals, which is not the case in such situation when EU laws substitute the lacking domestic legal solutions.[21]

[21] For more on this topic see: M. Jozon, *Enlargement and Mandatory Requirements, European Law Journal*, Vol. 11, No.5, September 2005, pp. 549-565

Law as market integration instrument has its boundaries, which cannot be overruled either by political will or economic developments. In the Central-Eastern European new Member States, but also at the level of EU institutions, the expectations are unrealistic concerning the laws' power to change legal culture and economic conditions. We experience a so-called 'optimistic normativism' causing high regulatory and political costs. Considering that the regulatory aims of legal approximation are the reduction of transaction costs, which may be caused by the differences in market regulations and administrative practices of the Member States, the central issue regarding effectiveness from the EU standpoint is whether transplants will generate more divergence instead convergence or new divergences.

'The transfer will always be confronted with the idiosyncrasies of the new legal culture and face resistance external to law, that is variety of social expectations of highly diverse social environment'.[22]

Nevertheless, the effects of the transplant policy and the existing systemic incompatibilities may be diminished, on one hand, by the spill over effects of micro-efficiency gains from the western part of the EU onto the Central- Eastern part, and vice versa, and by the natural convergence of the national regulators that will evolve as the result of trade liberalization. Therefore, after a period of increasing divergence in the first years of enlargement, one may expect an evolving convergence in the Central–Eastern European area. Therefore, the issue of effectiveness should not be treated from unilateral approaches of legal or economic assessments, which oscillate between either over dimensioning the risks and costs of diversity and differences for the functioning of the Enlarged Internal Market, by handling the costs of regulation outside the socio-economic context in which these regulations, together with the market forces, define the competitive landscape in the new Member States, or by marginalizing the effects of existing differences, by attributing absolute value to market rules in changing market conditions.

'If legal relationships are seen within the framework of 'reciprocal influences, that is a series of cross currents rather than as one way movements of 'contaminants' or 'irritants' than on the 'reverse seepage' the legal world at large may benefit and be enhanced by the divergences created in different soils'.[23]

In order for this to happen there are needed pro-active systems which suppose the shift of the Member States from the voluntarily undertaken 'follower status' during the pre-accession period into that of active player, which means searching for and contributing in the development of new common solutions and regulatory approaches, which equally take into consideration the emerging new regulatory needs generated in the reunified Europe by the scale effects of diversity brought into the EU by the new comers and the diverging conditionalities and preferences.

[22] Tuebner, p. 12

[23] E.Örücü, p. 211

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