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LOBBYING IN THE UNITED STATES AND THE EUROPEAN UNION: NEW DEVELOPMENTS IN LOBBYING REGULATION

Liliana Mihuț*

Abstract. *The paper compares lobbying in the United States and in the European Union taking into account the specific environments in the two areas. It is focused on recent developments (2006 – 2008) in lobbying regulation in the US, at the federal level, and in the EU, at the level of the European institutions. The compulsory system typical of the American approach is compared to the lower regulated system specific to the European Parliament, as well as to the self-regulatory approach that is still proper to the European Commission, even though its recent decisions indicate a departure from it. The main conclusions highlight the increasing similarities between the American and European approaches, as well as the differences that still exist, mainly in the framework of the pluralist – corporatist dichotomy. Having in view this background, the concluding remarks also stress the need to intensify the debates on lobbying regulation in Romania.*

Keywords: *corporatism; European Union; interest groups; lobbying regulation; pluralism; United States.*

Terms and definitions: lobbying and lobbyist

‘Lobbying’ and ‘lobbyist’ are controversial terms. Quite often their negative or pejorative connotations and poor reputation are underlined, especially when the terms are associated with allegations of corruption and influence trafficking. Not surprisingly, many lobbyists prefer to use other terms to describe their work, like: ‘parliamentary relations’, ‘government relations’, ‘public affairs’, ‘political PR’, ‘parliamentary counseling’ etc.

However, the legitimacy of lobbying has often been emphasized. In the US, this legitimacy is widely accepted, since it derives from the First Amendment to the Constitution, which asserts the freedom of speech, the right

of people to assemble and to petition the government. This is the reason why, following the tradition inaugurated by James Madison, the US has chosen not to limit the lobbying practice and, generally speaking, the interest groups activities, but to regulate them in order to assure more fairness, transparency, and responsibility. As far back as in 1946 the Federal Regulation of Lobbying Act was adopted, then other regulations followed, the most recent one dating from 2007.

Traditionally, Europeans have been more skeptical towards the legitimacy of lobbying and most European countries have not adopted formal regulations. However, as a consequence of the lobbying explosion in the recent decades, the EU institutions have started to pay attention to this matter. The European Parliament decided on the ‘Rules of Procedure’ referring to lobbying in 1996-1997. The European Commission adopted measures for improving the framework for the activities of lobbyists only in 2007, as part of

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the so-called 'European Transparency Initiative' (ETI). It is worthy mentioning that the documents recently adopted by the Commission as well as by the Parliament use the term 'interest representatives' as an equivalent for 'lobbyists'.

Beyond the terminological aspects, definition of lobbying and lobbyists is particularly important, not only from the academic perspective, but also for practical reasons. This paper will not approach the variety of scholarly definitions, but will focus instead on the legal or official definitions that are at the basis of recent regulations. The OECD document, aimed at providing a 'practical point of reference' for the policy makers who are considering regulation of lobbying, stresses the critical importance of clear definitions of those who are 'in' and, equally, those who are 'out': 'Experience has shown that vague or partial definitions of who is to be covered by legislation, or what activities are encompassed leads to non-compliance or inadequate compliance' (OECD 2007: 32).

Definitions have proved to be quite difficult, since various perspectives and experiences are involved. Even in the US, where these terms are used so much (even abused), there is no consensus in this respect. Traditionally, the term referred mainly to the influence exerted on the legislative institution. Now, the term describes the activity aimed to influence the policy-making not only in the legislature, but in the executive branch as well, and sometimes in the courts. In addition to this 'direct' lobbying, focused on governmental institutions, more and more attention is given to the so-called 'grassroots' lobbying, which seeks to influence the decision-making process indirectly, through mobilizing public opinion. No doubt, the legal provisions on this matter are relevant. The Lobbying Disclosure Act of 1995 (LDA)

defines 'lobbying activities' as 'lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work [...]'; further down it defines 'lobbying contact': 'any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official [...]'. Obviously, this definition is much narrower than many scholarly definitions: it does not include the influence exerted on the courts, nor the grassroots lobbying.

Coming back to Europe, it is to be remembered that controversies on the definition of lobbyist and lobbying were one of the major difficulties experienced by the European Parliament in the process of developing its strategy towards this activity in the early 1990s. The adoption of the present rules was possible only when the terminological confrontations were avoided. When the Commission decided to approach this issue a very broad definition was chosen, as compared to the very specific, even technical American legal definition. The ETI documents defined lobbying as 'activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions' and lobbyists as 'persons carrying out such activities, working in a variety of organizations such as public affairs consultancies, law firms, NGOs, think-tanks, corporate lobby units ("in-house representatives") or trade associations' (Commission 2006: 5). It is worth mentioning that the European Parliament agreed with this definition of lobbying, considering it 'to be in line with Rule 9(4) of its Rules of Procedure' (European Parliament 2008).

A comparison of the American and European definitions reveals a basic difference between the two approaches: professionalization of lobbying. Clive Thomas,

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in his remarkable comparative approach, stated: 'While there are emerging lobbying professions in Canada, Australia, and Britain, in the United States the profession has made major advances in the last thirty years, both in numbers and in its level of professionalism' (Thomas 1993: 39). Although a necessary connection between professionalization and regulation of lobbying cannot be ascertained the experience has proved that the adoption of certain rules of conduct (statutory or even voluntary) for the practitioners has had beneficial influence on the status of this activity.

EU and US – specific environments for lobbying activities

It is well known that the 'United States of Europe' was launched more than fifty years ago as a possible future counterpart of the USA and, since then, the federalist paradigm came in the forefront of political debates in some crucial moments of the European integration. However, what the EU is now and seems to be in the near future is very different from the American settlement.

First of all, comparison of the EU with the US as specific environments for lobbying has to stress an essential difference from the historical point of view. The American settlement has been dynamic but stable for more than two centuries, under the provisions of the oldest constitution in the world. Unlike it, the EU is a system in-the-making that have evolved over the last half century through successive extensions and institutional changes, and therefore 'the persistence of the provisional' (Wallace, W. 2000: 537) can be identified as its defining feature.

Also, it is very significant that the EU is not a nation-state. Although the multiculturalism has substantially affected the traditional 'melting pot' paradigm, most Americans place

identification with their national traditions and symbols among the core values. Unlike them, most Europeans prefer to preserve the national identity of their own people (language, cultural traditions) and to cooperate inside the EU for developing certain common values and projects.

In a way, the EU institutional system seems to have more in common with the US federal government than with the government of some EU member states, especially of those having unitary systems. The American federalism means the division of sovereignty between the national and state governments, characterized by a strong decentralization. In part, it is similar to the relationship between the EU and its member states in a system characterized by subsidiarity. This relationship is based on the division of sovereignty too, but the EU is a very complex organization which consists in a mixture of the attributes of a state and those of an international organization. In other words, it is an expression of the preference for the 'deliberate ambiguity of this semi-confederation' instead of a 'full federation' (Wallace, W. 2000: 531). Rules and policies are decided and executed by many actors at different levels: the European institutions, characterized by a certain tension between supranational and intergovernmental features; the governments of the member states, which are so different in terms of size, wealth, culture, political systems and many other respects; also, local and regional authorities, having specific problems and interests; even more than that, the actors from the public sphere have a word to say in various stages of policy-making. Therefore, this complex system, in which power is even more dispersed than in the American federation, has been characterized as a 'multi-level governance' (Wallace, H. 2000: 31).

Also significant, the EU has a more limited jurisdiction, as compared with the national governments, including the American federal government. The EU has exclusive competency in very few policy areas; most of its competencies are shared with the member states; in certain areas, the states are the main actors, the European institutions only facilitating a kind of coordination. Accordingly, the EU budget is much smaller than the US federal budget, as well as the size of the European institutions administration is much smaller than the American government.

The differences are prominent not only regarding the government or governance but also regarding the party systems and activities. Unlike the parties in the European countries, the American parties do not have either strong political ideologies or the ability to dominate the policy agenda. When comparison takes into account the European level it cannot reveal more similarities. Although we could say that the internal heterogeneity characterizes both the American and the European parties, it is to be underlined that the last ones are mostly umbrella organizations comprising very different parties as members of the same 'family'. Considering that the European parties could be characterized in terms of a 'party system' we have to take into account the differences between this multi-party system and the American two-party system. While the US politics tends to be polarized around the two major parties, the EU politics involves numerous political 'families' (7 political groups in the European Parliament) and wide array of parties having various national traditions.

Also, there are relevant consequences of the differences in the way of electing the people's representatives. The American plurality system makes the candidates in Congressional elections particularly attentive to the demands coming from their constituencies,

at the state and local levels. The members of the European Parliament are elected, in most countries, through a system of proportional representation defined at the national level; once elected, they are focused on the European agenda and are trying, sometimes quite hard, to make the national agenda consistent with it.

Important differences follow from the specific involvement of corporations and civil society in the election process. This participation characterizes, in a way or another, all democracies. However, the US developed an original organization by which corporations and various interest groups collect and spend money for the candidates' campaigns: Political Action Committees (PACs). Unlike the US, in the European countries, as well as at the European level, such a practice is neither recognized nor regulated.

The characteristics of interest groups systems and their activity are particularly relevant for defining the two specific environments. The differences do not consist in the groups' number and diversity, or the propensity of people to join them, as there are significant similarities in these respects (Thomas 1993: 31). Traditionally, the nature of the relationship between interest groups and government has made the difference between the US and the European countries. The US is characterized by the existence of a competitive system of interest groups, without peak associations that could speak on behalf of an entire sector. On the contrary, the existence of peak associations at the national level, regular consultations between government and interest groups, especially unions and business associations, often concluded by tripartite pacts, are seen as being a significant dimension of a genuine European tradition. Usually, the differences between these two systems are described in terms of pluralism vs. corporatism (Lijphart 1999).

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Is this dichotomy relevant for comparing the presence and activity of the interest groups in the US and in the EU? While the American system is described as having one of the highest degrees of pluralism in the world, the EU case reveals a much more complex reality, in spite of those opinions that had anticipated eurocorporatism as a natural outcome of the European corporatist traditions. The best expression of this view was the establishment of the Economic and Social Committee (ESC, later EESC) in 1957, as a consultative body representing the European interest organizations, but this has not become the expected influential actor in the policy-making (Wallace 2000: 25).

Various characterizations of the European system of interest intermediation have been formulated. The corporatist interpretations usually refer to the argument that the social dialogue is stipulated by the European Treaties and its role has been validated in the policy-making process. But arguments for an emerging pluralism seem to be more often identified, as an increasing number of various interest groups compete with each other for influence over policy-making and benefit by an open access to the institutions. Philippe Schmitter, although having a crucial role in redefining the concept of corporatism in the 1970s-1980s, concluded that the 'emerging interest system' at the European level 'was much more likely to be pluralist than corporatist' (Schmitter 1997: 294). Jeremy Richardson was even more firm in considering pluralism the defining characteristic of the EU interest group system (Richardson 2001).

However, according to Justin Greenwood, neither corporatism nor pluralism is a proper label for characterizing the interest representation at the European level (Greenwood 2003: 266, 276). This ambiguity can also be described in terms of the 'co-existence and complementarity of pluralism and

neocorporatism' as a specific feature of the EU uniqueness (Michalowitz 2002: 51). This 'mixed' character of interest representation seems to become even more prominent as a consequence of the Eastern enlargement. Unlike most Western European countries that have solid corporatist traditions, based on the collective bargaining between autonomous associations, for the countries of Central and Eastern Europe corporatism is still problematical, in spite of the progress that have been made in the dialogue between interest organizations and the government. On the other hand, for the people in this area pluralism is highly evaluated, being perceived as an alternative to their recent past, but the term has been used mostly to define a multi-party system, not a system of interest groups (Mihuț 1994).

Lobbying in the US and the EU. Developments in lobbying regulations

Development of lobbying activities has been identified as one of the 'basic similarities in strategy and tactics in all Western interest group systems' (Thomas 1993: 37). However, the comparison between the US and the EU can reveal significant differences, mostly as a consequence of the specific environments.

First of all, the tradition of lobbying (particularly of the professional lobbying) is much longer in the US than in the EU. It seems that the term was first used in the US by the early 1830s and the practice became usual in the following decades of the nineteenth century. Some types of interest groups emerged at the EU level in the 1960s, but most of them developed even later. Lobbying has become a basic tactic only since the second half of the 1980s, in connection with the single European market.

Secondly, the cultural environment matters. In spite of the important differences among the states in the American federation,

in terms of size, wealth, economic development, social structure, political culture, or even legal provisions, the lobbyists act in an environment characterized by common values and traditions and a common official language (even in the areas where Spanish is widely used). For lobbyists acting around the European institutions it is important to know the specificity of the cultural contexts in the member states, and it is useful to speak more than one language, even if English has become a kind of *lingua franca* in Brussels.

Third, the European institutionalized multi-level governance created a system of multiple access points, even more than the American federal government. This is not necessarily an advantage as successful lobbying often requires having in view multiple targets because of the limited jurisdiction of the European institutions. On the other hand, the smaller size and budget of these institutions proved to be advantageous to the European lobbying. The European Parliament, for example, has nothing similar to the prestigious and well-funded Congressional Research Service; therefore, those who are able to provide and disseminate reliable expertise and information are highly evaluated (see Watson and Shackleton 2006: 93). Also, the Commission welcomes outside inputs especially at the drafting stage of the policy-making; in fact, 'the Commission has been extremely active in developing the landscape of EU level interest groups' (Greenwood 2003: 14).

Forth, the way of collecting and using money in the electoral campaigns also makes a difference. Although PACs contributions and lobbying activities are usually seen as two distinct pathways of influencing politics and policy-making in the US, they are often described as supporting each other. The absence of PACs in the European politics is relevant for comparison, but it doesn't mean the absence of the scandals regarding the involvement of money in the electoral campaigns.

Fifth, the dichotomy pluralism – corporatism induces certain differences, even if the EU mostly has a 'mixed character' from this perspective. The example of the business interests is significant, since corporations and companies, as well as business associations are among the top actors of the lobbying community. Unlike the European countries, where the consultation of companies by the government is assumed, the American companies must invest substantial resources, mostly in lobbying, if they wish to affect public policy decisions, as they do not benefit by the official channels to communicate their positions to public officials. (Vogel 1996: 131-32).

The comparison reveals a more complex picture at the EU level. The EU business associations, which account for about two-thirds of all EU groups (Greenwood 2003: 75), are mainly federated, including federations and confederations from the member states. Some of them are involved in the activity of the EESC, the consultative body expected to be developed on the grounds of the European corporatist traditions. However, in the recent decades, mainly in connection with the development of the single European market, other associations have been established, and the pluralist shape has been strengthened. The business associations, as well as the large individual companies have identified other channels of influencing policy-making, including more and more sophisticated techniques of lobbying. Not surprisingly, they have mostly learnt in this respect from the American Chamber of Commerce to the EU (AmCham EU), which is one of the most effective lobbying forces in the EU.

Comparisons between lobbying in the US and the EU have revealed various characteristics of this practice. Quite often the scholars draw attention to the different styles required for lobbying in Brussels and Washington: more discreet and informal vs.

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more aggressive and professional (Watson and Shackleton 2006: 93; Greenwood 2003: 94). Clive Thomas identified two variations regarding lobbying, namely the use of contract lobbyists and the rise of new techniques in lobbying. The US is the most advanced system under both aspects: the number and the professionalism level of contract lobbyists and lobbying firms have increased substantially; also, the rise of new techniques, like mobilizing grassroots support networking, targeted mass mailing, public relations and media campaigns, etc is unparalleled in other countries (Thomas 1993: 39-40).

The most significant differences seem to derive from the ways of regulating this activity. Lobbying regulation has entered the political agenda in various areas of the world, but mostly in North America, some of the EU countries, and more recently the EU institutions. A.P. Pross identified two opposing aspects of the trend toward heightened lobby regulation: 'Globalization has diffused modes of lobbying across nations, creating common problems and raising similar issues in diverse societies. But, at the same time each political system values the objectives of regulation differently and varies legislative provisions accordingly' (Pross, 2007: 40).

This diversity has already been described in other documents. A report published by the Irish Institute of Public Administration revealed that formal regulation of lobbying is 'more the exception than the rule' (Malone 2004: 3). US and Canada were identified as the most notable exceptions, while within the EU looser formal regulations were found in Germany, where Bundestag had adopted rules regarding the registration of lobbyists, and in the UK, where the House of Commons had introduced rules relating the conduct of its members, that is 'to regulate the lobbied rather than the lobbyists' (Malone 2004: 23).

A subsequent report, based on the first one, but more comprehensive, classified the regulatory systems into three categories: 'Lowly regulated systems in essence detail who is engaged in lobbying government officials and elected representatives and getting paid for it. Intermediately regulated systems go further and report on what activity lobbying takes place in and has significant spending disclosures. Highly regulated systems go further again and state who employ lobbyists while having spending disclosure, which are open to the public' (Chari and Murphy 2006: 89). According to the authors of this report, only about half of the American states can be classified as highly regulated; the remaining states and also the American federal level, as well as Canada, both at the federal and provinces levels come into the intermediately regulated category, while Germany and the European Parliament belong to the lowly regulated category.

When we refer to the US in a comparative perspective it seems that Thomas's assertion is still valid: regulation of lobbying is 'far more developed in the United States than in any other democracy' (Thomas 1993: 46). As this paper tackles only the developments at the federal level, it is to be mentioned that as far back as in the second and the third decades of the last century the US Congress paid attention to this practice and its regulation. However, the first attempt to impose legal control on lobbying was The Federal Regulation of Lobbying Act of 1946, which required registration of those involved in influencing the lawmaking process and filing reports on their activity. It was an important step, but the provisions proved not to be clear enough, so that many organizations and lobbyists avoided registering; also, the law had other loopholes, like referring only to the legislative lobbying and ignoring the actions aimed at the executive.

In the years that followed, Congress periodically tried to strengthen the regulation of these activities, and in 1995 a new law was passed. According to the Lobbying Disclosure Act of 1995 (LDA), as amended by the Lobbying Disclosure Technical Amendments Act of 1998, lobbyists had to register with the Secretary of the Senate and the Clerk of the House, and to make semiannual reports on their activities. They had to report who their clients were, what house of the Congress or what agencies they lobbied, how much they were paid. Moreover, the law restricted gifts to officials. Despite the more restrictive requirements the provisions of the 1995 law proved to be insufficient to avoid the abuses.

Other attempts followed and, finally, as a response to some corruption scandals, such as the one involving 'super lobbyist' Jack Abramoff, the Honest Leadership and Open Government Act of 2007 was passed, amending the LDA and other pieces of legislation. Title I of the new law is significant: 'Closing the Revolving Doors'. According to its provisions, the departing members of the Senate must wait now two years, instead of one, before lobbying former colleagues (the former members of the House of Representatives must wait one year). Title II, 'Full Public Disclosure of Lobbying', provides quarterly reports, rather than semiannual ones, and other detailed disclosures. Also, the Act prohibits giving of gifts by lobbyists and their clients to members of Congress and their staff. The law strengthens certain former provisions regarding the sanctions for failure to comply with LDA requirements: civil penalties are raised from \$50,000 to \$200,000, and, for the first time, criminal penalties are provided, namely imprisonment for up to five years or a specified fine, or both (see Library of Congress THOMAS 2007).

The regulation of lobbying is an even more complex issue at the EU level, as there are

important differences among institutions in this matter. Although the Council of Ministers is very powerful in the decision-making process, it remains difficult for lobbyists to obtain access to this institution, which is representative not so much for the supranational character of the EU, but for its intergovernmental character. The key targets of lobbying are the Commission and the Parliament. Being the initiator of legislation the Commission has often been the first target. However, the Parliament has become increasingly attractive to lobbyists as a result of its increased legislative power, mostly in connection with the use of the co-decision procedure with the Council of Ministers.

Not surprisingly, the Commission and the Parliament are the only institutions that tackled the regulation of lobbying, but in a different manner, although signals for a common approach have been launched recently. The differences have been explained through the specific role of these institutions: while the Commission as the agenda-setter wishes to keep an open dialogue and provides only minimum standards of self-regulation, the Parliament, as a pluralistic institution, requires structures and regulations to secure transparency and the building of stable majorities (Schaber 1998: 219-220).

The Parliament was the first European institution that put the proposals for regulating lobbying on the agenda, back in 1989. A number of reports were drafted and discussed, but it proved to be very difficult to reach consensus regarding certain problems, the most substantive one being the definition of lobbying (European Parliament 2003: 37). Only in 1996 – 1997 did the Parliament adopt certain rules, which were annexed to its Rules of Procedure. Actually, there are two sets of rules: one of them is a code of conduct for the Parliament members (Annex I refers to the 'Transparency and members' financial

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interests'; the other concerns 'Lobbying in Parliament' (Annex IX). According to this document, the lobbyists have access to the Parliament using nominative passes issued by quaestors; in return, they are required to observe a ten-point code of conduct, and to sign a register, which is published on the Parliament website. It follows that the Parliament has adopted an accreditation system for lobbyists, but the register provides only the names of the pass-holders and of the organizations they represent, without giving information about the interests for which the lobbyists act.

Unlike the Parliament, the Commission has consistently rejected the idea of accrediting the organized interests on the grounds that it may create a barrier to the open consultation with civil society. The first notable references to the lobbying activity were in the context of the Communication regarding the dialogue with the so-called 'special interest groups' (Commission 1992). The Commission was consistent with its 1992 approach for more than one decade: not accreditation, registration or code of conduct since all groups must be treated equally; but a voluntary directory was set up and the groups were encouraged to draw up their own voluntary codes of conduct.

A new relevant document for the consultation process was adopted in 2002 (Commission 2002). A more neutral term is used in the title of this document: 'interested parties', but a special credit is given to the concept of civil society, which benefits now by a distinct site of the Commission. Again, a very broad view is involved, as a large range of organizations are included in the definition of civil society, from the private and public sectors as well. The document defines the 'general principles', as well as the 'minimum standards' for consultations. Although the lobby organizations or the lobbyists are not

specifically mentioned, obviously they are supposed to follow the established principles and standards. However, the relationship between the Commission and the lobbyists remained 'largely informal and ad hoc' (Watson and Shackleton 2006: 100).

A significant change occurred only in 2005, when the Commission launched the ETI in order to review the framework for 'interest representation (lobbying)'. Based on the Green Paper (2006) that opened a debate with the stakeholders on this matter, the Communication that followed set up a new voluntary register of interest representatives coupled with a binding code of conduct. Those who register certain information about themselves will be alerted in return to consultations in their specific areas of interest. 'In line with the self-regulatory approach', it will remain the responsibility of registrants to disclose how they are funded; however, when reference is to the Code of Conduct, 'Self-regulation of lobbyists is not seen as a viable option' (Commission 2007: 4, 5). We can identify here a relevant departure from the Commission's traditional approach to lobbying regulation: subscribing to the Code of Conduct is now a requirement for lobbyists wishing to be included in the Register of interest representatives, a provision characterized as being 'in line with the example set by the European Parliament'. Moreover, the Commission launched the invitation to the Parliament to examine the possibility of closer cooperation in this area and to consider the feasibility of 'one-stop-shop' registration, where the lobbyists could register with all the European institutions.

The European Parliament had a favorable reaction to this initiative. The 'one-stop-shop' proposal was welcomed, and the Commission and the Council were called to set up a joint working group to consider, by the end of 2008, the implications of a possible common

register; also, the Commission was asked to negotiate a common code of conduct (European Parliament 2008). In spite of these important signals for a stronger cooperation, differences are still notable. While the Commission decided to maintain its formula of a voluntary register, the Parliament called for a common mandatory register. Also, while the Commission concluded to request registrants selected budget figures and budget sources, the Parliament called for 'full financial disclosure'.

A further communication from the Commission provided clarifications of its position regarding the activities and entities which are expected to be registered. The clarifications are very useful, especially those regarding the exclusion from this category of social partners acting in the specific framework of the social dialogue (Commission 2008). In June 2008, when the 'Register of interest representatives' was opened, the Commission stated that it will experiment this instrument for one year. It remains to be seen if the automatic alert will provide a sufficient incentive for voluntary registration and if the sanctions consisting in temporary suspension or exclusion from the Register will be strong enough to prevent non-compliance.

Since both the Commission and the Parliament declared their openness to dialogue on the issues that make the difference it seems that a common or a similar approach could be set up in the near future.

The question arises whether these recent developments that have occurred in the US and the EU at about the same time are a common trend. In September 2007, Siim Kallas, Vice-President of the Commission who had a crucial role in launching and implementing the ETI, gave a brief comparison of its provisions and of those comprised by the Honest Leadership and Open Government Act. According to his

evaluation, both documents have in essence the same purpose: to increase transparency in lobbying. There are, however, notable differences: the American law provides by far more details in definitions and rules of lobbying activities; also, it imposes greater administrative burden for reporting them and higher potential penalties. Briefly, the documents reflect the traditional differences between the American and the European view on lobbying regulation: while the US has reinforced the mandatory approach, the Commission has maintained the self-regulation one (Kallas 2007). Nevertheless, further developments at the EU level have diminished the relevance of this difference. Particularly the position of the European Parliament gave more credit to the mandatory system, and, consequently, similarities with the American approach have chances to be strengthened through an increased inter-institutional cooperation on this matter.

Concluding remarks

We can conclude that the recent developments have strengthened some similarities between the American and the European ways of approaching lobbying regulation: transparency or open government, as well as honesty, integrity or accountability are the key words in the laws or other documents adopted either in the US or in the EU in the recent years. It essentially means that they have sprung from similar problems, and therefore have targeted similar goals, in a world where globalization has diffused lobbying practices.

However, as this paper has pointed out, the approaches remain different. The corporatist tradition in Europe, although declining, is still relevant in making the difference. Social dialogue is an important channel for communication between trade

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unions, employers associations and public officials. On the contrary, the lack of official channels through which organizations can influence policy-making in the US explains why substantial resources are spent on lobbying and strict regulations for it are enforced.

Although this paper has not approached the case of the Eastern and Central European countries it follows from the analysis that the issue of lobbying regulation is challenging for these new EU members too. As there are no specific requirements relating to the development of a regulatory framework for lobbying, and since the examples in 'old' Europe are not very encouraging in this respect, each new member state has to decide how to approach it. Some countries in the region already adopted specific legislation on lobbying: Lithuania (2000), Poland (2005), Hungary (2006).

Unlike them, Romania has not yet decided in this matter. The first debates on lobbying started in the late 1990s; they were followed

by public hearings organized by civil society associations during the 2000s. A legislative proposal registered with the Chamber of Deputies in 2001 was rejected three years later on the reasons that there are many theoretical and practical questions needing to be cleared up first, and a more rigorous regulation is necessary. However, starting with 2000, all the Romanian programs of government, including the program for 2005-2008, provided for the adoption of a law upon lobbying in order to support the anti-corruption strategy. On the other hand, the lack of regulation doesn't mean that lobbying itself is not practiced in this country, although the 'active players are less visible' (Vass 2008). No doubt, Romania doesn't need to hurry in adopting lobbying regulation only to be in line with other countries in the region. But when the issue is on the agenda of relevant institutions, in Europe and elsewhere, the debates need to be revived, not only in the Romanian civil society, but also in the academic literature.

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HOW FAR CAN THE EUROPEAN PARLIAMENT CORRECT THE EUROPEAN UNION'S DEMOCRATIC DEFICIT?

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Abstract. *Whatever the definition for democracy and democratic deficit is, the European Union is expected to develop some of the democratic features that member states present in order to compensate for the loss of legitimacy at the national level. The European Parliament, as the single elected institution of the European Union, is not only expected to comply with the basic requirements of democracy, but also to be a tool for enhancing democracy in the whole European political system.*

Starting the discussion by presenting the most important views expressed in the literature regarding the European Union's democratic deficit, the paper aims to present the main strengths and weaknesses of the European Parliament in correcting the democratic deficit. It will be demonstrated that although the EP can correct the democratic deficit at the European level through its elections, the functions it performs and through its party system, it also has many limits in fulfilling this task. It can be stated that the same mechanisms which allow the EP to be a promoter of democracy inside the EU, also limit its capacity in this area and make the EP seem rather as part of the problem than a solution to it.

Keywords: *European Union, democratic deficit, European Parliament*

I. Democratic deficit and the European Union

Debates about the existence at the European level of some kind of democratic deficit began to emerge in the 1990s in the aftermath of the Maastricht Treaty that created the European Union with its three pillars. The emergence of this debate is attributed by the scholars to the disappearance from the European scene of the permissive consensus¹ that has characterized the European integration for four decades. The reality is that

the founding fathers of the European integration process did not pay much attention to its democratic credentials and as long as the actions at the supranational level were perceived as working in everyone's interest no one contested the European Union's actions. As mentioned by Sharpf, this lack of contestation of the European Union's policies and actions began to change once new areas of activity, with much more impact on citizens' lives, were transferred at the EU level².

Every discussion about democracy and democratic deficit should start with answering to the question what is legitimacy, as democracy is considered one of the most powerful instruments of legitimation. In the simplest words legitimacy means that "persons subject to the binding rules made by

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¹ Dimitris N. Chrysoschoou, "EU democracy and the democratic deficit", in *European Union Politics*, ed. by Michelle Cini (New York: Oxford University Press, 2003), 367.

² F. W. Sharpf, "Economic Integration, Democracy and the Welfare State", *Journal of European Public Policy* 4, no. 1 (1997): 23.

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political authorities, or at least the overwhelming majority of them, must accept that the political institutions making those rules have a right to do so³. For a political system to be considered as being legitimate it has to comply with three conditions: democracy, performance, and identity.

The first component of legitimation, democracy, also labeled as the system's input, as simple as it may seem, is a concept open to a variety of interpretations. Christopher Lord considers that its attributes can be reduced to two: the public must be able to control those who make decisions on its behalf and citizens should exercise such control as equals, and the key principles by which this is realized are the following: authorization, representation and accountability⁴. According to the second element of legitimacy, the political system is also expected to perform reasonably well and to fulfill the needs of its citizens. Defined like this, performance can be seen as the system's output. Despite this distinction between democracy as input and performance as output, it should be stated that there are also scholars who see both the input and the output as being part of the definition of democracy⁵. Finally, the identity element of

legitimacy requires a convergence of identity between the rulers and the ones being ruled, with the latter group considering that the former one is part of it.

If democracy is so difficult to define even when generally talking about it, it is obvious that it becomes even more difficult when applying the concept in the context of the European Union. The EU is often seen as an unfinished political system⁶, as a democracy still under construction, or as a "regional state" which differentiates itself from nation states due to its variable boundaries in terms of territory and policy areas and due to its composite identity.

In spite of the widespread debate, there is no consensus among scholars what the democratic deficit is all about, whether it really exists at the European level, whether democracy is needed at the EU level and what are the best solutions for developing an authentic democracy in Europe. As Andreas Follesdal and Simon Six correctly assess, "definitions are as varied as the nationality, intellectual position and preferred solutions of the scholars or commentators who write on the subject"⁷. As such, Christopher Lord, for example, defines democratic deficit as meaning that "decisions in the EU are in some way insufficiently representative of, or accountable to, the nations and the people of Europe"⁸. This definition seems to take into account only the input side of legitimacy as previously described.

³ Lynn Dobson and Weale Albert, "Governance and Legitimacy", in *The European Union: How Does It Work?*, ed. by Elizabeth Bomberg and Alexander Stubb (New York: Oxford University Press, 2003), 160.

⁴ Christopher Lord, "Democracy and democratization in the European Union", in *Governing the European Union*, ed. by Simon Bromley (London: SAGE Publications, 2001), 167.

⁵ For example F. W. Sharp considers that democracy is a two-dimensional concept, which on the input side requires political choices to be derived from the authentic preferences of the citizens and on the output side implies that the choices of government are able to achieve a high degree of effectiveness in meeting the preferences of citizens. Seen as such, democratic deficit should be analyzed not only in terms of the inputs of the political system but also in terms of its outputs.

⁶ See for example Gianfranco Pasquino, "The Democratic Legitimation of European Institutions", *The International Spectator*, no. 4 (2002): 36.

⁷ Andreas Follesdal and Simon Hix, "Why There is a Democratic Deficit in the EU: A response to Majone and Moravcsik", *Journal of Common Market Studies* 44, no. 3 (2006): 534.

⁸ Christopher Lord, *op. cit.*, 165.

But there are also wider descriptions of the European Union's democratic deficit which combine the input element and the identity element of legitimacy as described above. From this perspective, the EU is suffering from an institutional but also from a socio-psychological democratic deficit. Dimitris N. Chrysochoou⁹ considers that from an institutional perspective the democratic deficit is related to the flawed inter-institutional relationships that characterize the European Union. The transfer of legislative competences from national assemblies to the European institutions has not led to an increase of accountability, transparency and simplification from the European institutions. The socio-psychological perspective starts from the assumption that without a European demos there can be no democracy at the European level. The emergence of a European civic identity is thus considered to be crucial for democratization at the EU level.

Other scholars, on the contrary, have focused more on the democratic deficit in terms of the output of the political system developed at the EU level. Acknowledging that most analyses focus on the weaknesses of the input structures at the level of the European Union, Sharpf blames the European leaders for concentrating on creating an economic area through negative integration and failing to deliver, through positive integration, policies that could comply with the citizens' preferences¹⁰. Sharpf's theory seems to be contradicted by scholars which have attempted to demonstrate that there is no democratic deficit at the EU level in terms of the output of the system. This is so because the voting system employed at the EU level, with large

majorities required in the Council and in the European Parliament, leads to a reflection of the median voter's preferences in the decisions taken at the supranational level¹¹.

But is there really a democratic deficit at the EU level at all? Andrew Moravcsik, writing from a liberal intergovernmentalist point of view, considers that democratic deficit is not a problem for the European Union as long as the division of labor between the EU and the member states determines the former to specialize in exactly those areas that tend to involve less direct political participation. Not only are there a number of constraints which impede the European Union to become a super state, but at the same time the European system seems not to be lacking accountability or transparency more than the nation state¹².

Finally, there are even scholars that pose the question whether the EU should become democratic. Giandomenico Magione emphasizes the idea that there are non-democratic sources of legitimacy and that policy areas differ in their need for legitimation. In his view, the EU is a regulatory state whose main function is to address market failures and thus to produce policy outcomes that are Pareto-efficient rather than redistributive. From this perspective, the legitimacy of regulatory bodies derives from their independent expertise, while the influence of politics on regulatory policies and institutions would be pervasive and a way of undermining the legitimacy of the political

⁹ Dimitris N. Chrysochoou, *op. cit.*, 368-374.

¹⁰ F. W. Sharpf, *op. cit.*

¹¹ Christophe Crombez, "The Democratic Deficit in the European Union. Much Ado about Nothing?", *European Union Politics* 4, no. 1 (2003): 101-120.

¹² Andrew Moravcsik, "In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union", *Journal of Common Market Studies* 40, no. 4 (2002): 603-624.

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system¹³. The most important problem with Majone's theory is that most policies developed at the EU level have also redistributive effects, which makes the presence of democratic sources of legitimation imperative.

The reality is that "some form of democracy at the EU level is necessary to make good the loss of democratic control at the national level, even if this does not mean that democracy/democratic control of decision-making is only viable at the new 'European' level"¹⁴. This being the case and recognizing the importance of the legislative bodies in any democracy, the next pages will be an attempt to present the role and the limits of the European Parliament in constructing an authentic democracy at the European level.

II. The ability of the European Parliament to correct the democratic deficit

Having in mind the fact that the European Parliament is the only directly elected multinational parliament in the world, as well as the only elected institution in the European political system, it is no surprise that it has a central role in analyzing the democratic deficit of the European Union. There are many mechanisms through which the European Parliament can correct the democratic deficit at the supranational level and this is one of the reasons why some scholars like to present this institution as suffering the least form democratic deficit¹⁵. But because of the

functions that any parliament is expected to perform in a democracy, namely representation, decision and supervision of the executive, the European Parliament is at the same time more and more associated with the EU's democracy problem for the way it performs the above-mentioned functions.

Elections are seen as one of the central mechanisms of any representative democracy as they allow voters to choose between rival agendas for public policy and to choose between rival office-holders. The European Parliament is directly elected since 1979, after long discussions and delays from the part of the member states. The reluctance of member states to consent to direct election for the EP is a consequence of the following dilemma: why to directly elect a parliament which lacks considerable powers?¹⁶ Direct elections made the EP more assertive in its relations with the Council and the Commission and pave the way for the extension of its legislative and supervisory powers.

The other mechanism through which the European Parliament is expected to reduce the democratic deficit is its powers in what concerns the adoption of legislation at the European level, its powers to control the European executive and to have a saying in the adoption of the European budget.

The legislative powers of the EP have increased constantly starting with the Single European Act and are considered to be crucial for several reasons: rule making is the main business of the EU, the EP does not have to follow the orders of a government and as such has more freedom to legislate as it feels, is one of the main points of the EU's political system in which the EP's opinion can really matter in front of the Commission and the

¹³ Giandomenico Majone, "The Politics of Regulation and European Regulatory Institutions", in *Governing Europe*, ed. by Jack Hayward and Anand Menon (New York: Oxford University Press, 2003), 311.

¹⁴ Alex Warleigh, *Democracy and the European Union. Theory, Practice and Reform* (London: SAGE Publications, 2003), 7.

¹⁵ Gianfranco Pasquino, *op. cit.*, 41.

¹⁶ Michael Shackleton, "The European Parliament", in *The Institutions of the European Union*, ed. by John Peterson and Michael Shackleton (New York: Oxford University Press, 2002), 97.

Council and, finally, most of the areas included in the first pillar are regulated by the EP in collaboration with the Commission and the Council of Ministers.

Member states realized that as more domains of activity were transferred from the national to the supranational arena and as the qualified majority system extended constantly, some new form of legitimation was needed at the EU level. Thus, this increase in the democratic deficit was sought to be compensated by granting new powers to the EP. While until the entrance into force of the Single European Act, the EP had weak legislative powers under the consultation procedure, this situation changed as two new procedures, cooperation and assent, were introduced. The Maastricht Treaty continued the pace of empowering the EP by introducing the co-decision procedure, which was further modified by the Amsterdam Treaty. Co-decision has been extended constantly to new areas and it is now considered to be the main legislative procedure inside the EU. If under the cooperation procedure the EP is thought to have gained conditional agenda-setting powers due to the possibility for it to amend the proposals coming from the Commission, the co-decision procedure finally put the EP and the Council on the same footing, as now the agenda setting power lies in the conciliation committee formed by both members of the EP and of the Council¹⁷.

Another way for the EP to determine the content of the EU legislation is to influence proposals made by the Commission or even make its own proposals. As for influencing proposals, the EP sometimes participates in discussions with the Commission in the pre-proposal stage and has the power to indirectly influence the annual legislative programme of

the Commission by approving it. The EP also has the capacity to make its own proposals by submitting a report to the Commission or by making a request in the name of the majority of its members to the Commission in areas where a legislative act is needed for implementing the treaties.

Although it is a recognized idea in the literature that controlling executives has become a difficult task for the parliaments as problems are becoming more and more specialized¹⁸, the EP has some powers to supervise the activities of the main European executive bodies. In what regards the European Commission, the EP has the following mechanisms of control at its disposal: approval of the president of the Commission, approval of the Commission as a body, two-thirds of the EP members can decide by adopting a motion of censure to dismiss the Commission, an annual general report is submitted by the Commission to the EP, the Commission reports in front of the EP for the budget implementation, supervision of the Commission through the EP's standing Committees, the EP can establish temporary committees of inquiry to investigate maladministration in the implementation of Community law and questions can be asked of the Commission. As for the Council of Ministers, the EP has only indirectly mechanisms to control its activity through the presence of the ministers and the presidency at the plenary meetings of the EP or at the committees' meetings.

The powers to participate in the budgetary process were first granted to the EP in the 1970's. As such, the EP has the capacity to propose modifications to compulsory expenditure which then have to be approved by the Council, has the right to propose

¹⁷ George Tsebelis and Geoffrey Garrett, "Legislative Politics in the European Union", *European Union Politics* 1, no. 1 (2000): 23.

¹⁸ Neill Nugent, *The Government and Politics of the European Union*, 5th edition (New York and Hampshire: Palgrave MacMillan, 2003), 206.

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amendments to non-compulsory expenditures and has the power to reject the draft budget and ask for a new one to be submitted to it. The Interinstitutional Agreement on Budgetary Discipline adopted in the 1980s gave new powers to the EP in approving the budgetary perspectives which determine the ceiling of EU spending for a few years and which cannot be modified without the approval of all the institutions involved: the Commission, the EP and the Council of Ministers.

Political groups in the EP are the main agents in the aggregation of interests at the EU level and any analysis of the democratic deficit should not leave aside this important mechanism of enhancing democracy. In order for a party system to be considered democratic it has to comply with two essential requirements: internally hierarchical organization and competition rather than collusion between these organizations. For the first requirement to be fulfilled party groups would have to behave in a cohesive way, so that voting would be driven by transnational party membership rather than national affiliation. Analyzing the behavior of MEPs in roll-cast votes through the decades, Simon Hix et al. concluded that the political parties involved at the EU level are cohesive organizations. As for the competitive feature, the same analysis shows that, in spite of the widespread idea that parties in the EP collude rather than compete, the evidence points to the contrary. While it is true that the major parties in the EP, EPP and PES, prefer to collude on institutional matters they are rather divided when it comes to socio-economic problems, so the right-left classical division emerges even at the European level¹⁹.

¹⁹ Simon Hix, Amie Kreppel and Abdul Noury, "The Party System in the European Parliament: Collusive or Competitive?", *Journal of Common Market Studies* 41, no. 2 (2003): 309.

Having established the virtues of the EP in correcting the EU's democratic deficit, the paper will now proceed in analyzing the limits of the EP's to be a genuine promoter of democracy in the European Union.

III. The limits of the European Parliament in correcting the democratic deficit

The first critique addressed to the European Parliament concerns the European elections which are not at all European elections but actually second-order national elections. The theory about the European elections being second-order in comparison to the national elections seems to apply even to the 2004 elections for the EP, in spite of the many changes that have been undertaken at the European level. As Hermann Schmitt presents in his analysis²⁰, the main features of the second-order national elections model still characterize the 2004 elections: participation is lower than in national elections, government parties lose and small parties tend to do better than in first-order elections. All these characteristics are a consequence of the elections' drawbacks: campaigns are dominated by national problems rather than European issues as parties prefer to remain silent on this latter issue, absence of a uniform voting system, absence of the European-wide lists from which the voters should choose, and the European party groups are not relevant in this election.

These rather negative features of the European elections have many implications for the democratic deficit. First of all, low turnouts at the European elections does not necessarily imply that the European Parliament lacks

²⁰ Hermann Schmitt, "The European Parliament Elections of June 2004: Still second-Order?", *West European Politics* 28, no. 3 (May 2005): 650-679.

legitimacy, as it has been established that a low turnout is not a consequence of the anti-European preferences of the voters but rather a consequence of the fact that European elections do not provide voters with meaningful choices which would give them a say in the European affairs²¹. European parties are also the ones to blame for this lack of debate on European issues and for forgetting their European affiliation when it comes to the elections.

If absenteeism is a consequence of the perception that European elections only determine partially where the power really lies in the European system²², a solution to this problem often mentioned in the literature would be for the president of the European Commission to reflect the majority in the EP. This move would surely give more incentives for the voters to go to the polls but in the same time it would diminish EP's freedom of movement as it would need to constantly sustain a government. Despite of this critique, one should not forget the importance of the opposition in any democracy and this move would lead exactly to its emergence at the European level and would provide more incentives for the Commission to change its policies according to the voters' preferences.

Political contestation, as a corollary of competitive elections, would also help in what regards the opinion formation of the European voters since education and information is exactly what the European electorate needs. A greater understanding of the EP's influence could be conducive to greater levels of participation in the EU

elections. But the problem is how to make more understandable an institution which fails to meet even the most primary requirements of transparency?²³

The way European elections stand today makes some scholars conclude that there is no electoral linkage to the politics of representation and accountability: the policies at the EU level do not derive from the voters' preferences and elections fail to reflect the analysis of the performance of the EP and of the EU over the previous years. What the EP seems to be lacking is not more power but a mandate from the European electorate to use that power in a particular way. If this is the case, one should ask himself how could these elections contribute in any way to the formation of a European demos?

There are also problems in what regards the legislative, budgetary and supervisory powers of the European legislator. Starting with the legislative powers of the EP, it can be stated that the EP has no full legislative powers, in contrast to national parliaments. Although the co-decision procedure has been extended to most of the areas in the first pillar, member states are unwilling to extend it to the whole pillar despite the constant battle fought in this sense by the EP. But what is even more undemocratic is the EP's lack of legislative powers in the second and third pillar of the European Union, pillars that remain intergovernmental in nature.

Another move to keep the EP distant from the legislative arena has been the constant migration of decision-making from the Council of Ministers to the European Council, on

²¹ Mark Franklin, "European elections and the European voter", in *European Union. Power and policy-making*, 3rd edition, ed. by Jeremy Richardson (New York: Routledge, 2006), 233.

²² Christopher Lord, *op. cit.*, 176.

²³ On EP's lack of transparency see Pierpaolo Settembri's analysis: Pierpaolo Settembri, "Transparency and the EU Legislator: 'Let He Who is Without Sin Cast the First Stone'", *Journal of Common Market Studies* 43, no. 3 (2005): 637-654.

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which the EP has no powers of control. The same move can be noticed in what concerns implementation policy-making which remains under the sole power of the Commission. Moreover, the EP lacks any power in history decision-making, which means that the MEPs have nothing to say in the intergovernmental conferences that lead to changes in the funding treaties. Although some changes in this area have been undertaken, as for example the EP's participation in the discussions that lead to the drafting of the Charter of Fundamental Rights, its powers depend on the willingness of the members states. As for the power of the EP to initiate legislative proposals, one of the most important features of any parliament, this is dependent on the willingness of the Commission when the EP requests it through a report.

Looking more closely to the EP's supervisory powers these seem to be the weakest in relation to the European Council, on which the EP has no power what so ever and the same scenario can be noticed in the relation of the EP with national agencies responsible for implementing European policies. The last point to be addressed in what regards EP's powers is its weak role in deciding the compulsory spending areas of the budget, areas which encompasses among others agriculture, the most costly European policy.

As we have seen one of the limits of EP's possibility to reduce democratic deficit lies in the non-European behavior of the supranational party groups. In spite of the attempt of Simon Hix et. al to demonstrate the cohesiveness and competitive characteristics of the EU's political party, there is much evidence pointing in the opposite direction. Neill Nugent is one of the scholars that

analyze the drawbacks of the EU political system: the great number of national political parties in the EP, group formation and composition is highly fluid making a clear party ideology difficult to emerge and all groups are marked by significant internal divisions²⁴. Moreover, the long-term cost of the collaboration between the two main groups in the EP, the European Popular Party-European Democrats and the European Socialist Party, is the inability of voters to distinguish the choices or cleavages intrinsic to European integration.

IV. Conclusion

If in any democracy a parliament is expected to suffer the least from democratic deficit, then the European Parliament fails in passing this test. Whether looking at the input side, where the European elections have many drawbacks, at the output side, where the voters' preferences do not even count when the grand coalition is formed in the parliament, or at the identity element of legitimacy, where the voters do not even know what happens in the EP, the conclusion seems to be the same: the European Parliament suffers from democratic deficit as much as any institution at the EU level.

But if the European Union is considered to be a democracy under construction, the conclusion should not be that radical since many of the drawbacks addressed can still be addressed. The reality is that the constant increase in EP's power has not made it more democratic and maybe the European leaders should try to find the solution for democratization somewhere else, that is, if they are really looking for democratization at all.

²⁴ Neill Nugent, *op. cit.*, 217-220.

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THE “STATE OF THE ART OF THE EU”, THE FRENCH PRESIDENCY AND A FORECAST OF FUTURE FRANCO-GERMAN COOPERATION

Ulrike Guérot*

Abstract. *The French Presidency has more or less dropped its initial agenda and has turned nearly exclusively to crisis management, forced by the need to address the three major crises the EU stumbled into in the course of the second half of 2008: the institutional crisis after the Irish ‘no’ on the Treaty of Lisbon, the breakout of the Russian-Georgian war and the subsequent EU relations with Russia and the financial crisis and its potentially recessionary consequences.*

Keywords: *French Presidency, EU-Russia relations, Franco-German relations*

I. From the initial EU agenda to crisis management

The launch of the Mediterranean Union at the beginning of the French Presidency at the EU-Summit in Paris 13th and 14th July was, in a way, the only element of the French presidential agenda successfully achieved on plan so far.

Indeed, the EU-Mediterranean Summit was a success at the end, despite the critique and the tensions that have been accompanying the idea of a Mediterranean Union (MU). In March 2008, Franco-German differences about the shape of the MU had led to a serious clash between the two countries and to speculations that the MU would not be put into place. Until late, observers thought that France would not be able to gather most of the Heads of States and Governments of the Mediterranean countries. But finally, with admittedly huge last-minute efforts, France succeeded to choreograph a surprisingly good Summit-event, with spectacular pictures, i.e. Israeli Prime-Minister Ehud Olmert and Palestinian leader Mahmoud Abbas driving together into the court of Elysée-Palace.

Also in terms of content, the Mediterranean Union finally suited most European governments. The overall opinion is that the South of Europe deserves more attention. The moment France had agreed to integrate the MU project into the framework of the Barcelona-Process – especially with respect to the financing – and to open the future general secretariat of the MU to other than Southern EU-countries after two years time, the most ardent dispute points had been clarified and the project had been finally supported by Germany and all EU member states. The secretariat will now be opened and will begin to work on the endorsed working program¹. In a year’s time, the foreign ministers of the EU and the ones of the Mediterranean countries will meet again for an evaluation summit after the first year of existence. In 2010, another summit of Heads of states and governments shall take place again. However, a fair assessment will need to acknowledge that the launch of the Mediterranean Union had no lasting effect so far and the risk is that the idea will not keep the momentum, but fade away as one of the

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¹ The Mediterranean Union working program will have a special focus on energy security, counter-terrorism, immigration and trade.

multiple projects of the EU. It is still uncertain to which extend the launch of the EU will affect the question of Turkish membership in the EU.

Soon after the launch of the MU – and in the middle of European holiday season – the Georgian-Russian conflict broke out and turned around the initial goals of the French presidency. France was in the necessity to go for immediate crisis management, rather than focus on the EU agenda of energy and climate change, health-check of CAP, EU-budget reform, ESDP or any other more routine-business.

In addition, over the summer, the financial crisis took much larger amplitude than expected and is now supposed to have a huge impact on European (banking) markets, but also on the broader European Lisbon agenda, meaning the modernization of the European economy. Europe also will need to engage into the 'cleaning' of its banking market and overcome the potentially recessionary consequences of the banking crisis. There is also rising evidence now that Europe needs a common European banking regulation. The October council² was mainly dedicated to the management of the three crises (Lisbon, Georgia/ Russia and the financial crisis). The 'European Pact for Migration and Asylum'³, identified as main topic for the French presidency, fails to get attention, although it had been initially one of the key issues referred to, since Sarkozy wanted to put strong emphasis on migration problems and also to satisfy its domestic public. The good news is that the key points of

the 'Pact for Migration and Asylum' are the steering of migration with respects to the job-market needs of the receiver-countries; enhanced 'return-politics' of illegal migrants and sharper boarder controls; and a common asylum-policy and partnerships with origin- and transit-countries. It has always been so that progress in home and justice affairs of the EU does not get the attention that it would deserve.

II. Zoom on the EU-Russian relations and the Georgian crisis

The French presidency proved busy, engaged and competent especially on the Georgian conflict. It was known since long that the 'frozen-conflict' region in the European neighborhood was highly unstable, but the outburst of the Russian-Georgian conflict came to everybody's surprise. In the retrospective, even though the EU had to face a lot of critique, it becomes nevertheless clear that the sheer fact that the EU succeeded in getting a common position on the Georgian crisis in its resolution of August 13th was and is a huge success for the French presidency, which should not be underestimated. The same is true for the extraordinary EU-council meeting on September, 1st.

In opposition to the Iraq crisis, the EU came up with a common position despite huge internal differences as regards Russia. Whereas Poland, the Baltic States, Sweden and the UK favor a rather tough approach towards Russia, similar to the US position, Germany, France and Italy do have a more differentiated approach, in which the new danger stemming from Russia and its clearly anti-democratic and hawk tendencies are not ignored, but is flanked by a strong wish to keep Russia as a strategic partner and to not close the doors of dialogue.

² The Council of the European Union, "Draft Agenda October 2008", Brussels, 10 September 2008, available at <http://register.consilium.europa.eu/pdf/en/08/st12/st12713.en08.pdf>

³ "EU-Pakt zu Einwanderung und Asyl. Steuerung der Migration", July 6, 2008, available at http://www.ntv.de/EUPakt_zu_Einwanderung_und_Asyl_Steuerung_der_Migration/060720080711/989791.html

The German position especially was much differentiated. The interview of former Chancellor, Gerhard Schröder, in the German weekly 'Der Spiegel'⁴, in which he called Michael Saakashvili's behavior 'hazardous', was probably the most outspoken defense of Russia and Vladimir Putin's behavior. However, Klaus Mangold, the head of the German 'Eastern Commission of the German Economy' also largely defended Russia in a prominent TV-interview⁵, and argued that Russia will and must remain a strategic partner of Germany, due to their economic ties. Germany would not be more depended on Russia than Russia on Germany. Even broader, the political establishment in Germany is perfectly split on Russia between those who want to cut relations to Russia and those who want to keep the strategic ties. The cleavage goes through the Grand Coalition, with Merkel being more on the 'human-rights'-side, and Foreign Minister, Frank-Walter Steinmeier, being more on the 'strategic-partner'-side; but it also goes through the middle of especially the CDU, where positions from prominent deputies are not homogenous with respect to Russia. It is on the SPD-side that the position tends to be also much in favor of keeping doors open for Russia.

This is all the more interesting as the German position contrasts much with the main-stream position of the US. Leading US-journals or American analysts pointed to the sole responsibility of Russia, demanded a strong course towards Russia and urged Europe to open NATO and the EU for

Georgian membership,⁶ what precisely France and Germany together had refused to accept at the last NATO-Summit in Bucharest in April 2008. Time has come to acknowledge that Europe and the US do not agree any longer on Russia and on what transatlantic relations could look like with respect to Russia, especially if Senator McCain should win the elections. The very fact that the French presidency could hold together the EU on the subject of Russia deserves special attention and one reason why the French succeeded so well is probably the fact that they also reached out largely to improve the Franco-American and overall European-American relations, i.e. through announcing France's return to the military structures of NATO.

III. Behind the Scenes: The Franco-German concert at work again

The common position of the EU should therefore not be taken for granted – especially as some European countries tend to sign various security agreements with the US⁷ - and the achievement of the French presidency, perhaps more in terms of content than in terms of style, should be broadly acknowledged. When Angela Merkel somehow changed her position on Georgia's potential NATO-Membership after her trip to Georgia in August⁸, this had taken place in

⁴ *Der Spiegel*, August 11, 2008

⁵ Dr. Klaus Mangold, Ostausschuss der Deutschen Wirtschaft, in the TV-Talk-Show 'Anne Will' on Sunday, August 10, 2008

⁶ Ronald D. Asmus, "New Purposes, New Plumbing: 'Rebuilding the Atlantic Alliance'", *American Interest*, November/ December 2008; Ronald D. Asmus, Tod Lindberg: "Rue de la Loi: Global Ambition of the European Project", Working Paper of the Stanley Foundation, September 2008; Jörg Himmelreich, "Großreich Putin. Russland fällt zurück in zaristische System – und schadet sich damit selbst", *Internationale Politik*, Oktober 2008.

⁷ Especially the Baltic countries and Poland; and, to a lesser extent, Sweden and the UK.

⁸ *Der Spiegel*-online, August 17, 2008.

narrow concert with the French presidency. By this time, it was clear that the EU would need to take over much more responsibility for the region and would also need to get much bolder in what it expects from Russia as much as in what it could do for and offer to Georgia.⁹

It was clear that, in preparation of the extraordinary EU-summit on September 1st, Germany took a leading role in a well-orchestrated cooperation with France. France and Germany were both, together, the broker of this deal, both committed to keep the EU together and to avoid a split at all price. Germany and France, hence, needed to respect the more Russia-hostile positions of the Baltic countries and Poland; but tried to forge a realistic consensus. I.e. it was mainly Germany who argued against sanctions against Russia, which at some point had been considered, as much as a postponement, if not suspension of the just shortly started negotiations on the Partnership- and Cooperation Agreement (PCA) with Russia. As Russia did not fully comply with the stipulations of the cease-fire agreement so far and as a 'business-as-usual' procedure cannot be accepted, the EU-October Council postponed the PCA negotiations for the time being, also because continuation of the talks could be interpreted as a *de facto* recognition of South-Ossetia and Abkhazia. The EU clearly needs an overall strategy towards Russia first.¹⁰

⁹ Nicu Popescu, Andrew Wilson, Mark Leonard: "Can the EU win the piece in Georgia", European Council on Foreign Relations Policy Brief, August 25, 2008, available at http://www.ecfr.eu/content/entry/georgia_policy_brief/

¹⁰ Nicu Popescu, Mark Leonard, "A Power Audit of EU-Russia Relations", Policy Paper of the European Council on Foreign Relations, November 2007, available at http://www.ecfr.eu/content/entry/georgia_policy_brief/

There is evidence that the French presidency is now changing course in the EU policy towards Russia, taking a tougher stance.¹¹ On the other hand, through the commitment to a donor conference and a large European contribution to the reconstruction of Georgia's infrastructure, Europe has quickly shown engagement.

It is important to underscore that Europe is in a total revision of its policy towards Russia; that the EU is called to take greater care of its Eastern neighborhood and that European credibility in foreign policy is at stake. Therefore, the French presidency tackles with the utmost energy this conflict, as well as the future positioning of the EU towards Russia.

IV. Germany matters most when it comes to Russia

Germany, however, is reluctant - despite Merkel's statement from 10th August - as regards a NATO accession of Georgia as consequence of the war. Some argue it would lead the article 5 guarantee of NATO *ad absurdum*. The EU would ultimately not defend Georgia - nor would the US - in case of a Russian attack with Georgia being NATO member, and neither the US nor Europe would react militarily - since this might mean the definite death of NATO.

In more general terms, the German position, essential for the common EU position on Russia, can be resumed as follows: Russia is clearly too central for Germany to cut relations. However, it is also clear that Russia crossed the Rubicon when it attacked Georgia. If Russia complies now (full retreat of troops), the German assessment, at least of

¹¹ "Paris stellt Russlandpolitik der EU in Frage. Frankreich hält Anbindung an Europa gescheitert", *Financial Times Germany*, September 22, 2008.

some German representatives, although sounding cynical - is that the conflict on South-Ossetia and Abkhazia should be somehow 'shock-frozen' again. This could lead to a sort of 'Cypriotisation' of the conflict, without any clear solutions or the return to the *status quo ante*. The real question for Germany is now whether the 'Georgian case' has been the *one* exception of Russian policy in its near neighborhood; or whether Russia makes a pattern or a method out of it in the month to come with respect to other frozen conflict zones, i.e. Moldova, Armenia, Azerbaijan, but especially with respect to Ukraine. Therefore, Ukraine – and Russia's behavior towards Ukraine – will be *crucial* in the next month. The EU cannot accept one wrong move on behalf of Russia towards Ukraine, also because the US would not permit it. However, the solutions which feature a relationship in which the Ukraine wants to live with both EU and Russia, need to come from the Ukraine itself and an EU-membership perspective cannot be the answer for now. The EU can and wants to help stabilize Ukraine through cooperation, trade, exports and opening of markets, but the real stabilization efforts need to come from the Ukraine itself. Foremost, Ukraine needs to stabilize and reform its political system and undergo constitutional reform. The policy of Germany is oriented towards avoiding anything that could further split the country into East- and West- Ukraine. It would be wrong to assume that if the West-Ukraine can be pulled into the 'camp of the West', East-Ukraine would follow. Unfortunately, this seems to be precisely the strategy of (some in) the US, so that there is a real need for better EU-US understanding on what to do with Ukraine. The French presidency, together with Germany, visibly tries to prepare new common ground for discussion and understanding.

V. No short-term solution for the ratification of the Lisbon Treaty

After the Irish 'no', it had been expected that the French Presidency would try to come up with possible solutions as early as at the October Summit. In the meantime, this assessment has changed. New Irish polls indicate that, if the Irish were to vote again in some time soon, the 'no'-vote would even be higher than in June 2008.¹² Initially, speculations assumed that it would be possible to organize another referendum in Ireland in spring 2009. As the Lisbon Treaty also changes the seats of the European deputies per country, March 2009 would be the last moment to adopt the Lisbon treaty, if the European elections of June 2009 should be run under the Lisbon treaty.¹³ The French idea was to prepare the territory for a new Irish vote already in October, at the latest at the December council. However, after Nicolas Sarkozy's trip to Ireland in July 2008, it became clear that Ireland cannot be pressured and that the French Presidency would not be able to present any concrete steps to be taken on the ratification issue. 71% of Irish people pronounced against a second vote, and 62% of those who would vote again would go for a 'no'.¹⁴ Given these results, the institutional crisis of the EU is clearly not longer a priority for the French Presidency in the immediate term.

The forthcoming Czech EU-Presidency in the 1st half of 2009 has therefore already put strong emphasis on solving the institutional crisis, as no major steps are expected from

¹² *Red C and Open Europe* Opinion Poll (poll conducted in Ireland, 21-23 July 2008), available at <http://www.openeurope.org.uk/research/redc.pdf>

¹³ This is so, because national parliaments need some three month in average to adopt national election laws for the EP-elections to the Lisbon stipulations.

¹⁴ *Red C and Open Europe* Opinion Poll, *op. cit.*

the French Presidency. Beyond the Irish 'no'-vote, Poland, the Czech Republic itself, but also Germany are still faced with the problem that complaints have been brought to their constitutional courts.

In Germany, this legal handicap is a formal one, as officials are eager to underscore. Mr. Gauweiler, of the CSU, has appealed the Bundesverfassungsgericht (constitutional court) to make the case that the Lisbon Treaty is not in concordance with the German basic law. The German government needed to suspend for the time being all activities in order to prepare for the stipulations resulting from the Lisbon Treaty, i.e. preparations to establish the European External Action Service (EEAS). Also, the President of the Republic, Horst Köhler, did not yet sign the law in order to wait for the court's decision – which however, seems more a formal problem, as there is no risk that the German court will oppose Lisbon. The situation is similar in the Czech Republic and in Poland. The real problem therefore remains the Irish 'no' and no solution is in view before 2010. It might well be that –rather to find a juridical way out of the crisis and to work in narrow terms on the ratification of Lisbon – the EU will imbed the solution for its institutional set-up in a new broad reflection group, tied to the one the Council launched last year under the guidance of Carlos Westendorp.

VI. Europe's South-Eastern Strategy: a new momentum for enlargement in 2009?

It is interesting to note that one can detect slight changes in the French position on EU-enlargement. France has been one of the most prominent defenders of a 'core'-Europe and has been openly against further enlargement of the EU in the past decade, under previous governments. It was also

France that never had been truly committed to give a clear enlargement perspective to the countries of the Western Balkans. And it was France that changed its constitution in early 2005 and introduced the provision according to which any newcomer's application to EU membership would be the object of a French referendum, a move clearly seen to torpedo Turkish EU-membership.¹⁵

Now, however, due to a much more complex geo-strategic positioning of the EU between Russia, Turkey, Central-Asia and Iran, and with the energy/ pipeline-questions¹⁶ getting ever more important, it seems as if France is quietly changing position. French officials start to voice that of course the Balkan countries must join the EU, and soon.¹⁷ The EU should go for visa-regulations with the Balkan countries soon and Balkan countries should soon get a date for membership, and this largely before 2014. The Turkish case is more complex. It's too early to talk explicitly of full membership – hence, Turkey clearly needs a European perspective. This does not resemble to what is normally the discourse of the UMP party on European enlargement. The UMP party (the French conservatives) is one of the most reluctant parties as far as further enlargement is concerned, so slight changes in the wording on enlargement should not be taken for granted.

Shifts in French policy can be explained by means of three aspects: First, France, particularly Nicolas Sarkozy, wants to please

¹⁵ Similarly, the idea of a Mediterranean Union had, at least at the beginning, a clear spin to put Turkey rather in the MU than in the EU.

¹⁶ i.e. France has been refused to participate in the consortium of the Nabucco-Pipeline if it does not favor Turkish membership in the EU.

¹⁷ "The challenges of the EU in the 21st century". Conference organized by *Aspen France*, in cooperation with *La Fondation pour vie Politique (Fondapol)* and the *OECD*, Paris, October 19-20, 2008.

the US. Second, with Russia becoming an extremely difficult partner for Europe, there is a fear that Europe cannot afford to lose the two most important and biggest countries in its neighborhood altogether. And third, with President Sarkozy being keen on playing a major role in the Middle-East, France is realizing that good relations to Turkey might be very helpful, i.e. with respect to Syria.

The French policy shift fits into the plans of the Swedish EU presidency to bring enlargement policies back to action. Swedish government officials state¹⁸ that enlargement will be the cornerstone of the forthcoming Swedish presidency in the 2nd half of 2009. One central idea would be to make a package out of Turkey and the Balkan countries and to bring them into the EU together, as it would not be possible to take the Balkan countries first, leaving Turkey behind again. Binding essentially Serbia and Turkey together would also make it difficult for France to go for a referendum on enlargement, as France is pro-Serbian and would not like to vote on Serbia, but could not vote on Turkey alone. It can therefore be expected that further commitment of the EU towards the Balkan countries will happen during the Swedish Presidency.

VII. Franco-German dynamics: ready to lead again?

The Franco-German engine is finally getting closer together after a rather difficult starting period right after Nicolas Sarkozy's election and a first year of problematic Franco-German relations which were full of tensions. With smaller – and not really experienced countries – like Sweden and the Czech Republic taking over the EU-

Presidency in 2009, France and Germany will have an indirect function of a leadership-role to provide, as, for instance, the Czech Republic is working together extremely close with the two. It is clear that, with respect to the major new orientation of the EU to come (Russia, US and new US-administration, neighborhood policies), the grand orientation or commitment will and needs to come from France and Germany.

However, in 2009, there will be a new US-administration, EP-elections, a new EU-Commission, German elections (and elections in the UK in spring 2010), let alone that a difficult relationship towards Russia will need to be managed in the middle of a lasting financial crises whose impact on Europe is quite unknown for the moment, and with growing concerns to the overall economic environment in Europe, let alone energy prices and security. France and Germany will have the difficult task to combine the increasingly difficult aspect of internal European integration (social Europe, migration, wealth, economic growth etc) and the broader geo-strategic dimension of the EU (Mediterranean Union, South-Eastern enlargement, neighborhood policies).

That is not to say that there is no awareness regarding these problems or that Franco-German cooperation is mainly under strain. Even if most say that Angela Merkel and Nicolas Sarkozy do not really like each other, they perfectly work together on a very pragmatic level. However, it is hard to assess whether or not France and Germany will find the energy and the dynamic to develop in common a 'big picture' for the future of the European integration process and to tie together again – as they did many times in the past – the need for more integration with the momentum of enlargement. Even if the cooperation is good at first glance, beneath the surface there is a growing skepticism in

¹⁸ European Conference of CIDOB and ESI (*European Stability Initiative*): "EU-enlargement: is all still going well?", Barcelona, September 20-21, 2008

Germany with respect to its cooperation with France. Also, France may suffer quite significantly from the financial crisis due to a different structure of its economy, which may put the country under strain with respect to its domestic situation and shift interest from Europe once the presidency is over.

The problem is that France feels increasingly marginalized within Europe and 'always needs to win', i.e. when it comes down to European industry cooperation in European Security and Defense Policy. In short, the German 'trust-level' towards France is at a lower level than in the past, and French attempts to outpace Mrs. Merkel, making France the 'must-go' country within Europe, displease many in the German European and

foreign policy establishment. Franco-German relations are therefore also at a turning point and the tandem definitely needs to be enlarged. The institutional gridlock will derange the European Union over the course of the year 2009, which, in many respects, is likely to be a difficult year for the EU. Without formal ratification, it will be impossible to implement those stipulations of the Lisbon Treaty that the EU needs most, especially the European External Action Service (EEAS) and progress in European Security and Defense Policy (ESDP) through structured cooperation. It is again up to France and Germany to put into motion the European mechanics and to make it ready and functioning for the next decade.

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CZECH REPUBLIC BEHIND THE STEERING WHEEL OF THE EUROPEAN UNION: EXPLORING CHALLENGES AND OPPORTUNITIES OF THE FIRST CZECH EU PRESIDENCY

David Král*

Abstract. *The Czech Republic will be only the second of the EU members that joined in 2004 to preside over what is viewed as the most powerful and influential institution within the European structures – the Council. While technical preparations have been well underway for several years, the current political constellation inside the EU seems to be leaving certain signs of nervousness among Prague-based decision makers. The uncertainty surrounding the future of the Lisbon Treaty with the Irish ‘no’ and uncompleted ratification in the Czech Republic itself, recent controversy between the EU and Russia and not least highly complicated political situation at home are all likely to have an impact on the first, and – in the current form – perhaps also the last Czech presidency of the EU. This article will try to have a look at a critical assessment of the preparations for the Czech presidency, various factors, both internal and external, that are likely to influence its execution, as well as at its priorities as they are tabled at the moment.*

Keywords: *EU presidency, Czech Republic, enlargement, European Neighbourhood Policy*

Tasks of the Czech Presidency – challenges of the joint programme

The role of any presidency can be defined in terms of several points: agenda-setting, mediation, representation and organisation. We will not deal with the co-ordination and organisational and logistic structure of the Presidency, as this would be rather technical and descriptive exercise. It would be sufficient to mention that the preparations have been co-ordinated from the Unit subordinated to the

Vice-Premier for EU Affairs Alexandr Vondra and incorporated within the structures of the Office of Government, a body co-ordinating the activities of the government but without a specific role in public administration.

The other tasks are more interesting to examine. It is clear now that the representative role of the Czech presidency will remain untouched. This has been until recently one of the headaches that the officials in the government and particularly in the Foreign Ministry had to deal with for quite some time. It was expected that if the Lisbon Treaty came to force on 1 January 2009, the Czech presidency will be responsible for the implementation of the institutional innovations enshrined in the treaty, including the permanent chair of the European Council or EU High Representative, who would take over the external representation from the current prime minister and the foreign minister of the country holding presidency. Thus, the MFA

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was working with several different scenarios dependent on when the treaty might enter into force which obviously complicated the preparations. It was not for instance sure what the role of the Prime Minister in the Council would be – while the sectoral ministers would chair the different Council formations, the Prime Minister would be somehow excluded from the Presidency business and this might have deprived it of the necessary political leverage and drive. One can at least assume now that this practical obstacle has been removed; on the other hand, it opened other challenges such as that the Czech government will have to deal with the outcome of Irish ‘No’ during its presidency term. Thus instead of implementing institutional changes, the Czechs will perhaps even more delicate issue of how to get out of the current stalemate.

The agenda-setting function of the Presidency has probably proved the most contentious issue of the preparations thus far. Czech Republic is not completely free to set the agenda for the Council during its half a year of sitting in the steering chair. There are at least two factors that limit its execution: one is the “given” agenda, which has been decided by the European Council beforehand and time-wise will be discussed under the Czech presidency. The mid-term budget review, discussing the structure of expenditure in post-2013 financial perspective is one example of such an issue. The other additional obstacle to the agenda – setting is the recently established system of “team presidencies” in the Council, whereby the three consecutive countries work together on basis of a joint programme. Each of the countries sets its own priorities, however, these have to be co-ordinated with the other two members of the Trio to ensure coherence and continuity. The negotiation of the French, Czech and Swedish joint work programme

proved particularly difficult. This can be already illustrated on the choice of the motto – while the French have chosen ‘Protection Europe’, indicating that they would like to deal with issues like immigration or defence, the main motto of the Czech presidency is ‘Europe without barriers’, articulating determination to press for removing obstacles in the internal market, liberal trade policy but also enlargement. At a certain point, the talks were so closely to collapse that the programme had to be drafted by the General Secretariat of the Council which came up with a compromise wording. Nevertheless, it seems clear that there is a much stronger alignment between the priorities of the Czech Republic and Sweden within the Trio than with those of the French government.

Internal factors influencing the Czech Presidency

Shaking government

Internal factors that will influence the execution of the Czech presidency derive firstly from the current strength of the Czech government and the degree of internal consensus among various political actors, secondly from the position of the Czech Republic in the EU. The first factor does not seem to be very favourable. The Czech Republic has a weak and unstable government at the moment, with three coalition partners – the conservative Civic Democrats (ODS), centrist Christian Democrats (KDU-ČSL) and the Green Party (SZ). The Prime Minister Topolánek has been facing enormous problems in the last year to hold the coalition together, being exposed to the pressure of many members of the Green Party to leave the coalition, implications of Vice-Premier Čunek (leader of Christian Democrats) in corruption (by not being able to

prove the origin of some of his assets) and more recently even facing an internal crisis within his own party with some ODS deputies leaving the parliamentary club. Government which is constantly shaking is obviously less likely to give the strong leadership to the Union. There was a proclaimed consensus among the parliamentary political actors to pull together during the following half year, as it is regarded as a matter of national interest and especially since this is the first presidency and the future image of Czechs in the EU is likely to be strongly influenced by its outcome. The major opposition party - the Social Democrats - have offered 'armistice' during the Presidency, meaning that they will not initiate a vote of confidence to the government. But whether the presidency will be enough to put the politicians off the vision of scoring points domestically is an open question. With the regional and Senate elections approaching (October and November 2008 respectively), the opposition Social Democrats escalated anti-government rhetoric again and threatened in case they win the regional elections, they might initiate a vote of non-confidence leading to a transitional (i.e. caretaker) government during the Czech presidency. Topolánek could perhaps only be comforted with the fact that Slovenia was facing a similar situation recently. The coalition headed by Prime Minister Janša was close to a break-up just a few weeks before the start of the Slovenian presidency. Under the pretext of 'national unity', Janša managed to hold the coalition together during the whole term and lead the country and the EU. Nevertheless, two days before the end of the Presidency Janša called an election. In the Slovenian case this was a regular election, but it is quite possible that if the current coalition fares badly in the election, the 'armistice' will be over even before the start of the presidency and the

Prime Minister will be forced to call an early election.

Polarisation regarding European issues

Another internal factor relating to the Presidency has to do more with a long-term vision of the EU's future. The Czech political scene is strongly polarised in this respect, ranging from hardcore Euroscepticism of President Václav Klaus and some ODS members to the visions of political or even federal Europe shared by many Social Democrats. This poses several particular challenges for the Czech Republic ahead of the Presidency. The most imminent one is the mediating role in the situation dealing with Lisbon Treaty ratification crisis. The Czech Republic has not ratified the treaty yet, as the document is awaiting compatibility check at the Constitutional Court which should come out in late October 2008. Regardless of the ruling, the ratification might prove very complicated. The camp of Treaty's opponents, even in the ranks of ruling ODS party, has grown stronger with the Irish 'No' vote and with the outspoken opposition of President Klaus (party's honorary chairman) who declared the Treaty dead immediately after its rejection in Ireland. But the Prime Minister needs the treaty to be adopted, despite the fact that he is not its wholehearted supported. Firstly, President Sarkozy made it clear that without the Treaty he will be opposed to any further enlargement which is a point that will be likely supported by many other countries in the EU. Topolánek, as a pragmatist, knows too well that the trade off with the French will be necessary. But this is not the only reason why Topolánek should be eager to get the treaty approved. The ratification is pushed strongly by the two smaller coalition parties – Christian Democrats and the Greens. Furthermore, the Treaty creates a better

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framework for some policies that the Czech government is interested in getting high on the EU agenda, such as energy security, and removes institutional obstacles that the Czechs would have to tackle with regard to the composition of the upcoming European Commission, where the number of commissioners will have to go down, but not yet settled how. Last but not least, the Czech Presidency will have to deal with the aftermath of Irish no. The referendum in Ireland will not be repeated before the autumn of 2009, due to the European Parliament elections. It is also becoming increasingly clear that no substantial deal vis-à-vis Ireland (and with what possible concessions to Ireland the referendum will be repeated) will be reached under the French Presidency, except for the roadmap at the December 2008 summit. Thus it might be the up to the Czechs to offer a solution and a deal to Ireland. If the Treaty is approved by all the other 26 member states and especially by the Czech Republic in the Presidency position, it is more likely that such an agreement with Ireland could be found.

Position of the Czech Republic in the EU – size and money do matter

There are other things that will have an impact on the exercise of the Czech Presidency – the size, the budgetary position and the fact that it is a relative newcomer to the EU. The size seems to play rather in favour – usually the small countries' presidencies tend to perform better, as those countries are perhaps less ambitious in their agendas, can team up better with the Commission and do not have such strong stakes in many issues which makes them better suited for the role of the potential broker. On the other hand, this might turn disadvantageous in the foreign policy arena. Small countries in the EU's helm are less

likely to be taken seriously by the third parties they have to represent the EU, particularly in the case of Russia. The Czech Republic will be in charge of the EU-Russia summit in the spring of 2009. The question arises to what extent the Czech Presidency would be able to handle the situations such as the one that arose around the Russian-Georgian crisis in August 2008. Many French diplomats informally acknowledged that the EU was lucky when the Georgian crisis broke out during the French presidency, as France was much better positioned to negotiate with the Kremlin on behalf of the EU than Slovenia or the Czech Republic. But the relations to Russia turn out to be a very contentious issue generally, and it is unlikely that any country in the EU would be able to strike a deal which would significantly differentiate from what could be viewed as the 'lowest common denominator' in relation to Russia.

The budgetary position of the Czech Republic is significant because the debate on the mid-term review of the current budget and the discussion of the composition of EU expenditures after 2013 will be launched in the first half of 2009. One can generally assume that the country would be in a better position if it was a net contributor, as these countries have politically more weight to carry such negotiations. This might well change in the next budgetary perspective, but in 2009 the biggest paymasters such as Germany, the Netherlands or France are likely to have the main say. On the other hand, the Czech position towards the budgetary structure is quite articulated: cutting down the agricultural and structural expenditure and pouring more money into policies that would foster European competitiveness, such as research and development. The cuts in agriculture are likely to be strongly opposed by France, the holding the presidency just before, thus the assumption that the Czech presidency would

keep a lower profile in this respect and try to move this agenda on to the Swedes. There is also a good justification for that – it makes sense to wait for a new European Commission and the newly elected Parliament to interfere in such debates. The launch of the debate is also dependent on whether the European Commission will publish the White Book on the budget reform already at the beginning of 2009, which is not sure given its approaching end of term.

Bringing the 'fresh wind' to the Council?

Finally, the Czech Republic being only the second newcomer to the EU to hold the presidency after Slovenia makes it totally inexperienced (in practical terms) with the Presidency business. The Czech Republic had its bitter experience with misunderstanding the negotiating and procedural rules in the EU, such as over the EU common position on Cuba in 2005 when the Czech delegation agreed to lift provisionally diplomatic sanctions, thinking that they would be re-imposed automatically if the Cuban government would fail to improve human rights situation, which was not the case. On other occasions, such as the case of the Swedish-Polish Eastern partnership initiative, a rather clumsy approach of the Czech administration caused that an idea brought by the Czechs to the Council was picked up by others who developed it and presented it as their own initiative. Hopefully, the Czechs have already learnt their lesson and will be able to handle such situations in a better way. So far, the Czech Republic is trying to sell the fact of being the newcomer in terms of substantive agenda as well as the image, purporting that a "fresh wind" should be brought to stiff and cumbersome thinking of the European institutions – thus for instance

the push for more open and liberal Europe, further deregulation at the internal market and liberal trade policy. In terms of the image, the Czechs government arguably tries to give the impression that this will be a non-conformist presidency. Some controversy has been generated around the public campaign launched by the government in September 2008. The main motive of the shot is a sugar cube which is a Czech invention and depicting various Czech personalities playing around with it and accompanied by motto "We will sweeten Europe". The motto it can be interpreted in several different ways in Czech. Sweetening has a positive connotation and it has been interpreted as making the overall product (i.e. EU) better by adding sugar (i.e. the Czech invention). On the other hand, it can also mean sarcastically making the life more difficult, meaning that the Czech Presidency will not always chose the way of least resistance or lowest common denominator. Last but not least, some double meanings can be spotted here as well – it can be interpreted as a parody of the infamous "sugar reform" implemented in the EU over the last few years, which severely hit the Czech sugar producers. Finally, it would certainly recall the remarks by Václav Klaus prior of the Czech accession to the EU when he admitted to be afraid that the Czech Republic might dissolve in the EU like a sugar cube in a cup of coffee.

External (objective) factors

External factors will also have a strong impact on the execution of the Czech Presidency. At least two of them are particularly worth considering – the upcoming elections to the European Parliament and the end of term of the Barroso Commission. They are generally considered as factors that hinder a strong performance by the Presidency,

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because there is very little legislation passed as the Parliament is practically inactive for the whole second half of the Presidency's term. Likewise the European Commission does not table any major policy initiatives, although the Prodi Commission adopted just at the end of its term one of the most controversial legislative proposals, known as the 'service directive'. It is rather unlikely that the current Commission will put forward such a controversial proposal. However, some of the things sensitive particularly to the new member states will definitely be on the table. One of such issues will be possible extension of the transitional periods for the free movement of labour from the countries that have acceded in 2004 to additional 2 years. Although these measures are being applied only by a few countries (including e.g. Germany and Austria), the Czech government is already now arguing that the extension is unjustifiable, quoting that the number of Czechs working in EU-27 is about twice lower than the number of EU nationals working in the Czech Republic. However, the Czechs do not have any effective means of reverting this as the final decision is up to the individual member states. The issue would be sensitive politically, given that those who want to keep the restrictions in place will have to prove that their removal would cause strong disruptions to the labour market – something that would surely be difficult even for Germany and Austria. The European Commission was already asked by a group of new member states to produce its own assessment of the impact of removal of the existing restrictions on the European labour market.

In terms of other objective factors, the Czech Presidency will try to make use of the symbolism relating to the first half of 2009. It is going to be exactly five years after the first Eastern enlargement, which the Czechs would love to sell as a win-win situation from which

both sides benefited enormously. On the top, they will also use this argument to stress that enlargement must continue and that 'enlargement fatigue' cannot become a pretext for creating 'Fortress Europe'. Furthermore, 2009 is going to mark 20th anniversary of the changes in Central and Eastern Europe and the collapse of communism, which will highlight the huge political, economic and social progress that the region has made since then. Finally, the 60th anniversary of the Washington Treaty establishing NATO will be used as a reminder of the importance of Transatlantic relations for the European Union and the indispensable part that the US play in ensuring European security. It will be interesting to see whether the rather symbolical reminders will have some practical implications, which is something that will be examined later on in conjunction with the Presidency's priorities.

Another event that could be important is the fact that the Czech presidency will be in charge of establishing the first contacts with the new US administration and organizing the first EU-US summit with the newly elected US president. The Czechs would certainly want to make sure that this gives a new boost to Transatlantic relations, which witnessed many rows with the Bush administration over issues such as Iraq, climate change or the International Criminal Court. The success will also depend on the outcome of the U.S. election, nevertheless, there is a widely shared hope in Europe (and in Prague for that matter) that things can get only better after George W. Bush.

Of course, one thing that cannot be tackled by any presidency beforehand but might actually become a top priority is an unexpected crisis, like the one between Russia and Georgia or the current turbulences accompanying the financial crisis. The Czechs will most probably have to deal with the

aftermath of both of them, but others might occur unexpectedly. The unpredictability of such events requires a lot of flexibility on the part of the Presidency. Rather than enumerating all the possible threats that might appear, it is more challenging for the Presidency to have an effective crisis management, which would enable it to react quickly to such events. A constructive communication with the Secretariat General of the Council is thus crucial in this respect, but the Presidency would probably not avoid making consultations with the big countries in the EU either.

Priorities of the Presidency – ambitious goals, realistic expectations?

The first drafting of the Czech presidency priorities, which started already at the beginning of 2007, certainly did not lack ambitions. For a mid-sized country in the EU, the Office of Government came up with an extensive list of issues ranging from pursuing further liberalisation of the internal market and liberal external trade policy to negotiating the follow-up of the Hague Programme or implementing the institutional innovations of the Lisbon Treaty. The original list which included some six priority areas has been reduced to three currently standing main priorities – Competitive Europe, Energy and climate change and Europe open and safe, with the original priorities being re-packed into the three. Some of the priorities have not been defined by the government itself – they were part of the pre-agreed EU agenda, such as the CAP health check and the budget review or the follow-up of the Hague programme. Other areas come up with the very nature of the presidency, such as foreign policy, and so the government only limited itself to areas where it has special interest and where it believes the Czech Presidency can have an

added value in moving the EU agenda forward. But the limitation to three priorities indicates a more realistic reflection of the Czech capabilities, as well as the necessity to co-ordinate the priorities with France and Sweden to ensure coherence in the team presidency.

Liberal policy for the internal market – good idea at a wrong time?

The overall priority, reflected also in the motto of the Czech Presidency – “Europe without Barriers” – remained unchanged, and underlines the overall determination to push the liberal agenda in the internal market at the EU level. Some of the aspects present in the original government documents have been abandoned. For instance, the first concept reckoned that the Czech Republic will re-open the issue of service directive, where the country very much supported the original Commission proposal, including the contested ‘principle of origin’. But it would be almost impossible to imagine that some kind of debate could be re-launched before the expiry of the implementation period, not least because the Commission could not present any assessment of the effect of legislation. Thus, the activities of the presidency will probably remain focused on implementing measures that are supposed to bring about an increased competitiveness of European economy, i.e. Lisbon strategy which will be entering its final phase, small and medium enterprises, better regulation package, full implementation of the four freedoms, support for research and development etc. Two issues that have been originally set as separate priorities have now been included under the competitiveness – the budgetary reform and migration. As far as the budgetary reform goes, it has been said that the role of the Czech Republic would only be to open the

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debate on the desirable structure of post-2013 budget. The Czech position is that the EU should cut down both agricultural and structural spending and to focus more on innovative parts of the economy that would make Europe more competitive globally, such as support for research and development. It is likely to be a difficult task, with the opposition coming not only from the southern members of the EU who are in favour of keeping the current structure of spending heavily focused on agriculture, but also from some of the newcomers with large agricultural sector (such as Poland, Romania and Lithuania) who with the approaching vision of reaching the level of rural subsidies in EU-15 might be more reluctant to substantially change the generous EU farming policy.

Regarding migration, asylum and other policies under Freedom, Security and Justice, the position of the Czech Presidency is going to be arguably even more complicated. Firstly, the Czech Republic apparently does not have the strongest stakes in this area, as immigration does not pose such a strong public policy challenge. But it is certainly coming to the fore, as it is seen as one of the possible answers to the lack of European competitiveness, demographic decline and sustaining Europe's growth. Recently the Czech Republic has enacted a very liberal legislation at national level, giving access to third country nationals for both skilled and non-qualified workers to the Czech labour market (known as the Czech 'Green Card'). This would make the Czech Republic an obvious promoter of such progressive measures at EU level that are currently debated, such as the EU Blue Card. Migration policy is also a top priority of the French Presidency, so there would be continuity. But the Czech Republic actually behaves quite destructively in this respect. Firstly, there was a controversy between the Czech government

and the European Commission over the issue of unilateral negotiation of the extension of visa-waiver programme for the Czech Republic, where the Commission wanted to take a lead and negotiate for all the countries not currently enrolled, while the Czech government pressed ahead with bilateral negotiations. This alienation showed some problems that might arise during the Czech Presidency. As the outcome, the Commission agreed to move ahead with the follow-up of the Hague Programme only under the Swedish presidency, although the Czechs really wanted to have this adopted as the 'Prague programme'. The second reason for the Czech reluctance has to do with the opposition to facilitating the legal movement of third country nationals' across the EU. Prague is afraid that with the existing limitations of the free movement of labour between the new and old member states, the Czech citizens might actually find themselves in a more disadvantageous position than certain third country nationals. Although the accession treaty contains sufficient safeguards against such possibility, the Czech administration politicised the issue arguing that the removal of existing restrictions is unfounded and that it has been politicised as well. Thirdly, the Czech Republic is not a frontrunner in other areas currently on the agenda of justice and home affairs – e.g. enhanced police co-operation, harmonisation of criminal law etc. There is currently a lot of suspicion towards transferring more competences to the EU probably motivated by institutional ego of law-enforcement ministries who are afraid of losing power to Brussels and also by a bad state of some parts of law enforcement, particularly intelligence services but also the judiciary. If some kind of differentiated integration should arise, the Czech Republic will most probably not be willing to participate.

Generally speaking, the Czech presidency with its competitiveness agenda does not probably come at the right time. Especially with the current financial crisis, when there is a strong push for more rather than less regulation (albeit specifically for financial markets) and for the need to intervene in the markets more vigorously, the Czech appeal to more open, liberal and less (or better regulated) European market might come at vain.

Energy and climate change – challenge of reconciling contradicting considerations

Regarding the second priority – energy and climate change, there has been an interesting shift in the governmental position, too. Originally only the issue of energy (and particularly the security of energy supplies) was to be put on the agenda, which created quite a strong discrepancy with the French and the Swedish programme, both of them putting main emphasis on climate. Although the refusal to acknowledge the climate change as a global (and European) problem is conferred mainly to Václav Klaus and a minor part of his followers within ODS, the energy issues were the main point of concern for the government. However, the eventual inclusion of climate change into the priorities is not surprising. Firstly, the Green Party presented in the government pushes strongly to take this problem more seriously. Secondly, the Czech presidency will be heavily involved in representing the EU in the key stage of negotiations of the post-Kyoto framework agreement, leading to what is known as COP 15 meeting in Copenhagen at the end of 2009, as the EU mandate would have to be approved at the spring European Council. It will also have to articulate the European position on climate change to the new US

administration, trying to get them on board for Copenhagen deal.

The multitude of aspects involved in the current energy and climate debate – political, economic, social, environmental and others often put the EU and member states in front of unpopular choices, will make it even more difficult for the Czech Republic to find a balanced approach. For instance the idea of moving away from non-renewable to renewable sources of energy opens up the debate on the revitalisation of the role of nuclear energy. This is strongly supported by part of the Czech political establishment, as well as some of the major stakeholders such as CEZ (the Czech Power Company, one of the biggest electricity producers in Europe), but opposed by others, such as the Green Party or environmental lobbyists. Current coalition agreement contains a clause not to start construction of new nuclear power plants in the current term, so it will be internally difficult to bring this issue up in the EU, despite the fact that Prague was the initiator of the so-called 'nuclear forum' in the EU.

The security aspect of energy has to do mainly with the overall dependence of the EU on Russia, especially for its gas and oil supplies. Although the Czech Republic is not as dependent on Russian commodities as the other countries in the region, it is much more so compared to the EU-15. Moreover, it has its own bitter experience with using the energy supplies as a political weapon. Just after the signature of the missile-defence treaty with the United States in July 2008, the supplies of Russian oil through Druzba pipeline were interrupted, allegedly for 'technical reasons', and the government had to deploy its reserves as well as to increase the import through Ingolstadt pipeline supplying oil from the port of Trieste. It is no surprise that the Czech Republic would like to have an agreement to limit the overall Europe's dependence. For this

reason it is determined to hold an informal Council devoted to energy security in February 2009 and also to push for speeding up the EU project of Nabucco pipeline, which should bring gas from Central Asia to Europe bypassing Russia. But the project is too divisive among the member states, so it remains to be seen whether the Czech ambitions are too high, especially given the competing Russian proposal for South Stream pipeline. One of the considerations is also to host a Trans-Caspian summit with potential suppliers from Central Asia and the transit countries of the Caucasus.

Foreign policy agenda – pushing both East and West

The third main priority of the Czech Presidency, called 'Europe open and safe', builds on the premise that the best way of ensuring Europe's stability and security is through an active engagement with the EU neighbourhood, either through the enlargement policy or by enhancing the co-operation with the EU neighbours. For obvious reasons, the Czech Republic is more inclined to develop the eastern rather than southern dimension of the European Neighbourhood Policy. In terms of the enlargement, Western Balkans is the foremost priority. There were rather high ambitions in respect to Croatia, where the Czechs originally hoped that the accession treaty could be signed under the Czech presidency. However, due to the stalemate of negotiations during the Slovenian presidency this is probably no longer the case, although the Czechs are determined to push ahead as much as possible, but the completion of negotiations is not on the table anymore. The Czechs, however, want to press ahead with the other countries in Western Balkans. The decision to open the negotiations with Macedonia might happen

already under the French presidency, in which case it would be up to the Czechs to make the first steps. But much will depend on the Commission's report published later in 2008, and on the position of Greece which has not settled the name issue. Montenegro can apply for EU membership already in 2008, which is likely to push Albania and Serbia to do the same. The Czechs will try to have an early avis of the Commission so that the decision on the candidate status can be perhaps achieved towards mid 2009 or under the Swedish one, but in case of Serbia it will depend on the full co-operation with ICTY and the Dutch position which is vetoing the ratification of the interim political agreement. Thus the most controversial issues in the region are likely to remain Bosnia and Kosovo.

As far Kosovo is concerned, its recognition has proved a highly divisive issue itself in the Czech government. All the Christian Democrats voted against it, including one minister from ODS, and President Klaus even claimed that he was ashamed of the Czech Republic for recognizing Kosovo's independence. On the other hand, the Czechs have obvious interests in Kosovo, not least because the Czech contribution to KFOR is currently the biggest Czech military deployment abroad and CEZ (the Czech Energy Company, largely state owned) is planning substantial investments there. The most imminent challenge would be for the Presidency to try to ensure that the EULEX mission is going to be deployed even in northern parts of the country, dominated by Serbs and practically at the moment run from Belgrade. But if Kosovo is to move to a classical path towards the EU, i.e. to start the Stabilisation and Association Process, a lot of effort would have to be invested into convincing those EU states that have not recognized it yet to do so, as otherwise the

contractual framework for accession (Stabilisation and Association Agreement) cannot be put in place. In Bosnia, the Czech Presidency will have to steer the transformation of the current Office of High Representative to the office of EU Special Representative, leaving the ultimate responsibility for the country fully in hands of the EU, but the phasing out depends on several conditions and it is not sure if they will be met.

As for Turkey, the Czech Republic does not have such strong stakes and interests as in case of the Western Balkans. Still, it is committed to keep the negotiation process going, seeing it as an important incentive for internal reforms in Turkey. Foreign Minister Schwarzenberg recently signalled that the Czechs plan to open as many as four new negotiating chapters, which would be a decent progress, given the fact that normally only two chapters per presidency have been open. The key issue, however, remains the de-blocking of the eight chapters relating to customs union because of the Cyprus problem. It seems that here the Czech Presidency will not strive for a major breakthrough in this respect and developments seem to indicate more in the direction that it will rather be the upcoming Swedish presidency who is working on unblocking the current stalemate, which makes sense given the fact that Sweden is one of the main supporters of the Turkish membership in the EU and has been very active in respect to both Turkey and Cyprus. But ultimately, the Prime Minister reiterated the support for Turkish full membership in the EU, although their coalition partners – Christian Democrats – would still rather prefer a status of privileged partnership vis-à-vis the EU.

The next big issue of the foreign policy agenda of the Czech Presidency will be the Eastern dimension of ENP. The Czechs have

rediscovered the Eastern policy only a few years ago, after it has practically been a non-issue in course of 1990's. From the governmental documents we can see that the region is viewed mainly as an important energy corridor for Europe, but the determination to push for getting the Eastern neighbours as closely tied to the EU as possible is not justified only by energy but by the overall stability of the Old Continent. For this reason the Czechs also emphasize the need for continuing support for democracy, human rights and rule of law across the region. As was already mentioned, the Czech Republic also quite clumsily tried to push for the Eastern partnership initiative in the Council, which was finally taken up by Poland and Sweden. But the Czech government is now, along with Sweden and Poland, preparing the input for the Commission communication that will come out in December 2008 and that will lend at Council's table at the beginning of 2009. Ukraine is likely to be in the main focus, but attention will be paid also to Moldova or the Caucasus countries. The aspiration is to organize the EU 27 summit with the six Eastern partnership countries (Ukraine, Belarus, Moldova and the three Southern Caucasus republics), and generally to keep it on the agenda for the whole of 2009 as Sweden is also very active in this direction. The Czechs originally aspired to conclude negotiations on the enhanced association agreement with Ukraine, but given the current crisis in the country it is unlikely to be achieved.

The most challenging issue for the Czech Presidency in Eastern Europe will undoubtedly be steering the EU policy towards Russia. The Czech position currently builds on the premise that the EU-Russia relations are unequal at the moment, not because the EU would be weaker but because it has not yet defined its strategic

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interests vis-à-vis its Eastern neighbour. The last version of the Presidency plan, produced before the Georgian crisis, reckoned with the Czech Republic pushing for defining a long-term strategy towards Russia, which should include debate not only among member states and EU institutions but also involving think-tanks and foreign policy experts, and striving for better understanding of the processes underpinning the current developments in Russia. However, with the aftermath of the crisis it seems that the Czechs will be faced with many practical issues in relation to Russia such as over viewing the deployment of EU monitoring mission in Georgia, tackling the negotiations on the enhanced agreement which have currently been blocked because of the Georgian crisis or preparing the EU-Russia summit where many sensitive issues will have to be touched upon.

The third main priority area in foreign relations is the Transatlantic relations. One would assume that the Czech Republic is relatively well positioned, given its excellent bilateral relations and strongly pro-American inclination of the current Czech government. But much will of course depend on the outcome of the Presidential election in the USA. While most of the European leaders would probably like to see Obama as the future president of the United States, for the current Czech government it might be paradoxically easier to talk to McCain in the White House. For instance the Czech Republic claims to strive to push for further trade liberalisation in WTO, which is likely to be opposed by the democratic administration and especially by democrat-dominated Congress. Likewise the Czech government's opinion on climate change might be closer to McCain who seems to have a more cautious approach to the problem than Obama. In any case, the Czechs might find themselves in an awkward situation when they have to defend

the EU stance vis-à-vis the United States, while their own position might be closer to that of the US administration than to the majority of the fellow European governments. In any case there is a strong expectation that the Transatlantic relations need a new boost after the elections to reaffirm the value of the Atlantic alliance and shared interests in the globalised world, and that the Czechs will be able to ensure this.

Interestingly enough there is one more country mentioned among the Czech Presidency's priorities – Israel. The Czech foreign policy has been strongly pro – Israeli since the collapse of Communism and the Czech Republic is perceived in Israel itself as one of the main allies and supporters in the European Union, which often does not apply to the Union itself, viewed with a lot of suspicion among Israeli policy makers. The strategy of the current Czech government is to contribute to improving the image of Israel in the EU and vice versa, i.e. engaging Israel more in European affairs. Perhaps also for this reason the Czechs are planning the EU-Israel summit during the Presidency. There might be an opposition to that from the other member states, but diplomatic sources talk about a possibility of a trade-off with the French who would like to have (and chair) another Mediterranean summit under the Czech presidency. The Czech government is also thinking about inviting some Israeli ministers to informal council meetings. Also the ENP Action Plan with Israel will expire in April 2009 and the Czech presidency will push for replacing it by an enhanced document that would underline the 'privileged' role of Israel in the ENP on the principle of differentiation (similar thinking is underway in regard to Morocco).

Furthermore, two horizontal issues regarding foreign policy resonate among the priorities of the Czech EU Presidency. The

first one is support for human rights, the other one is ESDP. In the first case, the emphasis of getting the democracy and human rights on the agenda is understandable from the Czech perspective – the Czech foreign policy has been since the fall of communism very much value oriented, and the Czech Republic is trying to make an impact in this sense even at EU level to highlight the importance of support for democracy, human rights and the rule of law. What can be practically achieved under the Czech Presidency is another question. The Czechs would not be able to launch the debate on the European Instrument for Democracy and Human Rights (EIDHR), as only the first project cycle under the new rules will be finishing and the Commission would only publish its own report. However, there will be an attempt to open a wider debate on the role of supporting democracy, human rights and rule of law in EU foreign policy involving especially NGOs. The Presidency will also strive for having a more structured dialogue between the European institutions and NGOs working in this field. Moreover, there is also a positive constellation with Sweden taking the presidency over after the Czechs, as this point features very high on the Swedish agenda, too.

One has to be a bit more careful with interpreting the mention of ESDP among the presidency priorities. The Czech Republic has so far not acted as an enthusiastic supporter

of ESDP. The main concern of the Czech government is that the underpinning ambition is to create duplication, or even counterbalance to NATO as the main security provider. At the same time, the Czechs are well aware that Europe needs more hard power if it is to play a role of a global actor and to take care of its own security interests. However, the emphasis is on building ESDP as complementary to NATO, so the main accent is likely to be on improving strategic dialogue, co-ordination and interoperability with NATO. The government document also mentions the need to prevent emergence of any permanent planning structures within ESDP.

So far, the support seemed to be purely rhetorical with any specific ideas on the table. Moreover, the Czech Republic will be probably faced with difficult choices in this respect too. For instance if the Lisbon Treaty comes to force (or even without it), some members states are likely to be willing to implement the permanent structured co-operation in defence. This might be a real test case for the Czechs, who take the military engagement more seriously and are increasing deployment in international operations, mainly under NATO command. Whether they will be willing to engage more also in war-like EU-led missions remains to be seen.

THE EUROPEAN UNION'S TRADE NEGOTIATIONS WITH THE ACP: ENTRAPPED BY ITS OWN RHETORICAL STRATEGY?

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Abstract. *This paper deals with the Economic Partnership Agreements (EPAs) between the European Union (EU) and the group of African, Caribbean and Pacific (ACP) countries. It addresses the question why the EU firmly insisted on upholding the negotiating deadline for these new trade agreements, despite the very damaging consequences; these hastily initiated trade deals entailed. Regional integration in the South was hampered; the development of the friendly image of the EU got a serious blow; the EU did not manage to include the WTO plus issues, and the prospect of full EPAs at later stage is not guaranteed. We first qualify the Union's argument to the expiry of a waiver by the World Trade Organization (WTO), which legitimized the former trade regime, and placed an external and insurmountable pressure on the negotiations. There is no rational explanation for Europe's harsh attitude on the EPA deadline, since neither legal, nor economic interests would have been harmed, if the deadline had been postponed. The main argument advanced in this article addresses whether the EU had to push through these trade deals, because it had entrapped itself through its own 'rhetorical action'. In its negotiation discourse, the European Commission (EC) had so often emphasized the deadline together with the fact that there were no alternatives to EPAs, that it could not change its mind overnight, when at the end of the 2007 negotiations they were still going nowhere. The Union was forced to keep up with the deadline it had imposed upon itself with the risk of losing all its credibility.*

Keywords: *EU trade policy, discourse, ACP, negotiation strategy, Economic Partnership Agreements, rhetorical entrapment*

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A short introduction

The beginning of the year heralded a new era in Europe's trade policy towards developing countries. After thirty years of non-reciprocal trade preferences granted to the ACP countries, a reciprocal trade regime has been put into place, by establishing several WTO plus trade agreements, well known as Economic Partnership Agreements (EPAs). Or

at least, that was the plan. Negotiations on these EPAs turned out to be extremely difficult. Instead of creating the comprehensive regional trade deals, the EU ended up concluding a jumble of bilateral narrow goods-only Free Trade Agreements (FTAs) with countries and groups of countries representing only half of the ACP.¹ (ECDPM, 2008, p. 4-5)

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¹ There is one exception: the CARIFORUM EPA, this is a comprehensive agreement concluded with all the members of the region, accounting for 16 ACP countries: Antigua, Barbuda, Bahamas, Barbados, Belize, Dominica, Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St. Lucia, St. Vincent, St. Kitts & Nevis, Surinam and Trinidad & Tobago.

These new trade deals are highly contested. Many Non Governmental Organizations (NGO), as well as academics and politicians inside and outside Europe, did not have good words to say about the Interim-EPAs. These so-called 'instruments for development' (Mandelson, 2005 a) are sailing under false colors; the trade deals do not have the ability to boost development. Moreover, they are seen as a threat to the ongoing regional integration processes in the South.² (Kabuleeta and Hanson, 2007, p. 1-2)

Not only the content, but also the negotiating strategy of the European Commission came under attack. During the last year of the negotiations, the European Commission increased seriously its pressure upon the ACP countries by threatening to apply the less generous Generalised System of Preferences (GSP), in order to regulate trade relations, if no agreement was reached by the end of 2007. (European Commission, 2007 c) This was done under the guise of WTO compatibility, as a highly valued norm that cannot be neglected. The severity of this threat can hardly be overestimated: not only would they have to pay higher import duties to enter the European market, and countries as Brazil, China and India would become their direct competitors. (*Overseas Development Institute*, 2007, p. 2)

The harsh attitude of the Commission on that negotiating deadline did not put the EU in a good light. Never before had an industrialized country increased its import tariffs towards the third world, and the Union was threatening on doing so, and later suited the action to the word. The development friendly image of the EU, which the

Commission likes to emphasize so often, was seriously damaged (Jones and Perez, 2008, p. 3, Kabuleeta and Hanson, 2007, p. 1-2). Bearing in mind that the Interim-EPAs also caused a negative impact on regional integration and embittered relations between the EU and the ACP as well as within the ACP regions, the question arises: why did the European Union firmly insist on upholding the negotiating deadline for the new trade agreements with ACP? What interest does these agreements serve that could be worth all this?

The rationale behind Interim-EPAs

The two rational reasons put forward as explanation for Europe's, at first sight, illogical stubborn attitude on the negotiating deadline are WTO-compatibility of the trade regime and the economic potential of the ACP markets. (*Oxfam International*, 2006, p. 4-6) But taking a closer look at these motives it becomes clear that, none of them can truly account for the EU's doggedness to conclude EPAs before the end of 2007. Instead, a more constructivist interpretation of the Commissions behaviour can shed a light on the real motivations of Europe's trade negotiators.

The first often quoted rationale is, as noted above, the EU's wish to establish a trade relationship with its former colonies that is WTO compatible and is no longer viable for challenges before the WTO's Dispute Settlement Body (DSB). This trade regime, in line with the WTO principles, would make a waiver superfluous. The former trade regime contained discriminating features that were not in line with the WTO principles. A waiver, a temporary exception on WTO law, granted through negotiations, gave that trade regime the necessary legitimization in the multilateral trade organization. On the first day of January

² www.stopepa.org - website of the Stop EPA campaign: a large coalition of ACP and EU civil society organizations aiming at stopping the EU's current approach in negotiating free trade agreements with the ACP countries.

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2008 this waiver expired. So, from that moment on, the former trade agreements became illegal, which led to numerous cases before the DSB of the WTO. All lost cases for the EU, which means that the Union would have to face economic sanctions from important trade partners. The EU most definitely wanted to avoid this scenario. It is not doubted that the WTO-compatibility is one of the reasons to adjust the trade regime between the EU and the ACP. The cost to legitimize the non-reciprocity is too high, and keeping this market access without legitimization would lead to, as said before, harmful economic sanctions. (Stevens, 2006, p. 444) This can, however, only explain the emphasis on the reciprocal character of the new trade deals, and not the stubborn attitude on the deadline. After all, with a case before the WTO it takes more than two years before a sanction can be applied.

Besides, it took the Union almost two years to get the waiver needed to legitimize their Cotonou trade regime. (Bilal, 2007, p. xii) In other words, the non-reciprocal trade regime had no legal status during these negotiations. Since the EU did not make a big deal of it then, it is remarkable that this time they are no longer prepared to miss their 'legal' deadline, not even for a few months, regardless the consequences.

Were there economic motivations to conclude these trade deals in haste? But only a quick look at the role the ACP is playing in Europe's trade numbers makes it clear: no interests there neither. The share in trade volumes that goes to the ACP is virtually nothing. Some researchers point out the fact that the ACP countries have markets with a lot of potential for the services sector, an economic sector which is very important for the EU. But the EU failed to include the liberalization of services into the trade agreements. Therefore the fact that services are so important to the EU would

rather be a reason to extend the deadline in order to get services liberalization into the agreement. And the same reasoning can be made for Foreign Direct Investments. (Faber and Orbie, 2007, p. 8)

Rhetorical actions and rhetorical traps

Neither the WTO compatibility, nor any economic interest of the EU explains why the Commission did not want to budge an inch on the deadline. Instead, this puzzle must be solved through a more constructivist approach towards the negotiating process.

It is beyond doubt that the European Commission really wanted to establish its proposed comprehensive WTO plus Free Trade Areas. Yet, little or no progress was made during the negotiations of the trade deals, while more and more critics were raised, questioning the positive impact of the EPAs. The European Commission, determined to revert this situation, hardened its negotiating discourse. The WTO deadline became the centre of its negotiating strategy: before 2008, a WTO compatible trade regime had to be in place, and no other trade deals but EPAs would meet that criterion. (Mandelson, 2007 a, b, c) But, no matter how much pressure the harsh rhetoric of the Commission brought about, less than two months before the deadline, still no headway was made. However, the Commission had focussed so much on the deadline, repeated so many times that there was no alternative to EPAs and that GSP was imminent without agreements, that it could only carry on with its threat, irrespectively of the negative impact this would have on its development friendly image. The Commission was trapped in its own discourse. As Schimmelfennig (2001, p. 65) argues; there is a danger in using norm and value based arguments in order to defend or strengthen ones own bargaining position.

Schimmelfennig (2001, p. 63) defines the strategic use of norm-based arguments in pursuit of one's self-interest as 'rhetorical action'. This rhetorical action can be helpful in two ways: it adds further legitimacy to the actor position, and influences the outcomes of the negotiations in favour of those availing themselves of the values and norms.

Let us take a look at the first function. Political actors who formulate their goals in line with collective the norms and values of their institution can simply refer to them as a justification for their position and, by doing so, gain further legitimacy. In our case we could argue that the Commission used the fact that EU is a strong supporter of the multilateral trade regime in order to justify its harsh focus on the negotiating deadline of the EPAs. Regardless of the real reasons concerning why the EC wanted to push through these trade deals. Indeed, on the first of January 2008 the WTO waiver would expire and the former trade regime towards the ACP countries would become illegal, so it was easily argued that the EU could no longer use that regime to regulate its trade relations.

The second effect can be found in negotiating outcomes. Political actors, who can defend their bargaining position in terms of collective norms and values, might get a more positive result out of the negotiations, than when outcomes would be based on interest and power alone. Or, as Schimmelfennig (2001 p. 63) puts it: 'Rhetorical action changes the structure of bargaining power in favour of those actors that possess and pursue preferences in line with, though not necessarily inspired by, the standard of legitimacy³. Consequently, again,

³ The standard of legitimacy is the term which Schimmelfennig uses when referring to a standard 'based on the collective identity, the ideology, and the constitutive values and norms of the political community.'

the Commission focussed on the WTO compatibility of the trade regime as a legitimized reason to push through the EPAs: It stated that it did not want the deals for its own interest; the agreements were necessary in order to have a trade regime in line with the WTO.

Though it is not the subject of the paper we could assume that the rhetorical action of the European Commission did not produce the intended effects, because the political actors from the ACP countries have not institutionalized the collective norms and values of the EU. Subsequently, referring to the importance of the WTO to legitimize their position had no effect here, since the ACP countries do not value the multilateral trade organisation that high. Or it is, at least, not a collective norm in the institutions where these political actors are working.

But political actors who use the constitutive norms and values to pursue their goals should be careful: if, in the future, it would suit the actor more to act against the norms he used before to justify his goals, he will not be able to. If he truly believed in the norm, the potential shame would stop him from going against its own principles. But 'even if community members use only the standard of legitimacy to advance their self-interest, they can become entrapped by their arguments and obliged to behave as if they had taken them seriously.' (Schimmelfennig, 2001, p. 65) These actors abstain from violating the before supported norms because it would severely damage their reputation and credibility. So, why the Commission focussed so hard on the WTO compatibility does not even matter. The point is that, after more than a year, grabbing every opportunity to highlight the WTO deadline together with the threat to imply GSP, they had no choice but to continue what they had started, despite its negative consequences.

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In order to reduce the negative impact caused by this entrapment, the political actors can of course use again rhetorical action. 'They may, for instance, downplay community values and norms or reinterpret them to their advantage, questioning their relevance in a given context, or bring up competing values and norms that support their own preferences. There are, however, limits to strategic manipulation.' First, the norm in question is part of a coherent group of values and norms. So it is not that easy to break up the norm construction or isolate one. Secondly, it is not wise to manipulate the norms you once firmly defended, if you would like to stay a credible actor. (Schimmelfennig, 2001, p. 65) In other words, the Commission had some space to adjust its attitude, but was restricted. The possibility they created for the ACP countries to sign an EPA light instead of a comprehensive trade agreement, must be seen from this perspective.

The following part of the paper will illustrate these theoretical assumptions. Describing the negotiating process towards the Interim-EPAs, I will point out how the Commission tried to influence the course of the negotiations by using a specific discourse. Subsequently, I elucidate the rigorous outcomes of these negotiations, by showing how the EC entrapped itself through its rhetoric, and, in trying to solve the problems, this entrapment caused upon them, opted for a solution that brought along its own unintended consequences. Instead of signing a comprehensive EPA with a whole region, countries could also sign a bilateral only-goods trade agreement with the EU, in order to avoid a trade disruption through GSP. These narrow trade agreements had negative effects on both the regional integration, such as the trust between the trading partners. But before I exemplify my theoretic reasoning I will give a short sketch of where EPAs came from.

The EPAs and the WTO

For more than three decades, the former African, Caribbean and Pacific colonies of the EU member states could enjoy a non-reciprocal preferential market access to the European Union. This trade policy was put into place with the establishment of the Lomé convention in 1975: a far-reaching partnership agreement that aimed at steering and reinforcing the economic, social and cultural development of the ACP.

During the nineties, however, this beneficial trade regime came under attack for being neither effective, nor in line with the principles of international trade law. While ineffectiveness was claimed because of the marginalization of the ACP in the overall trade statistics of the EU, the regime was also being criticized for its discriminating character towards non-ACP development countries. Indeed, the trade preferences were internationally legitimized through a waiver negotiated in the GATT and later WTO, but they infringed the core principles of these multilateral trade organizations. The trade relations were even more contested when more assertive developing countries successfully challenged parts of Europe's trade regime before the DSB of the WTO (successor of the GATT), and the Union considered the time ripe for a new policy towards the ACP. (Holland, p. 169-172)

From the very beginning it was already clear that the WTO would play an important role in drawing out the new trade regime between the EU and its former colonies, since it was proclaimed as one of the main reasons to abandon the Lomé fundamentals. In 1996 the Commission published a green book 'on relations between the European Union and the ACP on the eve of the 21st century'. This was the unofficial start of the negotiations on a new partnership, including a new trade

chapter. By the time an overall agreement was reached, on July 23, 2000 in Cotonou, trade remained an unsolved issue. The parties did agree that a new trade regime had to be established after a transitional period of 7 years, during which non-reciprocal market access would be continued. (Cotonou Partnership agreement 2000/483/EC) A waiver covering this period was obtained, expiring on the 1st of January, 2008. The deadline for the trade negotiations was set. (Daerden, 2007, p. 12-13)

But not just the date, the content of the trade agreements was negotiated as well, and a general blueprint was included in this Cotonou Convention. The compatibility with the WTO principles was a *sine qua non* condition for the European Union, which excluded though the most wanted options by the ACP. After all, to be in line with the WTO rules would mean the end of the favorable, non-reciprocal market access that only the ACP could enjoy.

The principle of non-discrimination, inherent to the international trade law, implies that countries must give to all the other WTO members the same market access as the one given to the most favored nation (MFN). According to this principle, preferential access used as a means to foster development is allowed. Preferences have to be based on objective development indicators (the GATT enabling clause). Another possibility to abandon the MFN principle is establishing a free trade area or customs union (Article XXIV of the GATT/WTO). In this case, preferences must be reciprocal. Europe's trade relations didn't qualify for any of these scenarios. Their granted preferences, based on historical ties, can hardly be called objective and, since the Union exported under less favorable conditions to the ACP than the ACP to the Union, the trade regime did not meet the conditions of reciprocity either. (Draper, 2007, p. 10)

The Lomé trade regime has always been legitimized through a waiver. Many ACP countries preferred a status quo of the former situation where ACP countries paid no or lower import tariffs than what the EU applied under the GSP and MFN regime. This was untenable according to the EU. Getting a waiver always ended in ordinary horse trading, where WTO members, who did not benefit from this trade regime, demanded expensive concessions in exchange for their support. Besides, during the Uruguay round, more restricted voting rules to obtain a waiver were adopted. Thus, the only options were granting market access, depending on the level of development, or installing a free trade area implying reciprocal market access.

Abolition of the ACP as a group, granting non-reciprocal trade preferences to countries based on their development status, such as the GSP and Everything But Arms regimes, was perhaps the most 'objective' option. However, both the ACP and the EU had their reasons to avoid such an outcome. The EU and the ACP had to face more competitors in the European market, if the favorable tariff lines were granted to non-ACP development states such as Brazil and India. The exclusion of several more developed ACP countries from the most generous tariffs seemed also politically infeasible. Europe's image as a development friendly actor would get a serious blow and ACP countries would not sign an agreement under this condition. (*Overseas Development Institute*, 2007, p. 2)

In other words, reciprocal market access, in line with the WTO requirements under art. 24, seemed inevitable. Few ACP countries were keen to conclude a reciprocal trade agreement with the EU. But at least they managed to get some respite by convincing the Union to negotiate a last waiver, legalizing the continuation of their discriminating trade relations. In exchange, the ACP committed

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itself to establish a reciprocal trade agreement by the end of 2007.

The reciprocal trade regime was to be established through the creation of several comprehensive FTAs: EPAs. These EPAs are, as the Union stipulates, 'above all instruments for development' - development that had to be reached through supporting and enhancing regional integration between ACP countries and the integration of these regional markets into the world economy.

To do so, the ACP would have been divided into six groups – West Africa, central Africa, East Africa, South Africa, the Pacific and the Caribbean - with whom the EU would negotiate separate FTAs. The compliance with the international trade law was guaranteed; the agreements would contain liberalization schemes establishing a free market access for 80% of all trade ('liberalization of substantially all trade'), and this within a period of 15 to 20 years ('within a reasonable length of time'). Thus, from then on, the ACP would be obliged to open up their markets for European products. But free trade in goods is not enough to stimulate economic development. EPAs ought to be a lot more than just FTAs. The so called WTO plus issues such as services, intellectual property rights, government procurement, trade facilitation, and competition policy would also be included. (Mandelson, 2005 b; European Commission, 2007 b) Both the reciprocity of the trade relations and the inclusion of the WTO plus issues were very controversial items for the ACP countries.

The negotiations or non negotiations

It was obvious that the trade negotiations between the EU and the ACP were not going to be easy. Indeed, both on the European side and among the ACP countries, there was little

enthusiasm for establishing a new trade regime. For the European member states a lack of interest was the main reason. Direct economic interests hardly existed. Besides, they had a new bilateral trade agenda that was far more important. (De Ville, 2008, p. 89) On the other hand, many ACP countries saw in the EPAs more harm than good. They were not convinced of the fact that the benefits would outweigh the costs. The most important criticism they addressed was the mandatory removal of import tariffs. This had baleful consequences for their estimates, as well as for the burden for their domestic producers, due to the enhanced competition in their markets. Besides this, the ACP countries were not eager to include the WTO plus issues, because this would imply a big interference in the countries' internal affairs and a curtailing of the possibilities for the national governments to intervene in their economy.

That there was little enthusiasm to carry through these EPAs was painfully demonstrated when, a year before the deadline, little or nothing had been reached. There was not a single indication of progress towards an agreement (except for the Caribbean region); FTAs and CUs in Sub-Saharan-Africa were but paper tigers, and regions were internally divided about what should be included and what not. (Bilal, 2008 p. 2) Some countries were still pleading for a waiver postponing or even replacing the EPA. In other words, the EPAs were going nowhere. Meanwhile, criticism was growing stronger when more and more NGOs, researchers, politicians had doubts about the positive impact of the trade agreements.

It goes without saying that the Commission wanted to revert this situation. First of all, it is its job to conclude trade deals. The Commission is granted exclusive negotiating power for the establishment of trade agreements. When it is, however, no

longer effective in concluding solid trade agreements, the Commission loses legitimacy and the member states might increase their involvement. (Meunier and Kalypso, 1999, p. 479) Furthermore, these new trade deals would be in line with the core principles of the WTO. This means that the EU would get rid of the expensive waiver they needed to obtain in order to legalize its discriminating trade regimes. But there is also another reason why WTO compatibility is important for the Commission, and especially for the Directorate General for Trade (DG Trade) that leads the negotiations towards a new trade regime with the ACP for the first time.⁴ During the nineties, the position of the European Union in the WTO shifted from a more defensive actor, towards an offensive leader. (Orbie, 2008, p. 46-51) After all, 'it is probably the only international organization in which the EU acts like a superpower and shares equal status with the VS.' (Van Den Hoven, 2004, p. 258) But it is difficult to defend the importance of multilateral trade law and, at the same time, not to obey the rules yourself. In particular, with the ongoing Doha round, the EU has good reasons to stay credible. Establishing trade regimes that do not follow the basic principles of the WTO, does not support that credibility. (Faber and Orbie, 2007, p. 16) Finally, it is true that the EU has no direct economic interests in the ACP countries. But that is not to say that the ACP markets do not hold any potential, especially with regard to trade in services and FDI, two issues that are included in the comprehensive EPAs.

Discourse as a negotiation strategy

Enough reasons thus for the Commission to turn the tide and get the negotiations going.

⁴ Before, it was Directorate General for Development that was in charge of the trade negotiations with the ACP.

Its motives to do so are, however, not all reconcilable with the noble goals put forward by the EU as reasons to pursue these comprehensive trade deals. The Commission needed a legitimization to increase the pressure on the ACP to sign a trade deal that could conceal its more egoistic motivations. That 'perfect excuse' was found in Europe being a strong proponent of the multilateral trade system. Indeed, on the first of January 2008, a WTO waiver legitimizing the former discriminating trade agreement expires and the trade regime would become illegal. So if the EU did not want to violate the WTO rules, it needed to install a WTO compatible trade regime before the waiver expired.

This point became the centre of the Commission's argumentation: on the first day of 2008 a WTO compatible trade regime had to enter into force at all costs. It was beyond the EU's ability to postpone this deadline, so it had to be met. The Commission left the ACP two choices: either would the ACP countries sign the comprehensive EPAs, or they would fall back on the only trade regime legitimized by the WTO: the GSP. This was of course not a choice, but a serious threat: if the ACP did not approve the proposed trade deals, they would be forced to pay higher import tariffs to enter the European market, and would have to face direct competition from countries as Brazil, China and India. Products that the ACP countries exported to the EU, sometimes representing a significant share of their exports, could now be easily pushed out of the market.

This reasoning was pet subject of the Commission's negotiating rhetoric: in every speech, press release or statement, the WTO deadline and the EPA were prominently put forward as the only valid alternative and this together with the threat to impose GSP upon the reluctant ACP countries:

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'We have a responsibility to act just as we promised in the Cotonou agreement; we also have a WTO obligation to do so. This is unavoidable and everyone should be clear on this when they talk of alternatives or of making agreements that are not rules based... Our deadline to negotiate EPAs is January when the Cotonou waiver expires... we have no magic alternatives to offer... Let us be very clear that there is no way back, no retreat from where we are now without harming the very interests of trade and development that we are seeking to champion.' (Mandelson, 2006)

The Commission even made a quick calculation on how much it would cost the ACP countries if they should fall back on GSP:

'We need to move ahead with substantive negotiations... One important influence is that not all West African Ministers appear fully aware of the risks of delay and lack of legal options available to the EU to offer them market access after 2007... If we do not [get to an agreement] it is not in the control of the EU to grant trade preferences equivalent to the Cotonou agreement. Both the Least Development Countries (LDCs) and non-LDCs will be affected... If an EPA is not signed and GSP preferences apply then some exports would pay higher customs. This would cover 36% of exports to the EU in Côte d'Ivoire, 25% for Ghana, 69% for Cape Verde.' (European Commission, 2007 a)

It was also continually underlined that the WTO deadline was imposed upon them, and that it was beyond the Commissions reach to prolong the negotiating time:

'That deadline is imposed by the expiry of the legal protection at the WTO for our existing trade agreements which are based on preferential access and break WTO rules. If we don't have the new

system in place we will have to fall back on alternative with less generous market access... So the importance of a new agreement by 2008 is not a threat – it's a reality.' (Mandelson, 2007a)

And, the Commission claimed, alternatives to EPAs were none existent:

'I have no hat and no rabbit to pull out of it, if we have no new trade regime in place by the end of the year in each of the regions, [...] the Commission has no legal option but to offer the region concerned GSP preferences. The 31 countries of the ACP who are not Least-Development Countries will lose the tariff advantage Cotonou gives them over their competitors in key areas such as textile, cacao, tuna, bananas and horticulture... The deadline is not a bluff or some negotiating tactic invented in Brussels. It is an external reality created in the WTO in Geneva.' (Mandelson, 2007 b)

This discourse definitely increased dramatically the pressure upon the ACP during the last year of the negotiations. The pressure dominated the negotiations, and induced an incredibly chaotic negotiating process. However, with two months before the deadline, the Commission realized that, no matter how much pressure it brought to bear on the ACP countries, only the Caribbean region could reach an EPA on time. (O'Sullivan, 2007) Countries within the same region were expected to establish a Free Trade Area or Customs Union, which meant that they needed to agree on the liberalization schemes for their integrated market. This turned out to be very difficult, especially when you take into account the fact that the markets within a region had sometimes very different structures, so all the countries wanted to exclude different products from liberalization. (Goodison, 2005, p. 170) In addition, some countries within the same

region are far more dependent on the European market, and were less reluctant to sign a deal. Besides, several countries had an alternative when no agreement was reached: The Least Developed countries could resort to the Everything But Arms trade regime (EBA). This is the most favorable kind of GSP that gives all the products from LDC countries a quota and duty free entrance on the EU market, except for weapons. Non LDCs did not have that possibility, so they had more to lose if they did not conclude an EPA. It is clear that these differences between the countries could constitute a major obstacle on the way towards a new trade deal. Moreover, most ACP countries were still not convinced of the benefits that the EPA's would bring about. (Meyn, 2008, p. 524)

The Commission had, however, focused too hard on the deadline, repeated so many times that there were no alternatives, underlined constantly that GSP would be implied and claimed that it was beyond their reach to postpone that deadline, that it could not simply recant what it had stated for such a long time. It would lose all its credibility, and not only towards the ACP, but also towards the other European institutions, the civil society, and even towards other, more important, trading partners. But it could, on the other hand, not apply the GSP regime on half of the ACP countries. The implication of this decision upon the economy and development of these countries would be incalculable. Moreover, Europe's normative power image, which grants EU legitimacy and credibility, would shatter to pieces. That is something the Council and the European Parliament would not allow to happen. Besides, it was never the Commission's intention to push through that threat; it was only a trick used to convince the ACP to sign the trade deals. But whether intended or not, the Commission got stuck with it, entrapped in its own rhetoric. And though the Commission had some maneuvering space, it

was little: the Commission could not act against the rules of the WTO, which the EU holds in such great esteem, since this was the argument used to legalize and legitimize its negotiation position.

So with only a few months left before the deadline, the need for a solution was pressing. With the aim to postpone the deadline without saying they had postponed it, the Commission had to propose an alternative without saying there was one, even if they previously claimed there was no alternative to EPAs. Obviously, this was not easily achievable. Yet they found a way, by introducing the Interim-EPAs. As the word indicates, the agreement would still be an EPA, so not really another option and these Interim-EPAs had to be signed before the end of 2007, thus the deadline was respected as well. (European Commission, 2007 d)

These agreements – also known as 'two phase agreements', 'stepping stone agreements', 'only goods agreements' or 'EPA-light'- covered only trade in goods and the commitment to conclude a full EPA within an interim-agreement specified period of time. Contrary to the original EPAs, these interim-agreements were not only open to the six regions, but also to individual countries or sub-regions. In this way, the Commission let the non LDC countries and countries whose economy strongly depended on their trade with Europe, the choice to conclude a trade deal and avoid a trade disruption through the implementation of the GSP. (Bilal, 2008, p. 1)

If you read between the lines, you will notice that both the content and the deadline partly postponed have changed. But the Commission explained this shift in such a way, that, at least at first sight, Interim-EPAs are consistent with the Commission's discourse:

'Some regions will need a little more time to complete full EPAs. To avoid disrupting ACP exports from 1 January, we need WTO compatible agreements for all

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regions soon. Where a full EPA is not yet complete, we have to capture those issues negotiated so far on an agreement with a goods market access arrangement at its core and then move on to finalise negotiations on other areas in the early part of 2008...It is also possible that in some regions, not every country member is able or willing to sign an agreement now. So where some within a region have real concerns about securing their EU market access, and were they propose WTO-compatible agreements, we will try to respond constructively to those countries... We will have to see whether we are looking in these cases at stepping-stone agreements covering goods only or whether more comprehensive EPAs are possible with some groups of countries within a region.' (Mandelson, 2007 c)

Interim EPAs and their Unintended Consequences

The Commission had, however, not anticipated some less positive effects that these Interim-EPAs brought about. Besides the impact on regional integration, the EPA-lights also impaired the trust between both the ACP Countries and the EU, as between the ACP countries mutually which, in turn damaged what was left of the development friendly image of the EU.

Not one region, except the CARIFORUM (16 countries) who signed a comprehensive EPA, was kept upright. Most of the countries did not reach an agreement in time. While 32 Least Developed Countries (LDCs) decided to stick to the EBA regime, 10 countries, who did not qualify for the LDC status, were forced to trade under the less favorable GSP schemes. 19 countries, individual or within a subgroup, signed an Interim-EPA agreement. (ECDPM, 2008, p. 4-5) The option to conclude a EPAs-light instead of a full EPA, rather hampered

than stimulated the regional integration projects. Since some ACP countries were more dependent on the European market than others, they had more incentives to reach an agreement and thus to make more concessions. The possible EBA alternative for LDCs magnified this problem. When the Commission announced that individual countries could also sign an interim-agreement, all but the CARIFORUM region fell to pieces.

With some countries trading under the EBA regime, some of them under the reciprocal interim-agreements and a few falling back on the GSP regime, regional integration was hindered by both economic and technical barriers. Creating a free trade area, between a number of ACP countries and the EU, implied a trade diversion, disadvantaging those whom had not joined, especially when subgroups such as the EAC, concluded an EPA. Moreover, the countries falling back on GSP are facing increased competition on the European market, since their products are subject to import tariffs; the products of the countries that signed an EPA are not. The LDCs trading under the EBA regime are confronted with more restricted rules of origin than the ones trading under an interim-EPA. (Meyn, 2008, 524)

On political level, trust between the ACP countries got a serious blow. It is difficult to maintain a good bargaining position as a region if, in the meanwhile, countries have started bilateral talks with the EU. In the future, these interim-EPAs could also become an obstacle that divides countries within a region. Countries that already signed an agreement will not be prepared to renegotiate their given concessions. This induced a 'take-it-or-leave-it' situation, where ACP countries can only choose to join an agreement without any involvement in the negotiating process.

EPAs were meant to stimulate the regional integration, but turned out be counter-productive. A perfect example of the 'divide-

and-rule' strategy was displayed by the EU. One country after the other signed an agreement out of the fear of being excluded from favorable market access. What the Union did reach by imposing the interim-agreements was a more WTO-compatible trade regime, which was no longer, or at least less vulnerable for contestation before the DSB of the WTO.

The course of events originating from certain decisions is, however, not always foreseen. The EU never had the intention of neither hampering regional integration, nor damaging their development friendly image. These are unintended consequences of the EU negotiating strategies. Above all, the Union wanted to establish a new trade regime. When the deadline approached, nothing was indicating substantial progress towards a trade deal and none of the ACP countries were eager to change this situation. So, the EU tried to increase pressure through its negotiating discourse: if no agreement was signed, the less beneficial GSP would be applied. Besides pressure, this threat brought also dissension within the regional groups, composed out of both LDCs, who could resort to the EBA alternative, and more developed countries. In order to keep the latter from trade disruptions caused by a more resisting group of LDCs, the EU allowed individual ACP countries to sign an interim-EPA. This had serious consequences, as explained before: instead of a boost for regional integration, it hindered the process. Yet the EU was left no choice but to carry through their threat. Otherwise, the EU would lose all the credibility it had left, and the countries who did not sign any agreements would see no reason to do so in 2008.

Conclusion

Why did the European Union firmly insist on upholding the negotiating deadline towards

the new trade agreements with the former colonies in African, Caribbean and Pacific countries (ACP), despite the very damaging consequences of these hastily initiated trade deals? The EU acted this way for the reason that it had no choice. Too long and too many times had the Commission emphasized the unavoidable WTO deadline, in order to change its mind overnight and prolong the negotiations towards EPAs, even if this would have been a better option in rational terms. Because the Commission would lose all its standing credibility as a negotiator.

They tried to set the situation right, while minimizing the losses in credibility through the introduction of interim-EPAs. The WTO deadline was kept upright, while the full EPA negotiations could be extended. A solution that, however, had some unintended consequences that on their turn affected Europe's credibility as a development friendly power. The regional integration was hampered, and the trust between the negotiation partners got a blow.

But this is not the only effect the Interim-EPAs induced. They indeed solved the problem of the WTO compatibility, but this implies that the Commission can no longer use that argument in order to push through comprehensive EPAs. In other words, by signing the narrow only goods agreements, the Union's trade regime towards the ACP countries became in line with the WTO principles, and by this, all the pressure to conclude a comprehensive EPA evaporated. No full EPAs means no WTO plus issues included, consequently no liberalization of services, no rules on FDI, public procurement. - All the issues so important for the EU. So, the question remains, what rabbit will the Commission pull out of its hat this time in order to get the negotiations back on track towards full EPA?

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THE ROLE OF THE COMPETITION POLICY IN FORGING THE EUROPEAN COMMON MARKET

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Abstract: *The forging of the Single Market represents the most important dimension of the first pillar of the European Union, which is the European Community. It can be argued that, as compared to the other two pillars (the Common Foreign and Security Policy and the Police and Judicial Cooperation in the Criminal Matters), it has the most powerful impact on the welfare of European citizens. The European policy makers define however the Internal Market as not only an economic area where there are no more state-imposed barriers in the path of the freedom of movement of goods and services at the borders of the member-states but also a single business environment where there are a single currency, coordinated economic policies as well as homogeneous business practices of private undertakings. In this process, despite a large set of common policies, the competition policy has reached the status of the building block of the Common Market.*

Keywords: *market integration, competition policy, Common Market*

European Union is a political project which targets more than just a free trade area, like North America. As one commentator highlighted, “after two world wars, it was believed that economic integration was essential to avoid future conflicts. A mere free trade zone would not have been sufficient”¹. It calls it the “taming of intra-European nationalism”. Europe completed the elimination of state-barriers in order to reach the customs union in 1968, the legal framework for a Common Market in 1992 and

the single European currency in 1999. But, from an economic point of view, the task of market integration seems not to be yet accomplished from the above-mentioned perspective.

The European competition policy seems to be the core policy that the European Commission, with the support of the European Parliament and the European Court of Justice, employs in order to continue the integration process. Practically, the challenge facing the European Union consists not in the already accomplished task of eliminating those barriers in the path of integration which are located *at the border* between member states but in the elimination of those barriers, more difficult to grasp and sometimes easy to conserve, which lie *inside the national markets*. Such barriers are the results of public policies of the member states and their interventionism but also, according to the perspective of competition policy, of the decisions of private undertakings looking for “avoiding competitive pressures”. By

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¹ Anderson, Robert, Alberto Heimler – “What Has Competition Done for Europe? An Inter-Disciplinary Answer”, *Aussenwirtschaft*, December 2007, 2, 4, page 423;

condemning anticompetitive behavior of competitors as well as state aid that attempts to protect national market structures, competition policy has remained the main tool in the process of forging and protecting market integration into the European Union.

One of the core insights of economics is that, as a market gets broader (both geographically but also, more important, as the income of consumers), the division of labor gets deeper and the prosperity increases. At its turn, such a raise in prosperity encourages saving and increases in the stock of capital goods and fuels a further expansion of market and division of labor. The level of prosperity that could be reached in a competitive Common Market is surely over the level of prosperity attainable in any autarchic, even competitive, member state.

Objectives of competition policies

Competition policies in the world have traditionally followed several objectives in their 100 years-long history. While such a policy emerged in United States of America as a consequence of political objectives (the fight against big businesses), later it switched towards protecting market structures and finally towards enhancing consumer welfare. United States of America were already in the moment of adoption of the first antitrust legislation a unified central state with little room for state-level policies in the taxation or industrial field. While at first sight the objectives of protecting consumers and protecting consumers' welfare may seem similar, there are several cases where the main competition decisions reached different conclusions as a consequence to different perspectives. The most frequent situations emerge in the control of business concentrations and in the treatment of vertical agreements.

The fundamental dichotomy between the objectives of competition policy, setting aside the political objectives, lies between the protection of consumers' welfare and the protection of market rivalry. It is still a theoretical debate that wasn't concluded in economic science. Putting it simple, the first perspective may qualify a market as competitive even if there is only one competitor while the second perspective supports the protection of the market structure, that is, a minimum number of competitors².

The specificity of the European competition policy, as compared to the American counterpart, comes from the particular political construction of the European Union. The European Economic Communities is a union of member states that sometimes have a particular history of public interventionism. The founding fathers of the European project attempted first of all to fragment the German coal and steel cartels from Ruhr and expose them to the rules of competition. Such a concentration of this particular industry was regarded as a significant factor in the emergence of German militarism prior to World War II³.

There must be remembered also recent propositions in which another objective of competition policy, particular to the case of Europe, should be also taken into account by Brussels, namely solidarity⁴. All these perspectives suggest that even competition

² see Musetescu, Radu – “Parallelism and Convergence in the Contemporary Competition Policies: The European Model versus the American Model”, European Institute of Romania, working paper, page 37, downloadable at <http://www.iier.ro/Studii/WP%2019.pdf>;

³ See Slot, Jan Piet – “A View from the Mountain: 40 years of Developments in EC Competition Law”, Common Market Law Review, April 2004, 41, 2, page 445;

⁴ Ross, Malcolm – “Promoting Solidarity: From Public Services to a European Model of Competition”, Common Market Law Review, August 2007, 44, 4, page 1057;

policy may seem at first sight to promote objective and universal principles of economic policy, there are however huge ways to differentiate between different countries. From such a perspective, it seems that competition policy remains an instrument and not an end in itself.

Finally, the core dimension of the European competition policy lies in its objective of market integration. Several commentators⁵ have argued that such an objective is unique to the case of the European Union. While market integration is a natural process even in the case of a free trade zone, we must remember that political objectives and soft nationalism have remained vibrant in Europe at the member-states level. European Union attempts to enforce, sometimes contrary to the common sense in business practices, a market integration that rewards the European citizens – in their quality as consumers.

All the dimensions of the European competition policy have a role to play in the forging of what the European policy makers considers to be an integrated market. We will point to these roles played by:

- horizontal agreements (cartels);
- vertical agreements (restrictions in the distribution contracts);
- the control of economic concentrations;
- the abuse of dominance;
- the control of state aid.

The fact that each of the fields of competition policy has a role to play in the integration of the Common Market may seem almost a paradox as this policy never explicitly formulated the integration of the European market as one of its core objectives. And our thesis is even more radical: without the competition policy, the enforcement of a

Common Market such as the one envisaged by the European governance would be almost impossible. We will attempt to prove such a thesis in the following argumentation.

Barriers in the forging of the Common Market as a result of vertical agreements between firms

The behaviour of producers towards distributors and the possibility of the former to abuse their economic position as compared to the latter is one of the core dimensions of the operation of the competition policy even from its start. In the European case, one of the first cases from this field which reached the European Court of First Instance was *Consten-Grundig* in 1966. It was the case of a German producer, Grundig, which awarded to a French distributor, Consten, territorial exclusivity. That is, no other distributor may import Grundig products in France. Moreover, the distributor is prevented from reexporting Grundig products to other European member states' markets. As the verdict of the European Court stated, "*an agreement between a producer and a distributor which tends to reestablish the national divisions in the path of trade between member states may impede the fundamental objective of the Community. The Treaty, whose Preamble and Content attempt to abolish the barriers between states and whose numerous provisions supply evidence for a decisive attitude towards their reemergence, cannot allow private undertakings to rebuild such barriers. Article 85 was designed to follow this objective, even in the cases of companies which are positioned at different levels of the economics processes [on vertical]*"⁶.

⁵ Petrella, Ricardo – "*The Limits of European Union Competition Policy*", *New Political Economy*, July 1998, 3, 2;

⁶ Decision of 13 July 1966;

This case will develop an entire legislation on vertical agreements. From the point of view of the infringement of the commercial freedom inside the European Union, the European jurisprudence has qualified as illegal the following types of vertical agreements:

- territorial restrictions or client restrictions;
- resale price maintenance;
- restrictions imposed by producers on their own suppliers at the marketing by the former of components directly to the final consumers of independent distributors (restrictions on "after-market").

The first category of agreements through which producers impose territorial restrictions on the distributors have the most negative effects on the integration process. For example, if on a Common Market with 27 member states, a French producer awards territorial exclusivity on each national market to a sole distributor and forbids it to resale on other markets, it may succeed to divide the market into 27 territorial distribution areas where differences in principles may impede the homogenization of the consumers' welfare.

Any producer may consider – and this really happened – that a differentiated price strategy may be attractive on markets with different average income levels. A market like Austria, a high income market, may offer the opportunity to higher pricing than a market like Romania, a low income country. While this may be a very reasonable marketing strategy, it contradicts the political objectives of freedom of movement of goods, services and persons. The barrier in the path of Austrian consumers to buy the same product from Romania while promoting the rights of European consumers may be a serious blow to the idea of common citizenship. This is a reason why the European competition policy

places a strong emphasis on the so-called "parallel trade" and "intra-brand competition". In the first case, the ability of distributors of the same producers to reexport a product on other national markets puts a powerful competitive pressure on other distributors.

In the second case, the European consumer is entitled to purchase a product in any member state of the European Union as a confirmation of the political right in a United Europe. The ability of such a consumer to arbitrate between the offers of different distributors of the same producer which are located on different markets inside the EU does directly affect its wealth. The concept of intra-brand competition derives also from the objective to keep independent economic undertakings as autonomous as possible in order to stimulate their competitive behavior. Such a control of vertical restrictions does not operate in the case of an agent of the producer (a controlled entity). But it strongly encourages distributors to take into consideration the competitive pressure and it denies them a safe harbor in a territorial area.

Two of the most sensitive sectors in which this field of the competition policy is very active are the motor vehicle distribution and pharmaceutical products. In the first case, there is a product which does have a significant impact on the welfare of almost each citizen of Europe. In the second case, it is a product which is very sensitive from the point of view of the health of the European citizens. This is the reason why these two sectors know a large number of cases in the area of vertical restrictions.

The European Commission has followed closely, for example, the prices of motor vehicles distributed in Europe and took the price differentials as a sign of yet to fulfill market integration. According to its wisdom, *"in the context of the creation of a common market, an analysis of cross-border price*

*divergence should reveal the scope and development of market integration. If the free movement of goods can be guaranteed within a truly single market, then the consumer will be empowered to shop around the entire Union for their vehicles, leading eventually to price convergence*⁷. Such a perspective may be put under question but it consistently influenced the competition policy in Europe.

For example, one of the first cases in this respect is BMW Belgium versus the Commission on which the European Court of Justice issued a verdict on 12 July 1979. As its German headquarter noticed a significant increase in the number of cars imported from Belgium, the local branch obliged the distributors on this market to agree to a supplementary provision through which they stopped reexporting on the German market. It was a classical case of attempting to prevent parallel trade and the Commission punished it. Other cases like Ford and Volkswagen also confirmed a strong stance of the Commission in this policy.

The same anticompetitive practices as qualified by the European competition policy are met in the pharmaceutical sector. GlaxoSmithKline (GSK) is a British company, one of the largest pharmaceutical producers in the world. Its distribution policy was proved to contravene to these principles of the competition policy and it was accused by the European Commission of attempting to prevent the parallel trade in pharmaceutical products between Spain and United Kingdom. As this producer implemented a dual pricing strategy as it considered that the differences in income between the two countries allow it, the activity of reexport of GSK products from Spain to the home country significantly

expanded. When British distributors claimed a break in their territorial rights, GSK attempted to prevent its Spanish distributors to continue this practice. At a certain point, the producer even menaced its distributors with the cessation of the distributorship. The European Commission punished such a business practice on 8th May 2001⁸.

It has to be mentioned that there are a number of reasons in the favor of a distribution policy based on territorial exclusivity and multiple pricing. But such a marketing strategy does contradict the political objectives of the European Union which is rated higher by the European policy makers. In fact, Europe strongly enforced new concepts in antitrust which are the image of its approach. "Selective distribution" and "multiple brand channels" are some of them. Producers have to assure an open-access distribution policy with objective selective criteria for any potential distributor. In the second case, distributors are entitled, in case of selective distribution, to market several competing brands.

Barriers in the forging of the Common Market as a result of horizontal agreements between firms

Horizontal agreements between firms – namely, between competitors – are declared *per se* illegal by the fundamental Treaty of the European Union. Article 81 of the Maastricht Treaty (former article 85 of the Rome treaty) declares as incompatible with the Common Market the following types of agreements between firms:

⁷ Marco Colina, Sandra – "On the Road to Perdition? The Future of the European Car Industry and Its Implications for EC Competition Policy", *Northwestern Journal of International Law & Business*, Fall 2007, 28, 1, page 41;

⁸ This case is more difficult as besides parallel trade there are also other aspects related to the drugs prescription policy and drugs distribution in general in United Kingdom. This is the reason why the European Court of First Instance finally altered the verdict.

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

From the point of view of the forging of the Common Market, the most important clause refers to the "sharing of markets". For example, even in the situation where there are no more trade barriers between the commercial transactions between two (or 15 or 27) countries, the trade between the two economies may become marginal in the condition that, on these markets, there are two (or 15 or 27) dominant companies which explicitly agrees through a cartel to not compete each on the other's market. Exports will become irrelevant even if there is a free trade are between the two countries and consumers will not be able to benefit from the political integration in terms of competitive prices of increased set of alternatives. The same effect can be obtained by an agreement between the two companies to "allocate relevant clients" in the industrial markets. Such business decisions can deny the effects of a political integration.

Other examples are the decisions of private firms to avoid investments in other national markets which devoid the freedom to capital transfers inside the European Union.

The ability of a European company to exploit spatial or other economic advantages of a European member state is denied and the competitiveness of the entire European economy may suffer. While the ability of a foreign (non-European) company to enter the Common Market may finally assure the preservation of the competition, the emergence of European-wide competitors, able to compete also on the international markets is seriously impeded.

Barriers in the forging of the Common Market as a result of abuse of dominance

The concept of "dominance" is the European translation of the concept of "monopoly" from the American counterpart. It was defined as "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an approachable extent independently of its competitors, customers and ultimately of consumers*". Several scholars have argued that "*the fluidity of the concept may enable the Commission to exercise its authority to protect competitors*"⁹.

The classical perspective on monopoly highlighted the exploitative abuse, namely the perception by the monopolist of a higher than competitive price through limitation of the supply. However, an increasingly significant dimension of the abuse of monopoly consists today on the European market in the exclusionary abuse. In such cases, a European undertaking which is in a dominant position on a market may:

⁹ Glifford, Daniel, Robert Kudrle – "European Union Competition Law and Policy: How Much Latitude for Convergence with the United States", Antitrust Bulletin, Fall 2003, 48, 3, page 738;

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- Directly or indirectly impose “unfair” prices or trading clauses;
- Apply different condition to equivalent transactions with different parties, placing some of them in a competitive disadvantage;
- Condition the conclusion of contract by the acceptance of supplementary clauses which, by their nature and according to commercial practice, do not have a significant relation with the object of the contract.

The impact of the abuse of dominant position becomes relevant in the context of intra-community trade when a European company would decide to enter another market which is dominated by a local firm. While nobody can guarantee *ex ante* that such a process will be successful, the European legislation attempts to eliminate the possibility that the local firm build such “artificial” barriers as:

- “single brand” obligations: the distributors are not allowed to commercialize products with another brand than the dominant firm;
- “bundling” or “tying” obligations: the dominant firm decides to offer bundles of products, each with a different market position on different markets. The dominant firm may attempt to prevent the entry of a foreign competitor on a particular market by bundling the product with a product which is dominant on another market.
- “non-compete” obligations: the dominant firm imposes its distributors not to market the products of a competitor within a period after the cessation of its distributorship.
- Others.

Such a perspective confirms the fact that a European Common Market with 27 member states and 27 dominant companies is not

qualified by the European Commission as an integrated market. The role of competition policy consists in opening even more the national markets – even the ones dominated by local firms – to the competition from other European companies. While even the concept of monopoly can be debatable, as certain scholars argue that only state barriers to entry guarantees the monopoly position, it is clear that European policy makers have a broader (less public) concept of monopoly – or “dominance” in European words – and they attempt to forcefully open the competition in such markets.

Barriers in the forging of the Common Market as a result of barriers to economic concentration

As we already have seen, a European Common Market is not limited, in the vision of European decision makers, to a free trade area where goods can freely transit. The freedom of the factors of production involves also the ability of the European companies to expand not only through exports or external growth in their home market but also by acquiring a company in any other European market. Or, from this perspective, the ability of European companies to grow through such a channel has been historically impeded by the intervention of member states. Even if a widespread process of privatization matured at the beginning of the 90s in all European countries, it must be noticed a continuous interest of the political decision makers in the fate of local companies. Such an interest usually took the form of strong support towards national strategic investors.

European member states seem to have never fully accepted a free market of corporate control on which the European investors and companies could freely transfer capital in order to take over other companies.

Historically, European member states have never known a free market for corporate control such as the one in United States of America in the late 80 (which knew the LBO wave). There are other reasons in this respect, among which the lack of mature capital markets but the core factor is still found in the historically aggressive public interventionism. As certain analysts highlights, *“the rivalry norm provided the best rational for maintaining some viscosity in a very fluid environment of unprecedented economic change, including a generally much greater level of international competition. Some leaning toward the status quo therefore provided the norm most conducive to maintain widespread political support for the new Common Market”*¹⁰.

As a consequence, the fundamental approach of the European competition policy was that competition was the result of the market structure (more competitors the better) and not of the competitors' behavior (a sole competitor but with free market entry qualifies as a competitive market). It was, in fact, the only political option. Moreover, such a political interference has been maintained in a significant number of member-states even 50 years after the start of the integration process. Even in 2008, the European Commission paid more attention to a German law adopted in 1960 through which the German auto producer Volkswagen was privatized (the law is better known as the “Volkswagen law”). In 1959, the German federal government (the Bund) and the Land of Lower Saxony agreed to prevent the possibility that a private financial investor get more than 20% of the voting rights in the General Meeting of Shareholders. The two public authorities decided to confer to the existing shareholders who detained more than 20% (that is,

themselves) have a veto right in a certain strategic decisions. The two governments (federal and local) also agreed to maintain 2 members in the Supervisory Board of the producer.

European Commission noticed that such provisions seriously impede the freedom of capital inside the European Union and lowers the interest of financial but also industrial investors in a particular company. The interest of the German governments has not been financial (the private investor principle) but purely nationalistic and breaches the core legal framework of the Common Market. The European Court of Justice supported this perspective in his ruling of 23rd October 2007 the rights of the public authorities were annulled. Other cases like ENDESA in Spain or the speedily arranged merger between Suez and Gas de France suggest that governments in member states are still not ready to fully accept the rules of the competitive game. European competition policy enforces however these rules, has the Treaty on its side and finally governments have to accept the outcome of the market process. Germany, as well as Spain, had to give up its position.

The community dimension in economic concentrations

The dilemma of the European policy makers from the point of view of the control of concentrations is to prevent the emergence of dominant companies that could abuse their position but meanwhile to support the growth of European companies in order to enable them to successfully compete with American and Japanese players on the international markets. The danger posed by an aggressive control of economies concentrations is to maintain a fragmented market structures which mean small European competitors. The

¹⁰ Gifford, D. – [2003], page 754;

answer to such a dilemma – whether deliberate or not, it is a question – comes from what is seemingly a technical provision: the concept of “relevant market”. Such a concept is fundamental as in any competition case, the market shares of the companies involved are calculated taking into account what is defined as the relevant market. In the case that the European Commission defines the relevant market in a broader sense, market shares will be smaller. If the relevant market is defined in a narrower sense, the market shares (and the number of competitors) will be higher.

A competition case may lead to a totally different verdict taking into consideration other relevant markets. One of the cases that made history in United States of America was Standard Oil versus USA in 1931. The defenders (large refining companies) have succeeded in demonstrating that the relevant market was the entire refining industry (where their combined market shares reached 26%) and not the refining market that used a certain type of cracking technology (where their combined market shares were 60%). Such a demonstration succeeded in dismantling the entire federal case against the industry as the argumentation of the prosecutors was based on the narrower definition of the relevant market¹¹.

According to the geographical definition¹², *„the relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of*

competition are appreciably different in those areas”¹³. According to such a definition, a relevant market may comprise the entire Common Market, a national market of a member state or a subnational area (like, for example, a city). As long as the principles of competition policy are enforced irrespective on the level, we can notice a so-called “Community effect” in the process of firms’ growth. As a large – even a dominant – company from a member state attempts to grow, it will be forced to avoid the relevant market it is present in (subnational or national) and be encouraged to grow in other European member state. As a consequence, the strict enforcement of the concept of relevant market and the reality that for most industries and companies such a market is smaller than the Common Market has a Community effect. In other words, the enforcement of such concept encourages companies to “Europeanize” when they grow, a fact that has also a deep effect on the political scope of market integration.

Let’s suppose, for example, that the relevant geographical market for a large company is the Romanian market. If such a company attempts to externally grow by acquiring a certain competitor, it will most probably avoid to acquire a Romanian competitor – as such an option will be most probably blocked by the Romanian competition authorities – and will follow the option of acquiring a potential competitor from the same industry from another European member state (like Austria’s). The market structure of the Romanian market is protected and the Romanian large company will “Europeanize” by growing in other markets in Europe. By such a pure technicality, the control of concentrations enforced by the

¹¹ See Kovacic, William and Carl Shapiro – “Antitrust Policy: A Century of Economic and Legal Thinking”, The Journal of Economic Perspectives, Vol. 14, No. 1, Winter 2000, page 48;

¹² European law defines the relevant market according to two dimensions: product and geography.

¹³ Commission Notice on the definition of relevant market for the purposes of Community competition law, EEC OJ 372 din 9/12/1997.

European competition policy will encourage the emergence of European players instead of local monopolies. Such companies will increasingly lose their “nationality” by becoming “European”.

Such a reality supports the perspective that, by applying a concept of relevant market which is smaller than the Common Market, a Community effect will be obtained. Such an impact will enforce the process of market integration by homogenizing the competitive conditions in Europe. European significant companies will prefer to grow in other European markets than their own.

Barriers in the forging of the Common Market as a result of state aid

The control of state aid awarded by the European Union member states is also a field which operates into the broader goal of an ever integrated Common Market at European level. State aid was defined in the Treaty of the European Union (article 87) as “*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market*”.

Such a broad definition of the concept of state aid raises serious questions regarding the definition of what means “distortion” created by member states’ interventions. A state intervention is by its nature opposed to the market process and, from such a perspective, any state intervention generates an anticompetitive outcome. But the fundamental objective of state aid control into European Union is not the one of reducing overall public interventionism but to discipline the interventions of the member states into the economy. A Common Market with 6 (or 27)

member states where state aid is not forbidden may generate a total competition between member states in aiding their companies. This cannot be but a race to the bottom of total redistributionism in the economy as any state will explore the limits of interventionism. As Geroski¹⁴ stated, “*support for national champions can look like a positive (or a ‘win-win’) sum game from a national point of view, but it almost always leads to a prisoners’ dilemma when viewed globally. That is, when every national champion attracts support from its host government, nothing is altered between the champions in the market (their relative positions have not changed) but taxpayers the world over have been made worse off*”.

The logic of classical interventionism is that the largest companies from a country will receive most of the aid. States usually pick national champions or industries in their drive to generate growth and support them in order to have an advantage towards their foreign (but also European) competitors. But such a perspective on state aid can be proved to be erroneous from the point of view of efficiency of allocation of resources or the incentives created to beneficiary companies. It is a serious question whether the companies that receive most of the aid are the ones that will win the competitive process. As a general rule, the companies that receive the largest state aid will become addicted to such resources and will most probably lose their ability to compete.

In fact, the state aid forbidden by the European legislation would be normally directed towards preserving market structures and preventing the dynamic adjustment of the

¹⁴ Geroski, Paul – “*Essays in Competition Policy*”, UK Competition Commission, August 2006, page 40, downloadable at http://www.competition-commission.org.uk/our_role/analysis/essays_in_competition_policy_paul_geroski.pdf;

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local industry or supporting national players in their competition on the Common Market. That is, state aid prevents the European market integration by artificially protecting local companies in their competition with other European companies. Moreover, in this race to the bottom, champions from member states with fewer resources will be easily swallowed by champions from the member states with larger resources. Such a competition leads inexorably to plain-vanilla socialism as each member state will attempt to get more resources from society in order to offer more aid to local companies.

Conclusion

Competition policy plays a fundamental role in the fulfillment of the main objective of

the European Union, namely the market integration. While such a role may sometimes put pressure on business practices that seem natural, the European Commission proved to make no compromise in this direction. Moreover, the European competition policy proved to take an innovative role in designing new tools such as the treatment of vertical agreements, merger control and state aid. It can be argued that such a policy remained the most important instrumentality in the enforcement of this process as all the public barriers which lied at the border of the member-states disappeared after 1992. Today, the challenge of Europe, is to deal with barriers that lie inside the border of the European countries, in public policies or business practices that still contradict the idea of the Common Market.

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THE NEW MIGRATION PATTERNS OF EDUCATED ROMANIANS TO THE EU: WHAT CHALLENGES FOR THE INDIVIDUALS AND FOR THE NATION-STATE?

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Abstract.** *Romanians, together with other Eastern Europeans, endured under communism confinement to the communist space, often described in terms of a geographic prison. The fall of communism brought Eastern Europeans the possibility of free movement. However, most Western states adopted restrictive admission policies towards the low-skilled and selective policies that favour the highly-skilled ones. Romanian skilled migrants resorted to a wide range of strategies in order to move around in the European space. In this paper, the case study on the Romanian community in France provides an insight into the life of the recent wave of Romanian skilled migrants to France: from the reasons to leave the country and the strategies adopted, to problems of professional and social integration. But, the physical absence does not mean that all the ties with the home country have been cut. Due to the development of information and communication technologies and price drop of means of transport, the ties with the home community are easily maintained. The virtual and real contacts create a flow of values, information and ideas generating a culture of networks that could play an important role in the process of convergence to the European values and institutions. The challenge facing the Romanian state is how to encourage this process, and, at the same time, how to help spread these flows at the level of the entire economy.*

Keywords: *highly-skilled migration, brain circulation, trans-national networks, information and communication technologies, state policy*

JEL classification: *F 22, D86, O15, O38*

Introduction.

The evolution of policies regarding the highly-skilled around the world

The unique development of a globalised economy based on knowledge as main production factor has led to an accrued competition on behalf of the states for attracting highly-skilled labour. As a consequence, highly-skilled labour has

become one of the most valuable resources on the global market. In order to attract the better educated and the highly-skilled labour, some of the developed states have implemented specific policies that range from facilitating access to high-level education, to

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substantial material advantages once in the labour market. Both traditional and new countries of immigration are changing their policies in favour of highly-skilled migration. Amongst the first countries who adopted selective immigration policies, USA, Canada, and Australia are habitually regarded as highly-skilled labour destination countries. At European level, Western European countries have begun to build more and more barriers for low-skilled migration, but, at the same time, are designing policies that target the highly-skilled labour. Sweden and Norway, followed by the UK and the Netherlands (Lowell 2006) have been the most aggressive among the European countries that have implemented brain drain risk policies (Lowell, 2006). Nevertheless, recent policies adopted in Belgium and France during the last years, show their determination to catch up with the above mentioned countries. This raises the question whether there will be a convergence between the European countries in terms of policies targeting highly-skilled migration. This is a delicate issue as intra-European migration and particularly East-West migration accounts for an important part of these flows.

Developing countries have also become aware of the danger of losing their 'best and brightest', a loss whose remittances received do not seem to be able to compensate for. Certain professions such as the doctors and high-tech specialists seem to be particularly affected by this 'brain drain' process. This is also in accordance with the labour demand in the receiving countries. The depleting of specialists in some strategic sectors for development like healthcare has begun to raise concerns in the origin countries. At European level, the Eastern European countries have begun to experience labour market shortages in some sectors and to recur to immigration in order to cover these shortages. Moreover, most of these countries

are nowadays confronted to negative demographic balances or are likely to be in the near future. In this context, home countries try more and more to implement policies meant to retain their highly-skilled labour force or to encourage the returns. These policies have proved to be more or less successful depending on the home country, but equally on the differential of development and finally on each individual's personal history and preferences.

Romania is the Eastern European country most affected by this phenomenon; although the recent period following the accession to the European Union seems to have encouraged some flows of return migration, due to the economic conditions improvement, Romania has equally seen an increase in the outflows of highly-skilled migrants and a shift in the overall composition of out-migration flows in favour of the better educated migrants. This raises important concerns regarding brain drain for the Romanian state.

A picture of the Romanian highly-skilled migration during and after communism

The collapse of communism brought about sweeping changes in the migratory pattern of the Eastern Europeans. The beginning of the 1990s saw an upsurge of mobility forms in Eastern Europe. Some of these were new, others were merely the augmentation of forms already present in the Eastern migratory space during communism. Many studies on Romanian migration emphasize the mobility of the low skilled, which often occurred illegally, and made the headlines of European newspapers, whereas the mobility of the educated migrants is often cast into shadow. In reality, highly-skilled migration flows developed in parallel with low skilled flows.

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Even if this form of mobility has seen an important upsurge in recent years, Romania faced brain drain at a smaller rate even during the communist period. As part of the ethnic migration agreements concluded with Israel, Hungary and Germany and also part of an agreement concluded with the US, almost 300,000 persons left Romania during the decade of the 1980s (Gheorghiu, 1996). An important part of these persons had a tertiary education level acquired in Romania. Besides these countries, the Romanian Ministry of Home Affairs also acknowledged flows to France, Canada and Australia of qualified Romanians (Nedelcu, 2005). Thus, brain drain is not a new form of mobility, but one which, under new conditions, has experienced important transformations and developments.

In 2000, Romania ranked among the first thirty countries of origin in terms of stock of highly-skilled persons, with a total of 176,393 persons living outside Romanian borders (Docquier and Marfouk, 2006). About 54.3 per cent of highly-skilled Romanians lived in North America, only 29.3 per cent in the European Union, and another 12.3 per cent in other European countries. But even considering the preference for North America, Romania still ranked among the first twenty-five countries in terms of stock of highly-skilled migrants to EU-15 (Docquier, Lohest and Marfouk, 2005).

As the development of this form of mobility became particularly clear in the recent years, the study of the flows allows for an even more interesting analysis. According to the OECD, out of 13,000 permanent emigrants from Romania in 2004, more than half were skilled emigrants, of whom 50 per cent had completed a secondary education and 13 per cent were college graduates.

In 2005, more than a quarter of the Romanian emigrants were highly-skilled, the rate being slightly higher in the case of men (28.5 per cent) than in that of women (25.1

per cent), as reported by the National Institute of Statistics (2005). However, the data provided by the Romanian National Institute of Statistics shows, from 1990 onwards, a steady increase in the percentage of women in the Romanian migratory flows from 51.63 per cent in 1992, to 64 per cent in 2005, meaning that actually, overall, more educated women leave the country than educated men. According to the Docquier, Marfouk and Lowell database (2007), in 2000 from the total stock of highly-skilled migrants from Romania 49.6 per cent were women. Whereas the US and Canada are the main destinations for highly-skilled Romanians, Romania, along with Turkey, also ranks first as country of origin for highly-skilled foreign residents in an enlarged Europe (which includes also ex-USSR and ex-Yugoslav countries and Turkey) (OECD, 2006). There are several Western European countries in which Romania ranks among the first ten countries of origin of highly-skilled migrants. This is the case of Belgium, Germany, the Czech Republic, Spain, Greece, Ireland, Italy, Luxemburg, the Slovak Republic and Sweden. Furthermore, concerning migration to Hungary and Austria, Romania is the first country of origin for highly-skilled migrants.

At the EU-15 level, in the early 1990s, most highly-skilled Romanians went to Germany (Straubhaar, 2000), but this no longer held true in 2000. With the start of the new millennium, there has been a diversification concerning the destinations of highly-skilled Romanians in the EU-15. Radu (2003) shows that the countries with the highest selectivity rate for Romanian migrants among the EU-15 are France and the United Kingdom, whereas Germany comes third, with a rate of selectivity just slightly exceeding the EU-15 average. In the light of the recent developments of the endogenous growth theories, these countries have all adopted

migration policies targeting the highly-skilled. For instance, Germany implemented in 2000 the Green Card, a programme quite similar to the US H-1B visa, enabling companies to employ some 20,000 IT experts from non-EU countries. The requirements were either a university or technical college degree, or a guaranteed gross annual salary of at least € 51,000. The Green Card could be obtained by international ICT students, enabling them to sign a labour contract in Germany immediately after their graduation. In this way, they were spared a lengthy process to obtain a residence permit. This programme granted a limited work permit of up to five years and, for spouses and minors the right to reside during this period. From August 2000 to July 2003, 14,876 work permits were issued on the basis of the Green Card regulation and most of them went to Indian and Eastern European specialists, Romanians ranking third.

Most of the ones involved in this type of mobility are young persons. A study, conducted by the Open Society Foundation, showed that for the last six years more than 15,000 young people left Romania every year when finished their studies, and a quarter of high-school pupils intend to leave during their undergraduate studies or after. Highly-skilled migration seems to affect especially high-tech specialists. At the beginning of the new millennium it is estimated that around 5,000 high-tech specialists were leaving the country each year after having graduated, most of them heading for North America. Another highly-skilled sector affected by migration is that of doctors. According to OECD (2007) Romania ranked eighteen as a source country for doctors in the OECD countries with an expatriation rate of 10.9 per cent in 2000.

According to the Romanian Passport Department and the Border Police the return rate for those who leave to study abroad is merely 10 per cent.

The Romanian community in France

According to OECD (2006) estimates, there are about 10,000 highly-skilled Romanians in France; this represents a quarter of Romanians living in France, out of which another 10,000 being in an illegal situation before Romania joined the EU. However, nobody can really estimate the number of Romanians in France. Whereas the Romanian authorities place it at around 60,000, informal sources often speak of 100,000. About 40,000 would be living, according to these sources, in Paris and Ile-de-France, whereas the rest is spread all over the French territory. The most important poles of Romanian communities can be found near Strasbourg, Lille, Lyon (with an important Roma community), Marseille, Montpellier and Bordeaux (Michaud, 2003).

France is one of the traditional destinations for Romanian migrants. Throughout the Romanian history France represented a model for Romania and the ties established with the French were particularly strong. Nowadays, we can identify several waves in the Romanian highly-skilled migration to France. First of all, a wave of Romanian intellectuals and aristocrats which exiled themselves to France during the early days of the communist regime in Romania, between 1946 and 1948. Even at the end of the 1950s we can still identify some Romanian intellectuals who managed to arrive in France either as tourists, or simply because the communist system thought best to get rid of persons perceived as a threat to the new regime and granted them the right to join their family already in France. In turn, their families established in France did their best to ensure their departure. These Romanians never recognized the authority of the newly set up regime in Romania and organized themselves around some remarkable Romanian intellectuals

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and established a Romanian government in exile.

Another wave had its origin in the labour migration from Romania during the 1960s when, under specific labour agreements, some Romanian specialists went to work in the North African countries. Once their contracts ended, some of these specialists, mostly scientists, never returned to Romania, but instead went to France and obtained the political refugee status.

During the 1990s, with the dismantling of political frontiers, a lot of intellectuals fled abroad, some of them choosing France. It is estimated that 5,000 Romanian students left the country after the miners' invasion in Bucharest in the summer of 1990, following a sign of possible political instability. The departures continued throughout the 1990s with many Romanians leaving during their undergraduate studies. As the status of political refugee became more and more difficult to acquire and the labour contracts favoured only some very specific domains such as the high-tech, this strategy was adopted by a wider range of highly-skilled persons coming from other fields in order to later gain access to the foreign labour market. With the emergence of a network of student exchange programmes, France became rapidly one of the main destinations for this type of migration for study (Lagrave, 1998). However, this proved to be a mere strategy for leaving the country, many never coming back. In fact, the rate of return was so small that France has reconsidered its policies in this field, and tried to develop joint programmes that could encourage Romanian students to return home once their studies were finished.

The further development of this programmes, in the light of the future accession to the EU, led to an important increase in the number of those who left the

country in early 2000. With a focus on Romanians, who came to France in the last ten years, the study is mostly concerned with the fourth and last wave of Romanian migration. It must be emphasized that the conditions under which this wave developed are very different from those concerning the former three. In this case, the accession to the EU was clearly in view and political conditions could no longer be considered unstable. The rate of growth in the Romanian economy was on a constant upturn and foreign enterprises were investing in highly-skilled intensive sectors of the Romanian economy, creating opportunities for well-paid jobs. For the first two waves which took place during communism there was no possibility of return and all ties with the country of origin and with those left behind were cut for what seemed forever. The third wave developed under the difficult conditions of the Romanian transition, with no economic opportunities and the worsening of living conditions. Compared to the former waves for which the future seemed clearly defined and concerned mostly the country of destination, the future prospects of this last wave can be considered to be open ended.

Case study: Romanian highly-skilled migrants in France in the last ten years

The case study relies on twenty exploratory interviews conducted in France during March and April 2006. The study team draw up a questionnaire further filled in by 125 persons. The sample can be described as follows: as previously mentioned, this form of mobility concerns mostly the youth; 48% of the sample is aged between 26 and 30. All these persons had a tertiary education acquired either in Romania or in France. The average time already spent in France by these people varied between two and five years.

Two thirds of the sample population consisted of women. This is in accordance with the statistics issued by EduFrance that acknowledges the female dominance of the student flows for recent years.

Since the history of migrants begins in their country of origin, we will first investigate who these persons were before their departure from Romania. First, they came from all eight NUTS II level regions and from 33 of the 41 Romanian counties. With regard to the region of origin, the capital Bucharest-Ifov ranked first with 27.2 per cent of the migrants. Another 16.8 per cent came from the Northeastern region, while 14.4 per cent from the South-Muntenia region. As far as universities are concerned, universities in Bucharest rank 1st, as: 54.4 per cent of the sample has studied there. Bucharest is followed by the universities of Cluj and Iasi.

One can thus identify a "capital" effect, with Bucharest attracting an important number of Romanian students, due to the quality and the diversity of the studies offered and to the availability of better job opportunities after having graduated.

In terms of fields of specialization among men, one identifies mostly high-tech specialists (32.6 per cent) and economists (30.4 per cent), followed by mathematicians, while among women we identify mostly economists (34.2 per cent) and philologists (15.2 per cent). The diversity of fields is larger in the case of women. Six persons had a double degree and nine had completed their whole college education in France.

The main advantage that this population obviously has, resides in the skills acquired. Most of them had a previous migratory experience generally linked to their studies. Should one consider former internal mobility (which is the case of sixty-two persons from the sample) or that of an international mobility (eight persons), or even both (four persons),

one can identify the existence of a mobility experience which has an important role in their subsequent decision to leave the country and in the way they fare afterwards. There are even cases in which the whole family stands as an example of the development of a "culture of mobility" with several members living in other countries or having spent significant time abroad.

Even if generally, these persons arrived in France as international students, this is often a step preceding the entry to the labour market of the destination country. Meyer and Hernandez (2004) acknowledge that two thirds of R&D experts at world level had entered the destination country as students. Steven Vertovec (2002) underlines "the experience of being a foreign student significantly increases the likelihood of being a skilled migrant at a later stage". The networks developed by the students helped to provide opportunities for other fellows from their country of origin.

Reasons for departure and the main strategies engaged

The most important reason seems to be the desire to pursue internationally recognized studies leading to the acquisition of an internationally recognized diploma. The second reason is the search for better job opportunities and the desire to acquire a better social status. However, these two reasons are not divergent, as the diploma recognized all over the world seems to be the element that facilitates the mobility. Once the diploma is acquired these migrants can leave wherever they find the best job opportunities. Another element that determines the departure resides in their discontent with the Romanian society as many consider that even though the communist regime is gone, the change in mentalities has lagged behind.

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Some of them said that they left in search of a freedom perceived as still difficult to find in the Romanian society, whereas the desire for an experience of another culture also plays a significant part. Man's exploratory nature has never faded away even in modern times.

Amongst the strategies engaged in order to leave Romania, migration for studying plays, as expected, the most important part. France is the country which receives the greatest number of Romanian students each year. In 2004, the number of Romanian students attending courses in French universities stood for 4,839 persons. Almost 70 per cent of the sample population left the country as international students, whereas a few persons left with a work contract (it is merely the case of high tech professionals) or for family reunion (in the case of women). Some of these strategies account for a well-organized plan, as in order to become an international student one needs to have very good results and to prepare for obtaining them several years in advance.

Sometimes, the strategies designed before the departures foresee the change of status, for example from international students to highly-skilled workers, or from tourists to international students. The differences between categories no longer seem to matter, as one can very easily pass from one category to another.

Destination choice and performance in the labour market

What determines the choice of the destination country? In the majority of cases, the geography of mobility seems to be shaped by the exchange programmes concluded by the universities in the countries of origin and destination. Formal networks are the main channels to enable the mobility of the highly-skilled as described by Faist (1999). Also, the

French soft power¹ seems to play an important part in that matter, as the knowledge of the French language and the attraction exerted by the French culture, represent together one of the most important elements to enable this choice. France has even developed an entire strategy for this purpose, seeing that the importance of student mobility in attracting highly-skilled labour has been officially recognized (Economic and Social Council, 2005). The French soft power is very important in the Romanian case, as the mobility of Romanian students to France started to develop from the end of the 18th century, and had even become a tradition during the following century, when the aristocratic families sent their children to be educated in France. At the end of the 19th century, Romania and Russia were the first source countries in Europe for international students in France (Pastre, 2003). This tradition was thoroughly respected until the outbreak of World War II and the installation of communism. Consequently, in what concerns the history of French-Romanian relations, we feel the need to emphasize the existence of a circulation not only of people, but also of ideas, practices and symbols, which was only interrupted by the communist period.

Another factor that seems to have influenced the choice of destination is the existence of informal networks of kin or friends. About a third of the sample members mentioned before in the study admitted the importance of informal networks in their destination choice. The development of new ICTs during the last years facilitated the contact inside the networks, allowing for a virtual projection of the future space of

¹ "Soft power" is a concept according to which knowledge and culture are viewed as instruments of power, a power to entice the hearts and souls at least as important as that of weapons (Nye, 2004).

mobility. Friends and kin already in the country of destination send information via virtual channels to future migrants in the home country. Moreover, migrants can do their own virtual search and gather information (including visual images) on their destinations. In this way migrants can get accustomed to their future destination even before having a physical contact with the space of destination. In other cases, following the significant decrease in transportation costs, many migrants had already been to the destination country to visit relatives and friends. The visits paid as tourists were just a first step to becoming a migrant and were part of a learning process that was very important for the future mobility of the migrants.

Focusing this time on the destination country, one would like to know why these students stayed on, once their study period ended. Some of the respondents admitted that they stayed on in order to complete their qualification, whereas the majority considered that they would have better career opportunities if they stayed in France.

In the case of researchers, the lack of possibilities to conduct research at international level in Romania, as well as the low rate of investment in the R&D activities, both in the public and private sectors, seemed to encourage them to stay on in France. A possible return to the home country is perceived as leading to brain waste.

For others, their stay was mainly due to changes that took place in their lives. Some of them built a family in France, others simply considered that they had created their own lives there and that coming back would mean starting all over again.

How do these migrants fare in their destination country? At the professional level, the difficulties emerge with the passage from one status to another, for instance from international student to highly-skilled worker.

Many of them admitted to have had difficulties in finding an appropriate job according to their qualification. The success also varied with the profession held, and, thus with the labour market demand. If the economists and the high-tech specialists seemed to face fewer difficulties in finding a job, this was not the case of the persons holding a degree in the field of humanities. Most of the migrants blamed this state of fact on the discrimination against foreigners in the French labour market. Indeed, the unemployment rate stood in 2002 at 5 per cent for the natives, 7.2 per cent for EU-15 nationals on the French labour market, 11 per cent for foreigners having acquired the French nationality and at 18 per cent for foreigners coming from countries other than EU-15. This accounts for a rate almost three and a half times greater than in the case of the natives (Economic and Social Council, 2002).

Reshaping belonging and identity

If professional integration can be difficult, how is social integration? Among the factors that can facilitate social integration is the acquisition of French citizenship, which ensures equal judicial rights as the natives, the knowledge of the French language, marriage with a French citizen, kin, and friendship networks that can ease the contact with communities in which they find themselves. The ties developed with colleagues at university or at work as they introduces the migrants to the common practices and act as their best teachers play the most important part.

The outcome of the analysis of the interviews made, was that the traditional discourse in terms of social integration, assimilation and identity does no longer correspond to these migrants' experiences, as they live in a world of multiple allegiances.

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These allegiances concern the home society, the destination society and above all a multitude of communities (Kastoryano, 1998).

One indeed notices that these migrants develop competing, but not exclusive attachments to more than one community at the same time. We can identify a wide range of communities to which these migrants belong: family communities, professional communities, student communities, ethnic communities, religious communities, political communities. Thus, these migrants are part of a range of overlapping communities, both in real and in symbolic terms. They can actually belong to more than one type of community, and even to more than one community of the same type. Rainer Bauböck (2001) notes "multiple citizenship is the most visible illustration of overlapping membership in political communities".

In these communities migrants very often develop ties which go beyond borders, creating a culture of networks, as most of them admit to having friends or relatives in other EU countries. Van Hear (1998) identifies three types of factors which favour the development of cross-border ties: communication facilities, transportation development and socio-cultural competences. These cross-border ties ensure the access of migrants to information and events that occur in more than one place at the same time. The nature of these ties can be either virtual in which case the contact inside the network is facilitated by internet, the mobile or fixed phones or it can be real. Migrants can be virtually present in more places at the same time. With the fall in the costs of transportation, migrants can easily circulate between the physical spaces which support the network. Identity itself is rebuilt inside these networks. Multiple allegiances to different communities are at the origin of the shift from a "territorial identity to a network

identity" (Badie, 1995). Identities, in consequence, tend to be more situational. They are overlapping and flexible in order to allow individuals to adapt to their new condition of circulatory migrants and to take advantage of the best opportunities they can come across.

Contacts and relations with the home country

Network expansion usually precedes territorial expansion. The circulation within the network of material and immaterial flows ensures the transmission of goods and services, as well as of social and economic information. The information received about better career opportunities often determines the departure of migrants to another country. Social networks usually guide migrants into or through specific places and occupations. They are often crucial for finding jobs and accommodation (Vertovec, 2002). Multiple presences allow migrants to take advantage of better career opportunities no matter where they may appear. Migrants do not circulate only between their home country and their destination country; they actually have multiple destinations; and what determines their mobility is the search for a better social status and better career opportunities. Should these opportunities arise in the home country, these migrants might return, if not, they are likely to choose another destination. With the accession to the EU, some seem convinced that better opportunities could arise in Romania. But even if they return, they are no longer confined to a certain space and they can go mobile again whenever they choose.

This space of flows is the source of their power as it provides them with access to knowledge and information, which are only available to individuals who are part of the network. One can actually identify the

emergence of a culture of networks built by these migrants, but which does not exclude friends and relatives who are still sedentary; differences between different categories tend to fade away and immobile individuals exposed to this network culture can easily become mobile, as mobile individuals can also choose for a period to become sedentary. In this case, some specific effects for the country of origin come not only from the networks established with their families and friends, but also from other professionals left behind. It is on these immaterial effects that this study focuses on. These long-distance networks can provide very important channels for flows of capital, skill and information.

In this study, one tries to assess the existence of a permanent contact with families and friends back in the home country. For almost 40 per cent of the migrants these contacts take place weekly, whereas for almost 50 per cent of these contacts are even more frequent, occurring daily or several times a week. The preferred means of communication is the telephone in about 45 per cent of the cases and the internet in 32 per cent. The rest of the migrants use both means with the same frequency. The telephone remains the means of communication mostly used in spite of the growth of the internet.

The decrease in the price of communications allows migrants to maintain the contact and to actively take part in the real lives of those left behind. It is a way of living together and apart at the same time. The contact can be very important. Recent interviews conducted with the friends and families of the migrants, make us realize that these flows lead to a learning process of those left in the home country. However, the existence of the contact is not enough for the success of transfers. The family and friends back home need to have an absorption capacity which could allow them to correctly

decrypt the messages received. In order to facilitate the contact and to ensure the right decryption of the messages, family members take up practices they were not accustomed to before.

Migrants, the state and Europe

This form of highly-skilled mobility, which involves a lot of circulation between more than two countries, can no longer be classified as brain drain. If during the communist period the highly-skilled migration from Romania could be indeed termed as brain drain, nowadays the strong ties with the home country and the development of contacts with the home society positively affecting its evolution, makes the term of brain drain no longer appropriate. The networks developed ensure the flow of financial capital, knowledge and information. The individuals involved in these networks are at the basis of the emergence of a culture of networks which relies on both material and immaterial flows.

What implications does this culture have for the state of origin? In order to take best advantages of the mobility of its citizens, the state has to shift its orientation in its policy designing from a static one to a more mobile one. The migrants can represent for the state of origin a source of social, financial, cultural and political capital (Dufoix and Diminescu, 2006). They are in the best position to promote their home country's values worldwide, acting as informal ambassadors of their state of origin (Nedelcu, 2003). The migrants can actively act in the space of destination and in the space of origin at the same time. They allow the state to expand beyond its limited local resources.

The emphasis must be laid in this context on the reciprocity of the relation between the state and the migrants. The state must develop an active policy in relation to its

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migrant citizens, as it is in the best position to intervene in order to defend their rights in the framework of the agreements concluded with the destination states. But, if the state can ensure that the rights of its migrant citizens are observed outside its borders, it has to do the same thing on its national territory, by not forgetting that these individuals who live beyond its borders are still Romanian citizens, and also by taking care that their rights are observed on the Romanian territory as well.

Citizen mobility beyond state borders must not be regarded in terms of a threat to the states' power. The territory of the nation state can be nowadays thought of being made of two components: a real one and a virtual one. By building bridges with its migrant citizens, the state is no longer confined to its limited political borders, it is present everywhere one can find its citizens.

Romanian citizens abroad might actually play a very important part in the process of European integration, as integration means not only economic convergence, but also convergence to a system of values promoted by the European countries. Through the immaterial flows that take place inside the networks, Romanian migrants can act as important catalysts for the transformation of the Romanian society and for the convergence of Romanian values and lifestyles towards European ones. This kind of convergence could be vital for the Romanian society, as informal institutions have been acknowledged to have played a major role in the transition. The convergence of informal institutions seems to be in this case even more important than the economic convergence. The persistence of behaviours inherited from the communist regime, such as

the generalized corruption and clientelist networks, has created major drawbacks to a successful transformation in Romania. Without informal institutions that could legitimize economic reforms and sustain these reforms, economic convergence is unlikely to be reached easily. In the case where migration networks through the flows of values and information act in favour of this informal institutional convergence, this process can be considered as a sort of transformation from below (imposed by migrants and their family and friends), and not something that is imposed by the Romanian state. But, both the state and the individuals have an important part to play and must work together in order to ensure the success of this transformation.

Conclusion

Migration is a complex phenomenon that involves different kinds of actors: from the individual and the household to nation states, and to regional blocks and international organizations. These actors might have different and even competing interests and objectives. In order to optimize the outcomes of this phenomenon for all the parties involved, all the actors must work together. States must become more flexible in their approach towards citizen mobility and must acknowledge that nowadays it is very easy to pass from one category to another: students might turn later into highly-skilled workers by simply changing their status; and in the same manner sedentary people might decide one day to go mobile or migrants might choose to turn sedentary. All these people involve and follow new mobility patterns that have become very difficult to distinguish and thus to control.

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