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Editorial

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Le numéro **7-8/2013-2014** de la revue l'EUROPE UNIE paraît à la veille des élections européennes qui seront déterminantes face à l'euroscepticisme et à la montée des populismes antieuropéens.

L'année 2013 a permis certaines avancées avec l'entrée de la Croatie dans l'Union européenne, l'accord sur le budget européen pour la période 2014-2020 grâce à la pugnacité de la Présidence lituanienne et les accords d'association signés avec la Géorgie et la Moldavie. Ce bilan doit cependant être nuancé avec l'échec du Conseil européen de défense de décembre 2013 et les crises ukrainiennes de 2013-2014.

Ce numéro renforce le caractère international de la revue avec la participation d'universitaires d'Ukraine, d'Estonie, de Géorgie, de Roumanie, d'Albanie, du Portugal, du Vietnam, du Chine et de France. Les articles sont écrits en anglais et en français, ce qui leur donne davantage d'intérêt pour les étudiants et chercheurs de nombreux pays.

Son contenu traite des relations extérieures, de la défense, des affaires intérieures et de la justice, des questions liées à l'énergie, à l'environnement et au climat, de l'identité européenne et de la globalisation.

Tous les articles présentent une haute tenue et sont facilement accessibles. J'en citerai plusieurs pour leur originalité et leur actualité : « The EU efforts in combating internal fraud and corruption » du Dr Alfred Kellermann, « Non refoulement and Dublin rules » du Dr Lehte Roots, « La gouvernance de l'eau et les changements climatiques en Roumanie » du Dr Flore Pop, « Promoting and Sustaining Security in Europe : The EU and its Neighbours» du Dr Licinia Simao , et les problèmes de la défense européenne par le Général Eric Dell'Aria.

Je suis certain qu'un nombreux public lira avec intérêt la revue en particulier dans les différents pays des auteurs et qu'ils ne manquera pas de faire connaître ses réactions.

A. The EU Foreign Affairs, ENP, Enlargement and Legislative Harmonisation

La politique mediterranéenne de l'Union Européenne

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Abstract : ***The Mediterranean policy of the European Union.*** The European Union has a Mediterranean policy since her creation. It is characterized by its permanent adaptation and is more and more global (Process of Barcelona in 1995, Neighbourhood Policy in 2003 and Union for the Mediterranean in 2008). The "Arab Spring" has changed drastically the political institutions of the region in 2011, especially in Tunisia, in Libya and in Egypt. Syria is experiencing civil war over the last three years. The "Arab Spring" is the revolt of the youth against the dictatorship (Ben Ali in Tunisia, Khadafi in Libya and Moubarak in Egypt) to build Democracy. The result is disappointing and the revolutions are in general stalled . In Tunisia the Ennhada party has won the elections, but it has Islamic tendencies. Its policy is conservative and controversial. Libya has a liberal government without authority against the militia. In Egypt the "Muslim brothers" have won the presidential election with Mohamed Morsi but the army has taken the power and President Morsi is in jail (2013). In Syria President Bashar-al-Assad fights a coalition dominated by the Islamic tendency. The European Union has not managed the "Arab Spring". EU has reactedand has not anticipated the events. EU has not found a response and must define a new Mediterranean policy. The difficulty is that the European Union is not a state and has not an effective foreign policy.
Keywords: European Union, Process of Barcelona, Neighbourhood Policy, Union for the Mediterranean, Arabe Spring, Democracy, Muslim Brothers, Salafism, Tunisia, Libya, Egypt, Syria.

La communauté économique européenne, puis l'Union européenne ont toujours mené une politique méditerranéenne qui s'inscrit dans le contexte historique des relations entre l'Europe et le Maghreb et le Proche Orient.

Les pays du Sud et de l'Est méditerranéen forment la frontière méridionale du continent européen. La Méditerranée est le lien entre les pays développés du Nord et les pays émergents ou en développement du Sud. Les Etats du Sud et de l'Est de la Méditerranée se caractérisent par leur instabilité géopolitique (conflit israélo-palestinien, guerre civile syrienne, déstabilisation du Liban, Printemps arabe et ses conséquences). Ils sont confrontés à une démographie dynamique et à des difficultés économiques et au chômage, à l'exception de la Turquie.

Le fossé continue de se creuser entre les deux rives de la Méditerranée, malgré une complémentarité qui a du mal à se concrétise, La politique euro-méditerranéenne a évolué vers davantage de rationalité et une approche globale.

LE CONTEXTE MEDITERRANEEN

a) Une proximité géographique[1]

Elle a influencé une histoire commune (Croisades, invasions ottomanes, crise de Suez, guerre d'Algérie, etc.). Les conflits n'ont pas existé qu'entre le monde chrétien et le monde musulman, mais ils ont été également internes de la Chrétienté (guerre d'Italie au 16ème siècle, guerre entre l'Espagne et la France).

[1] Distance entre l'Europe et les pays méditerranéens : Détroit de Gibraltar : 14 kilomètres entre le Maroc et l'Espagne. La Sicile est à 148 kilomètres de la Tunisie. Détroit turc : 1,6 kilomètres.

b) La démographie.

Il y a une nette opposition entre le Nord et le Sud. La population stagne en Europe et ne se renouvelle pas à l'exception e la France. La population est en forte croissance dans les pays méditerranéens du Sud et de l'Est. Elle était en 2006 de 264 millions d'habitants et devrait atteindre 360 millions d'habitants en 2030. L'Egypte connaitra la plus forte croissance, tandis que la Turquie et le Maghreb[1] sont engagés dans la transition démographique. L'urbanisation s'accélère et tend à se rapprocher des taux européens[2].

c) L'économie

Le monde arabe semble pétrifié par rapport à la mondialisation. Il semble incapable d'imaginer un mode de développement lui permettant de se rapprocher des pays du Nord ; Le découplage développement économique/croissance démographique va s'accentuer vers 2030-2035 avec l'arrivée sur le marché du travail des générations pléthoriques formées dans l'enseignement supérieur et qui ne trouveront pas suffisamment de débouchés. Ce phénomène est déjà présent comme l'a montré le Printemps arabe particulièrement en Tunisie. La libéralisation des économies accentue l'inégalité sociale entre les secteurs innovants localisés dans les villes et les secteurs traditionnels présents dans les campagnes. Les IDE (Investissements étrangers directs) sont négligeables. Ceux du Maroc sont trois fois inférieurs à ceux de la Hongrie qui est trois fois moins peuplée. Le commerce extérieur est dominé par les relations avec l'Union européenne [3](5) qui est bénéficiaire. La récente crie financière, économique et sociale a des conséquences négatives mais elles sont atténuées par la marginalisation de ces pays par rapport aux grands centres décisionnels mondiaux.

d) Le contexte géopolitique

La Méditerranée devient de plus en plus une zone convoitée par les puissances extérieures de la région. Elle est une zone stratégique majeure. 2500 navires y transitent journellement. Le trafic pétrolier représente un tiers du trafic mondial ; 60% des réserves de pétrole sont présentes au Moyen Orient. La Chine et l'Inde sont de plus en plus intéressées à cause de leurs besoins énergétiques. La Russie aspire à rejouer un rôle important comme le montre son soutien au gouvernement syrien de Bachar El Assad. La région est appelée à voir perdurer les conflits actuels qui risquent de prendre une autre envergure avec l'internationalisation du conflit syrien, la crise interne égyptienne ou l'instabilité de la Tunisie et de la Libye.

LE PARTINARIAT MEDITERRANEEN

Le processus de Barcelone (1995)

Les relations euro-méditerranéennes ont été tout d'abord bilatérales comme l'accord d'association avec la Turquie en 1963. A partir de 1992, elles prennent une dimension régionale avec des accords de coopération bilatéraux. Elles sont réorientées par l'effondrement du bloc soviétique (1989-1991) et les accords d'Oslo de 1993[4] . L'Union européenne se rend compte qu'elle a délaissé la Méditerranée au profit de l'Est européen et que la région est très instable (prolifération de l'armement, légitimité des régimes politiques, conflits frontaliers ou montée de l'intégrisme islamique). Elle s'engage résolument en faveur des pays méditerranéens avec le Processus de Barcelone (27-28 novembre 1995).

Il concerne les quinze Etats membres de l'Union européenne et des dix pays méditerranéens (Maroc, Algérie, Tunisie, Egypte, Autorité palestinienne, Israël, Jordanie, Syrie, Liban et Turquie). Il comporte trois volets politique, économique et culturel.

Un volet politique qui est caractérisé par un Partenariat politique et de sécurité qui traite des questions politiques et stratégiques.

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[1] Questions internationales numéro 10, le Maghreb page 39, la documentation française 2004.

[2] Taux d'urbanisation : Libye : 86% ; Tunisie : 64%.

[3] Le commerce extérieur de l'Union européenne vers les pays du Sud méditerranéen: Tunisie et Libye: 80% des échanges commerciaux, Maroc: 70%, l'Algérie: 65%, l'Egypte: 60%.

[4] L'accord d'Oslo du 9septembre 1993 entre Yasser Arafat, président de l'Autorité palestinienne t Yitzhak Rabin, Premier Ministre israélien pour la solution du conflit palestinien.

Un volet économique qui est basé sur un Partenariat économique et financier. Il vise à la libéralisation des économies de la région et à l'instauration d'une zone de libre échange à l'horizon 2010 qui s'appuiera sur des accords bilatéraux entre l'Union européenne et chacun des pays.

Un volet culturel qui repose sur un Partenariat culturel qui repose sur un partenariat dans les domaines social, culturel et humain qui traite de thèmes très variés (maîtrise des migrations, lutte contre la criminalité, trafic de drogues, dialogue interculturel).

Le programme MEDA assure le financement du Processus de Barcelone. Son montant est de 4, 6 milliards d'euros de 1995 à 1999 pour MEDA I et 5,3 milliards d'euros de 2000 à 2006 pour MEDA II. La Banque européenne d'investissement (BEI) participe également au financement avec la Facilité euro-méditerranéenne d'investissement de partenariat (FEMIP).

Le bilan en 2010 est décevant. Le volet politique est un échec à cause du conflit israélo-palestinien.2004 voit la création de l'Assemblée parlementaire euro-méditerranéenne. Le volet économique a échoué en grande partie. La zone de libre échange ne sera pas réalisée malgré la signature de huit accords d'association. Les échanges ont progressé et l'harmonisation de la législation a été réalisée dans les domaines de la concurrence et des mouvements de capitaux. Les accords d'Agadir créent une zone de libre échange entre le Maroc, la Tunisie, l'Egypte et la Jordanie. L'éloignement géographique des pays est un obstacle, mais c'est le premier exemple de coopération régionale, mais leur impact est difficilement mesurable. Le dixième anniversaire du Processus de Barcelone a été commémoré par une conférence tenue à Barcelone. La plupart des dirigeants arabes étaient absents et il n'y a pas eu de déclaration finale.

La politique européenne de voisinage

Elle est une initiative unilatérale de l'Union européenne qui éprouve la nécessité de fixer des limites géographiques à l'Europe et qui veut faire des pays voisins des amis qui ne menacent ni sa sécurité, ni sa prospérité. Les pays concernés sont le Belarus, la Moldavie, l'Ukraine, l'Arménie, la Géorgie, l'Azerbaïdjan et les pays méditerranéens du processus de Barcelone. A l'exception de la Turquie reconnue comme pays candidat à l'Union européenne. Il s'agit d'une seule politique pour l'ensemble des pays, mais la spécificité de chacun est préservée par les plans d'action. Les plans d'action ont une durée de trois à cinq ans et remplacent les accords précédents. Ils concernent quatre domaines : politique, développement économique et social, commercial (adoption des règles de l'organisation du commerce mondial) et justice et affaires intérieures (terrorisme, immigration et gestion des frontières). Elle est financée par l'instrument de voisinage et de partenariat (IVEP) qui est doté de 12 milliards d'euros dont 8 pour les pays méditerranéens et 4 pour les pays de l'Est européen.

L'Union pour la Méditerranée (2008)

Elle a été créée lors de la conférence de Paris du 13 juillet 2008. Elle concerne 43 pays et 765millions d'habitants (Union européenne, pays méditerranéens du Processus de Barcelone, Mauritanie et Balkans occidentaux à l'exception de la Serbie). Les points les plus discutés ont été la condamnation des racines du terrorisme, la lutte contre la prolifération des armes et le processus de paix au Moyen-Orient. Un texte de 14 pages a été signé et le conflit israélo-palestinien n'est mentionné qu'à la fin du document. La Ligue arabe passe du statut d'observateur à celui d'invité, puis sera reconnue membre. La coprésidence est franco-égyptienne et le siège du Secrétariat général sera fixé en novembre 2008. L'Assemblée parlementaire s'est réunie les 12-13 octobre 2008. Six projets de coopération ont été retenus. Quatre sont en rapport avec l'environnement : la dépollution, les ressources de la mer, la protection civile et l'énergie solaire. Les deux autres sont la création d'une université pour les PME en Slovénie et une initiative en faveur des PME. Le financement est assuré par les fonds structurels, le FEMIP et des partenaires comme le Qatar. La Syrie a fait un geste envers le Liban avec un échange d'ambassadeurs et s'engage à mener des négociations avec Israël. L'accord de Marseille (novembre 2008) décide que le Secrétaire général sera choisi dans les pays de la rive sud. Le premier fut e marocain Fatallah Sijilmassi.

La crise de Gaza (janvier 2009) a bloqué le fonctionnement de l'Union pour la Méditerranée. Le second sommet prévu à Barcelone ne sera jamais réuni. L'Union pour la Méditerranée reste une coquille vide à cause du conflit israélo-palestinien, des Printemps arabes et de la crise.

Quelques réalisations sont cependant à signaler comme l'université euro-méditerranéenne de Slovénie, 130 projets pour la dépollution de la Méditerranée, une université euro-méditerranéenne à Fès, la constructions des tronçons manquants de l'autoroute du Maghreb Rabat-Tunis ou le programme « Med for Jobs » pour la formation et le soutien à la création d'entreprises pour lutter contre le chômage des jeunes avec un premier projet lancé en Tunisie. Il faut signaler également la conférence sur le projet Anna Lindh[1] qui s'est tenue les 4-7avril 2013 à Marseille. Elle a réuni plus de mille participants de la société civile ; Son but est de partager les idées pour l'élaboration d'une feuille de route pour la promotion du dialogue interculturel en Méditerranée.

LES PRINTEMPS ARABES ET LES CONSEQUENCES

Les Printemps arabes ont touché le Maghreb, la ibye et l'Egypte à des degrés divers et chaque Printemps a sa spécificité.

Les évènements déclencheurs

TUNISIE

Le mouvement a débuté en Tunisie le 17 décembre 2010 avec l'immolation par le feu de Mohamed Bouazizi à Sidi Bouzid après la confiscation de son outil de travail (une charrette et une balance). Il se rendit alors auprès des autorités locales pour solliciter une autorisation pour exercer au marché et la restitution de son stock, mais il fut violemment éconduit humilié publiquement. Il s'immola devant le siège du Gouvernorat. Son acte en Tunisie et en particulier à Tunis le 27décembre 2010. La répression fut sanglante, mais ne calma pas le mouvement. Le Président Ben Ali dut quitter le pays le 14 janvier 2011.

ALGERIE

L'Algérie connue le début d'un mouvement contestataire le 28 décembre 2011. Il fut brutalement réprimé. Le 24 février 2011, le gouvernement leva l'état d'urgence instauré en 1991. La poursuite des manifestations obligea le Président Bouteflika à annoncer une réforme constitutionnelle.

MAROC

Le Maroc a été l'objet des premières manifestations le 20 février 2011. Le Roi Mohammed VI en a tenu compte en annonçant le 9 mars 2011 la création d'une Commission chargée de rédiger une Constitution.

Elle fut ratifiée par un Référendum tenu le 1er juillet 2011. 75% des électeurs se déplacèrent et approuvèrent le Référendum à 97, 58%. Les élections législatives du 25 novembre 2011 virent le succès du Parti de la Justice et du Développement économique qui est de tendance islamique modérée.

LIBYE

La Libye a connu des manifestations à Benghazi qui furent violemment réprimées. La révolte se propagea à toute la Cyrénaïque et les insurgés s'emparèrent de Benghazi les 19-21 février 2011. Un Conseil national de transition (CNT) fut formé le 27 février 2011 et la France le reconnut aussitôt ; l'ONU vota la résolution I973 le 17mars 2011 qui autorisait la création d'une zone d'exclusion aérienne pour protéger la population. Les raids aériens débutèrent le 19 mars 2011 avec les forces aériennes de la « coalition internationale » (Etats-Unis, France, Royaume-Uni, Italie, Belgique, Pays-Bas, Norvège, Danemark et Qatar). L'OTAN prit le commandement des opérations le 31 mars 2011. Les forces aériennes, surtout britanniques et françaises appuyèrent les rebelles au sol contre l'armée de Khadafi. Tripoli fut prise le 23 août 2011 et Khadafi capturé et abattu à Syrte, le 20 octobre 2011. L'OTAN mit fin à son mandat le 31 octobre 2011.

[1] Anna Lindh, ancienne Ministre des Affaires étrangères de Norvège (1998-2003) assassinée en septembre 2003. La fondation Anna Lindh a pour objectif le rapprochement des populations des deux rives de Méditerranée.

EGYPTE

« La première journée de la colère » eut lieu le 25 janvier 2011 aux cris de « Pains, Liberté et Justice ». Elle fut suivie le 2 janvier 2012 par l'occupation de la place Tahrir. Le 1er février 2012, « la marche du million » réunit 8 millions de manifestants au Caire et dans le pays. Le Président Hosni Moubarak déclara qu'il ne se représenterait pas et promit une nouvelle constitution ; La répression échoua et Hosni Moubarak quitta le pouvoir, le 11 février 2012.

SYRIE

Le mouvement de contestation débuta le « vendredi de la dignité » à Damas, Alep, Homs et Deraa. La répression fut violente avec l'utilisation de balles réelles. Le mouvement s'amplifia et le gouvernement promit des hausses de salaires et la libération des contestataires arrêtés. La nomination d'un nouveau gouvernement ne calma pas le mouvement de révolte qui gagna plusieurs villes. La répression fut violente comme à Deraa, le 25 avril 2012. « L'Armée syrienne libre » fut créée le 31 juillet 2012 et le 2 octobre 2012 fut constitué « le Conseil national syrien » qui regroupa les principaux courants de l'opposition. Il devint le 15 novembre 2012, la « Coalition nationale unifiée ».

L'ÉVOLUTION DES PRINTEMPS ARABES

TUNISIE

La Tunisie est en pleine crie politique, économique et sociale ; L'élection de l'Assemblée constituante a vu le succès du parti Ennahda largement majoritaire qui constitua un gouvernement de coalition. Les opposants considèrent que la Révolution a été confisquée et que le gouvernement crée les conditions d'une islamisation rampante et se montre trop tolérant vis-à-vis des salafistes et de leurs exactions. Le parti Ennahda a dilapidé le capital de confiance et de popularité qu'il avait acquis à l'automne 2011. Les assassinats de l'avocat Chokri Belaïd, le 6 février 2013 et du député de gauche le laïc Mohamed Brahmi, le 25 juillet 2013 sont imputés par l'opposition au parti Ennahda. Elle a manifesté avec le soutien des syndicats et accuse le parti Ennahda qui rejette ces allégations et affirme que ces assassinats sont le fait d'un groupe de djihadiste Ansar Al Charia. Soixante députés ont quitté l'Assemblée constituante dont les travaux sont arrêtés. L'opposition réclame la démission du gouvernement et son remplacement par un gouvernement de techniciens. Le chef du gouvernement Ali Larayech refuse et propose un gouvernement d'union nationale dont l'opposition ne veut pas. La sortie de crise n'est possible que si l'Assemblée constituante achève rapidement ses travaux et que des élections législatives suivent rapidement la concrétisation de la Constitution.

LIBYE

La transition est laborieuse, mais le calendrier établi est relativement respecté. Deux faits importants sont à signaler :

La direction révolutionnaire du Conseil national de transition devenu Conseil général national (CNG) s'est effacée dès les premières élections libres. Le CNG a désigné le gouvernement provisoire.

Les élections libres du 7 juillet 2012 ont vu l'échec des frères musulmans qui n'ont eu que 17 des 200 sièges de la nouvelle assemblée dominée par les libéraux, ce qui est un fait unique dans les Printemps arabes.Les nouvelles autorités ont du mal à s'imposer face aux milices héritières de la révolution et un très grand nombre d'armes circulent. Le sud de la Libye devient une base de repli des djihadistes du Mali repoussés par l'armée française. Les milices s'en prennent aux autorités tirant sur la voiture du Président du Conseil général et les djihadistes libyens ont assassinés l'Ambassadeur des Etats-Unis à Benghazi en septembre 2012. Des troubles ont lieu avec le texte d'une loi qui exclut de la vie politique les anciens responsables du régime khadafiste. L'élaboration de la future constitution sera confiée à une Commission constitutionnelle désignée par un vote populaire. L'Assemblée nationale doit gérer la représentation tribale qui freine son fonctionnement. 100 députés représentent la Tripolitaine, 60 la Cyrénaïque et 40 de Fezzan. Elle souffre également des invalidations de députés.

EGYPTE

Les élections législatives de 2011 ont vu le succès du Parti de la Liberté et de la Justice avec 38% des suffrages et 49% des sièges. C'est le succès des Frères musulmans. Ils présentent à l'élection présidentielle Mohamed Morsi qui est élu au second tour le 24 juin 2011 avec 51,73% des voix grâce en partie aux voix des libéraux et des gauchistes qui ne voulaient pas d'Ahmed Shafik, ancien Général d'aviation qui avait été le denier Premier Ministre d'Hosni Moubarak.

Les Islamistes ont établi un contrôle très strict du pays jusqu'à l'arrestation du Président Mohamed Morsi, le 3 juillet 2013, auquel l'opposition reprochait de gouverner de manière absolue. Mohamed Morsi s'était attribué des pouvoirs exorbitants par le décret du 22 novembre 2011 et avait imposé un référendum sur la Constitution. Il annula le décret, mais maintient le référendum qui eu lieu du 15 au 22 décembre 2011. La participation fut seulement de 32,8% et il fut adopté par 63,82% des votants. Le Front de salut national avait appelé à boycotter le référendum et refusa de participer aux élections législatives prévues en avril 2013 que la Commission électorale finit par annuler. Le Front du salut national reprochait aux Frères musulmans un redécoupage électoral en faveur et la nomination de gouverneurs de leur couleur politique sans tenir compte des compétences. L'armée n'aspirait plus à jouer un rôle politique. La situation économique est devenue catastrophique avec l'effondrement du tourisme et le gouvernement a demandé un rpêt de 4,8 milliards de dollars au FMI.

L'opposition au Président Morsi réussit à rassembler, le 30 juin 2013, entre 14 et 17 millions de manifestants. Des heurts firent plusieurs morts, cinq ministres et un porte-parole de Mohamed Morsi démissionnèrent. L'armée somma le Président Morsi de renoncer à la politique dans les deux jours. Son refus provoqua sa chute. Le Général Abdel Fatah Al Sisi, chef d'état-major de l'armée égyptienne, annonça sa destitution et son remplacement par le Président de la Cour constitutionnelle, Adli Mansour, la suppression de la Constitution de la formation d'un gouvernement de transition jusqu'à la tenue d'une élection présidentielle anticipée. L'armée est garante du nouveau régime. Mohamed Morsi est accusé d'espionnage, d'incitation à la violence et de destruction de l'économie.

Les partisans de l'ancien Président se regroupèrent au sein de « l'Alliance pour le progrès » et manifestèrent violemment au mois d'août. Ils parvinrent à réunir plusieurs millions de personnes. La répression fut sanglante. Plus de mille personnes furent tuées au cours de la troisième semaine du mois d'août. L'état d'urgence a été instauré ainsi que le couvre feu. Le guide suprême des Frères musulmans Mohamed Badie a été arrêté le 20 août 20113 et immédiatement remplace par Mahmoud Ezzat. Les manifestations se sont calmées par crainte de la répression et de la désaffection de l'opinion publique. Le Premier Ministre est favorable à leur dissolution. Un calme précaire s 'est installé, mais les manifestations pro Morsi peuvent reprendre.

SYRIE

La situation est bloquée militairement et diplomatiquement. Le régime de Bachar El Assad est soutenu par la Russie, la Chine et l'Iran. Aucune résolution n'a pu être votée par le Conseil de Sécurité de l'ONU. Le Conseil national syrien est reconnu par plus de soixante pays, dont les Etats-Unis, la ligue arabe, l'Union européenne et la Turquie. Le médiateur de l'ONU, l'algérien Lakhdar Brahimi n'arrive pas à trouver une solution. Il y a deux millions de réfugiés en Turquie, au Liban et en Jordanie. Des millions de personnes sont déplacées dans le pays et la guerre civile a fait cent mille morts. L'Armée libre de Syrie manque de moyens pour l'emporter et elle est divisée entre libéraux d'une part et djihadistes et membres d'Al Qaïda d'autre part qui n'hésitent pas à se combattre.

L'emploi d'armes chimiques, le 21 août 2013, dans la région de Damas risque d'internationaliser le conflit. Le régime et l'opposition s'accusent mutuellement. Les enquêteurs peuvent authentifier l'attaque chimique, mais ne peuvent révéler l'auteur[1] .

[1] L'ONU cherche des preuves de l'attaque chimique de Damas « La Croix », du mardi 27 août 2013.

LES CONSEQUENCES DES PRINTEMPS ARABES SUR LA POLITIQUE EURO-MEDITERRANENNE

L'Union européenne n'a pas eu de véritable réaction politique homogène face aux Printemps arabes, en dehors de la nomination d'un Représentant spécial pour le Sud méditerranéen. Elle a été absente des évènements de Tunisie au moment du départ de Ben Ali. Elle a essayé de se rattraper avec la visite de Catherine Ashton à Tunis, le 28 septembre 2011. L'Union européenne accorda une aide de 157 millions d'euros pour dynamiser l'économie et développer l'agriculture. Elle accorda à la Tunisie le statut de partenaire privilégié avec le plan d'action 2014-2017 dans les domaines politique, scientifique, l'enseignement supérieur, les affaires sociales et la libre circulation des personnes. Une approche globale est envisagée pour la question migratoire, la promotion de l'emploi dans les zones déshéritées et le renforcement de l'appui financier. L'Union européenne va aussi apporter son aide à la transition démocratique et à la promotion des droits de l'homme. Il est aussi prévu d'examiner les différents volets de la coopération bilatérale et les perspectives de développement dans le cadre d'un Partenariat privilégié dans les domaines de l'agriculture, du transport aérien et du libre échange. Le 19 novembre 2012, la Tunisie reçut une aide de 68millions d'euros.

La stabilité politique du Maroc avec la prise en compte des revendications politiques de la population par le Roi Mohamed VI explique le statut de Partenaire Avancé que l'Union européenne a octroyé au pays le 13 octobre 2010.

Il se caractérise sur le plan politique par des sommets réguliers et sur le plan économique par la mise en place d'un Espace économique communs s'inspirant de l'Espace économique européen, (exemples : baisse des droits de douane, adaptation de la législation marocaine aux règles européennes). Le Maroc participe aux agences européennes (Europol, Eurojust, Sécurité aérienne, Observatoire européen des drogues et des toxicomanies). Le Maroc sera dans la situation d'un candidat à l'adhésion parce qu'il est appelé à se rapprocher des critères de Copenhague. La visite de Monsieur Barroso, Président de la Commission européenne, le 1er mars 2013 au souverain chérifien traduit l'excellence des relations par l'annonce de l'ouverture de négociations pour un nouvel accord de libre échange approfondi (ALECA) pour réaliser le processus d'intégration économique et commercial prévu dans le statut de Partenaire Avancé. Le Président Barroso a évoqué l'idée de la relance du projet d'intégration du Maghreb. Un nouvel accord de pêche a été signé le 31 juillet 2013 pour quatre ans pour l'accès de navires européens aux eaux territoriales marocaines. 126 navires sont concernés au lieu de 137 navires durant la période précédente. Six catégories de pêche ont été définies. Le Maroc reçoit une aide de 40 millions d'euros, dont 14 millions pour le plan halieutique destiné au renforcement de son secteur de pêche pour une gestion durable et responsable des ressources halieutiques.

L'Egypte a reçu une aide de l'Union européenne de 5 milliards d'euros le 14 janvier 2013 pour aider la transition démocratique. L'Union européenne s'est engagée dans la coopération touristique. Elle a vainement tenté une médiation dans le conflit interne égyptien, a demandé la libération de l'ancien Président Morsi et la répression violente de l'armée. Elle hésite à prendre des sanctions et s'est contentée d'interdire les exportations d'armes. Elle a peu d'influence par rapport aux Etats-Unis et surtout à l'Arabie Saoudite qui a octroyé une aide de 12 milliards de dollars.

CONCLUSION GENERALE

La politique euro-méditerranéenne a été la victime des Printemps arabes qui lui ont porté un coup fatal. L'Union européenne n'a pas su anticiper sur les évènements du fait de l'absence d'une politique étrangère européenne. Cette situation est un obstacle à une action efficace. Elle a réagi tardivement en Tunisie ; Elle n'a pas eu de réaction commune pour la Libye et a été pratiquement absente de l'Egypte. Le seul apport de l'Union européenne est une aide financière dans le cadre du programme SPRING (Support, Partnership, Reform and Inclusive Growth) adopté le 20 septembre 2011. Il est la réponse de l'Union européenne aux Printemps arabes et est doté de 350 millions d'euros. L'objectif est de faire face aux défis socio-économiques de ces pays et de les accompagner dans leur processus démocratique. Le soutien est adapté aux besoins de chaque pays. L'aide sera plus importante lorsque le pays sera plus avancé dans ses réformes démocratiques et dans la mise en place de ses institutions. Les initiatives SPRING complètent le

soutien aux activités actuellement menées dans les pays partenaires et soutenues par l'Union européenne. L'Union européenne s'est aussi engagée dans la Facilité pour la société civile adoptée le 20 septembre 2011. Elle soutient le Conseil de l'Europe qui a pris l'initiative le 22 septembre 2011 d'un programme de soutien à la réforme politique et démocratique dans le sud de la Méditerranée. L'Union européenne a également renforcé le programme Erasmus Mundus adopté le 16 décembre 2011.

En attendant la stabilisation des pays des Printemps arabes la politique euro-méditerranéenne devra s'appuyer sur des organisations régionales comme l'Union du Maghreb arabe ou le Processus d'Agadir. Elle devra également coopérer avec la Turquie et le Qatar et bâtir sa stratégie en tenant compte de l'intérêt porté par la Chine à la région.

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Promoting and Sustaining Security in Europe: the EU and its Neighbours

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Abstract: Through continuous processes of enlargement, the European Union (EU) has extended the benefits of accession to new regions in Europe and has eroded the division lines of the Cold War. Through its emergent Neighbourhood Policy (ENP) it is now looking for ways to continue this process of positive spill over towards its direct neighbours. The success of the EU's security policies at this regional level is particularly relevant for its claims of being a relevant international security actor, and the ENP sponsors a multifaceted approach to security, combining all policy instruments available to the EU, with a vision of increased political association and economic integration between the EU and its neighbours. In this context, is there a role for the EU to play as a promoter of security in its neighborhood? What vision does it sponsor and promote? There are several problems with the EU's approach, which explain why the EU has had limited success in promoting security. The first problem is the lack of a long-term vision of how relations with the neighbours will look like and the second is the ability of the EU to make use of its diplomatic tools to be a central interlocutor among other regional and global powers.
Keywords: European Union, European Neighbourhood Policy, security actorness, capabilities, political vision.

The provision of security has been a central goal of European integration. The project designed by Jean Monnet saw the seeds of reconciliation and peace in Europe in the daily cooperation and economic integration among formal rivals. In a continent deeply divided by ethnic, national, linguistic and economic fault-lines, the vision behind the European project is strikingly bold and audacious: to unite the rivals of war in a project of peace and prosperity, which would have positive and long-term spillover effects in Europe and in the world. More than 60 years after the signing of the Rome Treaties, which established the European Communities, we can say that Monnet's and Schuman's dreams have been vindicated and proved to be among the most outstanding of our times.

Considering this heritage, the assumption of more visible security tasks by the new political actor established with the Treaty of Maastricht, the European Union (EU) is quite reasonable. In fact, not only did the internal institutional context of European integration reinforce the political vision of the European project; the regional and global context marked by the end of the Cold War and the explosion of violent conflicts in the Balkan region made the EU's contribution to regional and global security more urgent and needed. This contribution would come both through an active participation in the debates animating the 1990s about international security in a post-Cold War context (concepts such as human security, humanitarian intervention and responsibility to protect had important contributions by the European leaders and institutions), but also through the undertaking of an increased number of security missions. By bringing together the ability to think strategically about international security (the European Security Strategy of 2003 is the most important contribution in this regard) and the ability to act operationally on the ground, the EU has proved its relevance as a security actor.

However, in a fast changing context, the principled and optimistic reflections on global security of the 1990s soon gave way to the nightmares of global terrorism and unsanctioned military interventions in "failed states" in the name of humanitarian objectives. Coalitions of the willing replaced UN-sanctioned missions and in that process EU contributions have been mainly focusing on post-conflict reconstruction and policing. Torn by the contradictions of this new context and divided by the different positions of its member states, the Union's most significant contribution to international security still remains at the regional level, in Europe. Through continuous processes of enlargement the Union has extended the benefits of accession to new regions in Europe and has eroded the division lines of the Cold War. Through its emergent Neighbourhood Policy (ENP) it is now looking for ways to continue this process of positive spill over towards its direct neighbours.

The challenges are nevertheless significant. In 2008, the influent European Council on Foreign Relations published an analytical piece, underlining the difficulties of the Union in consolidating its presence and influence among the Eastern neighbours. According to the authors, Popescu and Wilson (2008: 1), the EU failed to impress across the board. In their words "The EU has not succeeded in turning this presence into power. In security and democracy terms, it has failed not only to achieve most of its objectives, but also to prevent a deterioration of trends on the ground". Also, on the Southern dimension, the EU has been mainly reactive to the events of the so-called Arab Spring and has had limited successes in conflict management in the Middle East and North Africa. In this context, is there a role for the EU to play as a promoter of security in its neighborhood? What vision does it sponsor and promote? This short piece looks at the ability of the ENP to contribute to peace and security in Europe and what that means for global security more broadly and for EU claims of being a relevant security provider.

THE EU'S SECURITY ROLE[1]

The EU's security actorness has mainly been built on soft security mechanisms, such as enlargement, stabilisation and neighbourhood policies, its normative *acquis*, and more recently, the deployment of CSDP missions (which have been largely civilian missions). The deepening and widening of the security agenda after the end of the Cold War, to areas not fitting the most conservative understandings of hard security, allowed the EU to develop and consolidate its role as a security actor in a non-traditional way. The EU's *sui generis* nature has challenged traditional conceptualisations of security (Bretherton and Vogler, 2007) based on realist assumptions about military power, with the EU using non-security instruments to address security issues (Brandão, 2013).

In fact, being a security actor does not imply being militarised. Additionally, the EU conceptualised security in innovative ways, bringing together the deepening of integration, which led to the establishment of a security community and the development of tools to act outside its borders. The European Security Strategy (Council of the European Union, 2003), as well as the Report on its Implementation (Council of the European Union, 2008), clearly identify these two dimensions, acknowledging the fundamental contribution of the EU to regional peace and stability in Europe and the challenges that its success poses to its nature as a global actor, with increasingly global responsibilities. This reasoning implies a deep and comprehensive approach to stabilisation processes, promoting democratic reforms and economic growth, in line with the security-building mechanisms agreed among the member states, but also further involvement in hard security issues, where the deployment of CSDP missions and the involvement of the EU in crisis management in its neighbourhood but also globally is central.

As a security actor, the EU faces endogenous and external constraints. The multilevel decision-making process of a collective of 27 member states and different intergovernmental and supranational institutions constrains the finding of common ground for decision shaping, making and implementation (Smith, 2004; Sjürsen, 2012). Also, EU institutions do not share the same understandings about security issues (Brandão, 2013), rendering inter-institutional cooperation sometimes cumbersome. The institutional design, the allocation of resources and the political will to act are, thus, major aspects constraining or potentiating EU action. This poses important challenges to the promotion of peace and stability outside the EU's borders, to where the security community is only reluctantly being extended (Simão, 2010). Hard security challenges, such as the South Caucasus' protracted conflicts and increased militarisation efforts by these governments, require adequate security tools from the EU, to be able to respond to the security risks associated to these developments, both at the EU and the regional levels.

The development of military capabilities, even if limited, alongside the deployment of civilian CSDP missions from 2003, rendered more coherence to this actor, since the most traditionalist understandings of security were somehow accounted for (Smith, 2000). However, it should be highlighted that these new instruments sought to reinforce the normative and civilian dimensions of the EU's security actorness (Stavridis, 2001: 9). This is pursued through the fostering of democratisation processes and the consolidation of peaceful paths towards development, complemented by the deployment of rule of law,

[1] This section builds on Freire, M. Raquel and Simão, Licinia (2013) "The EU in Georgia: Building Security?", Oficina do CES nº 396, January.

police training and border monitoring missions. Reflecting the self-image of the EU as mainly a civilian actor, the mixed nature of CSDP missions, combining civilian and military aspects and performing activities of prevention, assurance, protection and compulsion (Kirschner and Sperling, 2007), contributed decisively to make the EU a more complete and coherent security actor. It is in this comprehensive approach of EU action as a security actor that lye its strengths.

After the 2004 enlargement, the consolidation of a region of peace and stability at the EU borders became a fundamental security goal, prompting a more proactive approach from the EU based on principles of legitimacy, and geographical and cultural proximity, which became explicit in the European Neighbourhood Policy (ENP), and later on the Eastern Partnership (EaP) (Gänzle, 2007; Christou, 2010). In this sense, the EU has been consolidating its role as a regional security actor, with its neighbouring areas becoming a priority in its foreign policy agenda, though revealing limited capabilities to project security globally (Larsen, 2002). The relation with other security actors, in particular the North Atlantic Treaty Organisation (NATO) and the United States, but especially the Russian Federation, is of relevance here (DeBardeleben, 2008; Gower and Timmins, 2010). Additionally, the interplays that result from EU member states' distinct memberships in international organisations and how these intertwine with regard to their commitment to regional peace and stability are central to the performance of the EU. In this same line, the differentiated relations of EU member states with Russia and the weakness of the EU-Russia strategic partnership also contribute to the limits the EU faces, reinforcing the idea that the context is a fundamental element for understanding the EU's possibilities as a security actor.

EU's external relations are a fundamental element in the definition of the Union's international actorness, both in terms of how the EU designs its goals and actions beyond its borders and of how it is perceived by its partners, especially in the neighbourhood. This means that the EU's political will and operational capacity to act as a force for peace and stability are relevant not only to the effective management of the crises and conflicts in its neighbourhood, but also to the ability of the EU to be recognised as a legitimate security actor. The EU has been acting mainly through the promotion of cohesive governance structures (Lavenex, 2004) and approaches rooted on shared norms and principles, with important significance for regional security (Smith, 2005; Browning and Joenniemi, 2008; Tonra, 2010). Coherence between the rhetorical promotion of these norms and the effective translation of these into political action is the second element in this equation, calling for the careful management of expectations and the sustainable taking on of new commitments.

However, this has proved hard as the perceived normative imposition of EU standards and values have contributed to discontent in its vicinity regarding its normative credentials (Haukkala, 2011). A process that has been criticised for assuming co-ownership and co-responsibility between the EU and its partners (Korosteleva, 2012), but which has mainly been driven by the EU, as the drafting of the Action Plans with the countries covered by the ENP demonstrated. Moreover, at a time of economic and financial crisis, the lack of funding is an added concern, only reinforced by the EU's self-imposed limitations regarding future enlargements and the lack of strategic clarity and capabilities, which the multi-level governance structure reinforces. This integrated whole, which is more than the sum of its parts, renders the security actorness a dynamic reality.

THE ENP AND THE PROVISION OF REGIONAL SECURITY

As mentioned above, the ENP is one of the EU's most ambitious policies of regional stabilisation, short of enlargement. In the European Security Strategy of 2003, the role of the ENP as a central operationalizing policy of the security goals of the EU is rather explicit (Lynch 2005; Biscop 2008). The Strategy underlines the importance of proximity and interdependence for the EU, as well as the fact that "[t]he credibility of [EU] foreign policy depends on the consolidation of our achievements [in the neighbourhood]" (Council of the EU 2003: 8). Reflecting this priority, EU institutions have invested considerable political capital in this policy of proximity. After 2008, some EU member states pushed the EU agenda to include a process of deepening political relations with the Eastern neighbours. The Eastern Partnership (EaP) was established during the Prague summit, in 2009, and included important aspects such as bilateral Association Agreements with those partners to the East, which would be more

committed to advancing EU values and reform. Under this principle of "More for More", the European Commission and EU member states also agreed to visa facilitation processes and economic integration measures. Finally a multilateral dimension was established to facilitate horizontal dialogue among the partner countries, including on issues relevant for regional cooperation and the sharing of best practices. Conflict resolution however, has been kept at the bilateral level, despite the clear regional implications of existing conflicts.

This short overview of the EaP serves to illustrate the importance attributed to the Eastern neighbours in the post-Georgian-Russian war context. It became a turning moment for relations with the former-Soviet countries, leading to important breakthroughs such as the acknowledgement by the EU of the European aspirations of some of the countries in the EaP, the inclusion of incentives on visa facilitation and trade, which had been two areas where the EU member states had proved to be very conservative on, and finally, the EU was also more willing to muster the political consensus for undertaking a greater security role, namely by deploying a Monitoring Mission to Georgia (EUMM), to monitor the cease-fire brokered between Georgia and Russia by then-President of the Council of the EU, French President Nicholas Sarkozy. Thus, the EU was engaging in many multifaceted aspects of regional security in Eastern Europe and the South Caucasus, making relations with Russia a particularly delicate area of its external relations. This encompassing vision of security, centred around reforms of the state and the gradual shifting of principles and approaches from a post-Soviet mentality, to a EU-like approach, focusing on the fundamental principles of rule of law, democracy and human rights, is seen by European leaders as a major contribution to regional peace and stability. Moreover, as these principles are reinforced by increased operational and financial resources, the EaP is proving to be quite a robust approach to promoting regional security to the EU's East.

Before we move on to look at the southern dimension, it is worth trying to reconcile this narrative of robustness and gradual success with the analysis of Popescu and Wilson, which underlines the severe limitations of this policy. According to the authors, "[b]ehind the EU's failure to turn presence into power in the eastern neighbourhood lie three structural trends: the increasingly authoritarian and semi-authoritarian regimes in most of the neighbourhood states; the emergence of a multi-polar world that allows countries in the eastern neighbourhood to play "neo-Titoist" games of balancing between external actors; and the EU's own limited commitment to the ENP" (Popescu and Wilson 2008: 1). What becomes clear is that although the EU has invested more time and resources in its relations with its Eastern neighbours, there are both structural limitations in the ENP approach, such as the lack of an accession perspectives, and external factors of competition that undermine its approach. Eventually, the lack of a strategic vision for the region, which the member states of the EU should develop, is the missing element to power through the bureaucratic machine managed by the European Commission and the European External Action Service with the goal of anchoring these states onto the Union. The problems experienced in the Eurozone since the financial crisis began in 2008 and the political divisions among EU member states, which have been furthered since, have only contributed to this lack of vision on external relations and on the role of the EU as a security provider at the regional level.

On the Southern dimension of the ENP, in the Mediterranean and the Middle East, it was the popular uprisings in Tunisia, Libya and Egypt, first, followed by the violent aftermath of these transitions in power, which posed added levels of complexity for the EU's foreign and security policy. As the Southern dimension was being readjusted in 2008, with the creation of the Union for the Mediterranean (UfM), and political dialogue with the Mediterranean and Middle Eastern partners was upgraded, through the realisation of the Summit for the Mediterranean, in Paris, in 2008, the instability that swept the region as of late 2010 exposed the inadequacy of some of the EU's policies towards the region and required new adjustments. The process of revision of the ENP, which took place during 2010 and 2011, was largely driven by this realisation. A new focus on democratic standards and human rights was adopted by the EU, in order to disburse assistance, and the principle of "More for More", to which we have referred, was also introduced in order to provide additional incentives for reforms. In the joint communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, of 2011, the EU underlines the importance of "strengthen[ing] the partnership between the EU and the

countries and *societies* of the neighbourhood: to build and consolidate healthy democracies, pursue sustainable economic growth and manage cross-border links" (European Commission and High Representative 2011: 1. emphasis added). Also, a new concept of deep democracy is introduced. It is defined as "the kind that lasts because the right to vote is accompanied by rights to exercise free speech, form competing political parties, receive impartial justice from independent judges, security from accountable police and army forces, access to a competent and non-corrupt civil service" (European Commission and High Representative 2011: 2).

Following the setting of these new priorities, the Southern dimension of the ENP was also reinforced through four new programmes, aimed at addressing the underlying causes of social conflict and political instability in the Middle East and Mediterranean. The SPRING programme focused on democracy, reforms and growth; a package of special measures for Tunisia focused on employment and job creation, namely through access to microfinance; The Erasmus Mundus programme for academic exchanges was reinforced for the Mediterranean; and finally, a Neighbourhood Civil Society Facility was established in order to support non-state actors in their work towards reform and public accountability (see information on EU Neighbourhood Information Centre webpage). This set of measures promoted under the ENP show that the EU privileges structural prevention approaches, which focus on the root causes of conflict and seek to change the conditions for peace. In that sense, the EU's approach is much welcomed, even if only a late reactive response to long-standing problems in this region, to which the political management has been oblivious for many decades. It is thus not surprising that the criticism voiced by the southern partners has focused on the incoherence of European foreign policy towards the region, which simultaneously provided political legitimacy to the corrupt and authoritarian political regimes and now is quickly focusing on civil society partners as the solution (Youngs 2011).

On the issue of conflict resolution, the track record of the EU is also problematic. The EU has taken a leading role in the Quartet on the Middle East, dealing with the Israeli-Palestinian conflict, but no significant breakthroughs have been secured, and it is once more the White House, under the leadership of State Secretary John Kerry, which is leading the way. In the case of the intervention in Libya, the EU was sidestepped by its own member states, the UK, France, Italy and Spain, which took part in the NATO-led multinational coalition mandated to implement UN Security Council Resolution 1973. The EU's role has become more significant in the post-conflict stage (Pawlak, 2011) although the ENP is here of limited relevance, as Libya only participates in the multilateral dimension of this policy. 2011 was also the year of the Egyptian uprisings. The EU has faced important problems in dealing with Egypt, despite the fact that there is a ENP Action Plan in place to guide reforms. One of the most important challenges for the EU is the issue of dialogue with political Islam, which in the case of Egypt is right at the core of the country's current tensions (Eriksson and Zetterlund 2013). The CFSP has been largely absent, despite the efforts of the High Representative to be a constant presence in Cairo. The lack of strategic vision makes interaction with all the EU interlocutors tiresome and confusing (Statements by Egyptian Ambassador to Portugal, 2013).

The final challenge to the EU's ability to be a relevant security actor in its neighbourhood has come from the civil war in Syria, on-going since 2011. The EU has managed to agree on the adoption of restrictive measures against the Syrian regime, but besides this, very little has been agreed among EU member states. A joint communication by the High Representative and the European Commission, of June 2013, underlines a set of measures which the EU should adopt in order to develop a comprehensive approach to the Syrian crisis (European Commission and High Representative 2013). The focus is placed on political dialogue towards the settlement of the conflict in the framework of the so-called "Geneva II" conference, humanitarian assistance, and the rebuilding of the country and of the Syrian society. These are sensible proposals, but which have lost momentum with the escalation of tensions and the announced US desire to pursue a military intervention against the Assad regime. In such a context, a scenario like Libya is expected, when EU member states might take the lead in supporting the US, and the EU will be relegated to a second plan. Overall, the ENP is again a very limited framework for peace and security, as its structural and comprehensive long-term approach is ill-suited to respond to the immediate challenges of violence and war on-going in Syria.

CONCLUSION

Our analysis of the EU's role as a security provider has focused on the ENP and the challenges the EU faces in the regional context, where it expects to have a more visible and relevant role. As we have underlined, the success of the EU's security policies at this regional level is particularly relevant for its claims of being a relevant international security actor. Not only it is at the regional level that political agreement among EU member states is more likely, it is also the area where the EU has greater legitimacy for action, considering the issues of proximity and interdependence. In this context, the ENP sponsors a multifaceted approach to security, combining all policy instruments available to the EU, with a vision of increased political association and economic integration between the EU and its neighbours. The ENP in itself is not a policy or mechanism, which the EU can use, but rather a framework for these relations, aiming to establish a region of peace and prosperity around the Union.

There are however several problems with this approach, which explain why the EU has had limited success in promoting security. The first problem is the lack of a long-term vision of how relations with the neighbours will look like. Whereas for the Eastern neighbours this question is closely linked to their identity and to the possibility of being recognised as potential candidates for EU accession in a distant future; for the southern neighbours, the issue of the long-term configuration of the ENP relates more to the level of commitment of the Union with regional problems and the nature of the partnership they are establishing, in some cases, with former colonial powers. Thus, the ENP needs to clarify these issues if its conditionality is to become effective.

Another important issue related to this one is the ability of the EU to make use of its diplomatic tools to be a central interlocutor among other regional and global powers. If the EU is to give substance to its claim to be a normative power in international affairs, than it needs to puts its mechanism to work in the promotion and defence of a norm-based and just international order. EU member states have been reluctant to close ranks behind the Union and often, when it comes to areas of strategic interest, such as energy and conflicts, the EU is sidestepped in exchange for more expedient goals. Even in the neighbourhood, EU institutions have failed to develop a common vision of shared interests among EU member states, as was the case around enlargement processes.

Thus, we can expect more EU engagement in many of the regional security challenges, but also the maintenance of old patterns of decision-making, which remind us of the long way ahead, when it comes to relinquishing power in the name of common goals. In that regard, the EU still suffers from a rhetoric-action gap, which has important consequences for regional security.

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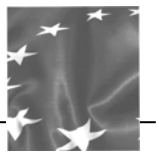

The Security Management of the Neighborhood Borders Through the European Neighborhood Policy

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Abstract: This article provides an overview of the measures with which the EU is managing its external borders since launching the European Neighborhood Policy (ENP) in 2004. In the case under consideration the ENP is represented by a complicated matrix policy of the neighborhood border's management that addresses external insecurities connected to the EU's neighborhood in different ways. The ENP is offering different economic and political incentives to its ENP partners. In all of them security and stability concerns of the EU constitute the most important EU policy objectives.
Keywords: ENP, borders, EU, ENP partner country, neighborhood, incentives, integration.

For the past 50 years the EU has pursued integration and enlargement processes which saw its union increasing from 6 to 28 Member States. The rationale for continuing with the enlargement of the EU was most recently brought to mind again in the Council conclusions of 14 December 2010: "Enlargement reinforces peace, democracy and stability in Europe, serves the EU's strategic interests, and helps the EU to better achieve its policy objectives in important areas which are key to economic recovery and sustainable growth[1],,. The Council conclusions reiterated that with the sixth enlargement the EU relations with its Eastern and Southern neighbors have improved; new ways of developing initiatives in the Black Sea and the Baltic regions have been initiated as well. With the entering into force of the Lisbon Treaty, the EU was able to pursue at the same time its enlargement agenda and deepen its integration. As noted in the Commission document of 2008, the benefits of enlarging for the actual candidate countries but also for potential candidates derive from the expansion of the internal market, legislative approximation, increase of financial support, promotion of cultural, educational, technical and scientific links, cross-border cooperation, reduced risks of political instability, improved security and leverage on fighting organized crime, reduced migration pressures, cultural enrichment and reduced negative environmental externalities[2].

With the sixth enlargement and the implementation of the European neighborhood Policy (ENP) the new external borders of the EU became the new border areas between the members of the EU and the neighborhood countries. And the European Neighborhood Policy itself became the test ground for a transformation of the neighborhood borders into frontier zones promoting security, inclusiveness, prosperity, openness and integration.

The ENP as finalized by the European Commission in May 2004 was clearly modeled on the enlargement process and was influenced by security concerns raised by the EU such as fears of increased migration, cross-border crime and economic globalization. The ENP was also perceived as an attempt to modify the borders with the neighborhood to create an area of shared prosperity and stability outside the actual boundaries of the EU[3]. The European Security Strategy stated that "the best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order[4],,. The ENP thus became an

[1] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/118487.pdf
[2] European Commission (2008), Communication from the Commission to the Council and the European Parliament: Enlargement strategy and main challenges 2008-2009, COM (2008) 674, Brussels, 5 November, http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/strategy_paper_incl_country_conclu_en.pdf
[3] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52003DC0104:EN:HTML
[4] European Security Strategy, A secure Europe in a better world, 12 December 2003.

attempt to address external insecurities with its neighborhood which was realized in the concept of the ENP transition toolbox presented to the ENP partners[1].

With the ENP having been modeled on the concept of enlargement, the same techniques and methods which had been used on the potential and actual candidate countries of the past enlargements were applied to the partner countries of the ENP: conditionality, incentives, financial and technical assistance, socialization, action plans negotiated on a bilateral basis with each partner country, types of monitoring, involvement in some community programs and agencies etc. The incentives offered to the partner countries within the scope of the ENP modified the concept of borders. They became more open when the ENP partner countries accepted the new economic incentives. This changed concept is also reflected in the three long-term objectives of the free movement of goods, capitals and services[2]. Nevertheless, the EU and its Member States remained reluctant to open the EU borders to travel and labor migration from these neighborhood countries due to security matters such as the risk of illegal immigrants arriving from these countries and the risk of organized crime and trafficking. The ENP reflected the border paradox: it was designed to avoid new dividing lines between the EU and its neighborhood, but instead this "fortress Europe" created new border lines - for example by imposing "strict conditionality" on the ENP partners for the conclusion of the visa facilitation agreement with the EU. While this was the way by which the ENP was aimed at better managing and controlling the European Union's borders with the neighborhood it sometimes caused criticism from the neighborhood countries which were willing to completely dismantle the frontier barriers between themselves and the EU. Nevertheless, even with the clear dissatisfaction of some of the ENP partners, the EU never changed the core of its discourse - its intention of controlling the ENP borders: "It is in the European interest that countries on our borders are well-governed. Neighbors who are engaged in violent conflict, weak states where organized crime flourishes, dysfunctional societies or exploding population growth on its borders all pose problems to Europe[3]." With regard to this aspect the EU borders with the ENP partners were seen as spheres of security control and the aim was to protect "the EU borders against smuggling, trafficking, organized crime (including terrorist threats) and illegal immigration (including transit migration)[4]."

Although the ENP exercised an influence on its ENP partners by offering them different economic and political incentives, it could not change their expectation of complete inclusiveness and openness of the EU's borders for them. The EU was offering its partner countries via the ENP a strong support to meet the EU norms and standards and also new trade possibilities by having a stake in the EU's internal market. For their part the ENP partners accepted commitments aimed at strengthening their democracy and the rule of law and common engagements related to the security of their borders and the borders of the EU that were implied in the "joint responsibility for addressing the threats to stability created by conflict and insecurity[5]." The ENP model of relations with partner countries became a model of interaction with the neighborhood countries that put more emphasis on the economic vector of its relations (since the ENP was proposing its partner countries a more advanced economic cooperation) which was leading to the opening of the border for the economic cooperation with partner countries followed by human interaction, socialization and networking with them.

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[1] Lavenex, S., & Wichmann, N. (2009). The External Governance of EU Internal Security. Journal of European Integration, 31(1), 83-102.

[2] European Commission (2003a), Communication on Wider Europe-Neighborhood: A new framework for relations with our Eastern and Southern neighbors, COM (2003) 104, Brussels, 11 March, http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf

[3] European Council (2003), A Secure Europe in a Better World, European Security Strategy, presented by Javier Solana, Brussels, 12 December, http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf

[4] European Commission (2003b), Communication on Paving the way for a new neighborhood instrument, COM (2003) 393, Brussels, 1 July, http://ec.europa.eu/world/enp/pdf/com03_393_en.pdf

[5] European Commission (2003a), Communication on Wider Europe-Neighborhood: A new framework for relations with our Eastern and Southern neighbors, COM (2003) 104, Brussels, 11 March, http://ec.europa.eu/world/enp/pdf/com03_104_en.pdf

Since launching the ENP the EU as an effective global and important regional player has also been realigning the priorities in its foreign policy in order to determine a clear picture of its borders with the ENP partners in the East as well as in the South. For the EU this was an important geopolitical and geostrategic step in order to prioritize its zones of interests in geographic terms and to govern the insecurity continuum. Different interests of the EU were leading to various geographic policy strategies and frameworks for an enhanced cooperation with the ENP partners. In general, the enhanced cooperation with the partner countries resulted in new integration boundaries formed by networking and socialization processes of political association and economic integration. For the neighborhood countries these integration processes with the EU also resulted in uncertainty and question marks concerning the definition of the EU's neighborhood borders and a lack of clear vision regarding their progressive ENP status in the relations with the EU. This caused new problems in the EU's relations with the neighborhood based on the "inside-outside" border dichotomy and "inclusion-exclusion" dynamics. The membership perspective was at the core of this complex of problems.

The ENP offered an advanced status to such Eastern neighborhood countries as Ukraine, Moldova, Georgia and others but it did not provide a clear picture if and when these countries would move forward from the outside neighborhood into the EU proper. The ENP management strategy of external borders was included in the concept of the ENP model of relations with its neighborhood partner countries. This ENP model of relations contains the risk evaluation of the security concerns coming from the potential opening of the EU border to the ENP partners. In that case the offer of a membership perspective represents a potential risk for the EU that the EU is not ready to take now. In general, the risk aversion and security- related motives in the ENP were embedded in the ENP discourse since the launching of the ENP in 2004.

Nowadays the EU is still facing an enlargement fatigue resulting from the previous enlargements and it also faces the challenge of an integration capacity that is in dire need for reformation before any more candidate countries can be admitted. This has a strong impact on the ENP. By being an intermediate strategy for neighborhood countries and by providing opportunities for them to develop strong ties with the EU without making promises which countries might join the EU in the future the ENP explicitly avoids giving third countries a membership perspective. Like this the EU encourages neighboring countries to undertake reforms by offering them various incentives but does not provide them with a membership perspective.

The core incentive for the neighborhood countries - the membership perspective - is missing in the ENP. That is why the main incentives and rewards remain in the individual sectors. Understandably some neighborhood countries are not satisfied with these "sector" incentives and they try to get a clear message from the EU with regard to their membership perspective and try to push the EU to allow them to benefit from a more advanced status in their relations with the EU. Such a partial application of the enlargement techniques without actually granting a membership perspective to the EU's neighbors, especially to the Eastern European neighbors who geographically are in Europe, makes the results of the ENP incomplete for these countries. For this reason it is important for the EU to dismantle the "outside-inside" border dichotomy - particularly regarding the Eastern partners of the EU - as otherwise the geographical aspect of the spheres of influence could spoil the matrix of the EU-Eastern ENP partners' relations.

In conclusion it can be stated that the EU tends to pay closer attention to its neighborhood as a way to establish and strengthen stability and security in its vicinity. The ENP in this respect provides a security toolbox for the management of external borders that promotes an Europeanization and socialization process for its neighbors without providing them with a membership perspective. So in the situation at hand the external borders of the EU become the territorial footprints of various integration processes which are leading to the closest possible approximation of the neighboring partner countries to the EU without granting them an immediate inclusiveness in the EU. This kind of management of the EU's external borders creates an enhanced political and economic interdependence in many sectors of the common framework of the EU with its neighborhood that leads to the harmonization of the periphery of the EU with the core of the EU's norms and practices. Nevertheless such enhanced interaction between

the EU and its neighbors results in high expectations amongst the ENP partners and, consequently, in their discontent with the still existing demarcation and dividing lines between "insider-members of the EU" and "outsider-neighbors of the EU" – an unsatisfactory situation that is difficult to change within the framework of the existing ENP whose main aim continues to be the pursuit of the European Union's security goals towards its neighborhood.

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Current Problems and Perspectives of the Cross-Border Cooperation Between Ukraine and the EU

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Abstract. In the article is presented a discussion over the importance of developing strong cross-border cooperation at the local government level by regional governments and the main principles for the creation of a successful policy towards its implementation. The article gives a detailed analysis of current strategy and actions of Ukraine in the area of the cross-border cooperation in regard to its collaboration with EU through EU Ukraine Association Agreement and gradual integration into the EU. Thus, the article provides suggestions regarding main principles of development of the cross-border cooperation for Ukraine and measurements for its successful implementation.
Keywords: cross-border cooperation, European Neighborhood Policy (ENP), European Neighborhood and Partnership Instrument, partnership, Association Agreement between Ukraine and the EU

Development of the cross-border cooperation at the local government level is an important and urgent problem of governance that reflects the need for closer mutual economic, political and cultural contacts between geographically close regions that historically have a common heritage. Regardless of the political systems of countries, the populations of these regions are faced with identical socio-economic, socio-cultural, political and legal problems. Thus, the development of the cross-border cooperation can mitigate the contradictions in border areas and create communication and contractual relationship that would help solve common problems. In particular, the cross-border cooperation develops the small and medium enterprises, tourism, trade, transport and accelerates the introduction of new technologies. International projects are such „points of growth" that significantly affect both the economy and the level of culture as a whole.

The Council of Europe in its paper examines the cross-border cooperation as a cooperation, which is not a foreign policy of a particular state and affects relations between authorities at local and regional levels, thus the cross-border cooperation does not threaten the territorial integrity of the state and governs the relationship between territorial unions.

According to international practice, the cross-border cooperation goes through a series of stages in its development, namely, the partners examine the border regions, converge with institutional structures within both states, determine advantages and areas of cooperation, strengths and weaknesses in the opportunities for joint activities, form an institutional structure, ensure the implementation and evaluation of projects. Thus, the cross-border co-operation involves planning, development and implementation of joint projects between governments, civil society groups and commercial entities of border areas of the neighboring countries. Cross-border cooperation may include the development of border infrastructure, tourism and recreation, ecology and environmental protection, the fight against crime, cultural exchange and so on.

Ukraine has unique geopolitical features for the cross-border cooperation, both in the west and the east, bordering the new EU members – Poland, Slovakia, Hungary, Romania, and with all eastern neighbors - Russia, Belarus and Moldova. In particular, Ukraine has the longest border line with the EU among the all CIS countries – 1152 km. This ensures Ukraine a considerable potential for the cross-border cooperation in one of the directions towards the European integration.

Currently in the border areas there is an establishment of social and economic relations on a new basis of cross-border cooperation, which requires new tools of organizational and legal framework in the context of improving the competitiveness of territories and development of mutually beneficial links between border regions. This is caused by the spread on the territory of Ukraine the European Neighborhood Policy (ENP), which opens great prospects for economic integration as it offers a wider

range of interaction mechanisms and in the context of the preparation of the new Association Agreement between Ukraine and the EU. According to statistical analysis, within the overall EU budget for 2013 for the implementation of European Neighborhood and Partnership Instrument (ENPI) is scheduled EUR 2,467,782,527.[1] Some of these funds could be used to develop the cross-border cooperation between the EU and Ukraine in the case of the joint commitment to the development of political, economic and cultural ties between the neighboring countries. With help from the European Union, Ukrainian border regions can gradually become a European development centers that will make help Ukraine to integrate to the EU.

The main element in the implementation of state policy on cross-border cooperation is the local authorities and local governments as initiators of an establishment of mutually beneficial partnership relations and deepening of cross-border cooperation. Thus, the increase management efficiency in this area can be achieved by improving forms, methods and tools of related activities of local governments.

However, the analysis of the current state of development of the cross-border cooperation proves the existence of certain problems and difficulties faced by local authorities. Among them, first of all, the national legislation needs to be improved, due to the lack of uniform regulatory standards and other cross-border cooperation, close to the standards of the European Union, which slows down a pace of cross-border cooperation. In the period of the preparation for the signing of the Association Agreement between Ukraine and the EU should be done a harmonization of Ukrainian legislation, which allows a better use of the possibilities of cooperation in various sectors of the economy and socio-cultural sphere.

Nowadays in Ukraine has not yet established an effective model of coordination of the cross-border cooperation at the local level due to the fact that there is a lack of institutional capacity of most local governments to implement large projects (economic, social, etc.) in the field of the cross-border cooperation and the level of cross-border infrastructure is insufficient.

It is important to note that there is a lack of qualified personnel, capable of generating new ideas, attracting investment and implementing an effective management of new cross-border projects, which are offered by Ukrainian neighbors. For this purpose it is desirable to create a training program for professionals in the field of international and cross-border cooperation for local governments to be familiar with the specifics of the cross-border cooperation at the local level.

In the future should be established a comprehensive system of monitoring and analyzing the performance of local authorities in Ukraine on cross-border and international cooperation that will more accurately plan and forecast the prospects for cross-border cooperation.

Among other problems of the cross-border cooperation should be emphasized an insufficient attention to this collaboration as a practical tool of territorial and regional development and improvement of the quality of life of people, who are living in the border regions of Ukraine; limited strategic vision problems and prospects of cross-border cooperation on the part of local authorities, leading to hard administration, „protective scheme"; insufficient financial support for joint cross-border projects that could be supported by local funds on terms involving private sector partnerships .

As a result, the cross-border cooperation in Ukraine requires significant changes, improvement of the legal and institutional framework, practical integration policy, the experience of which can be borrowed from the European Union.

Today Ukraine is involved in four cross-border cooperation – three neighborhood programs for land borders: Poland – Ukraine – Belarus, Hungary – Slovakia – Romania – Ukraine, Romania – Ukraine – Moldova and multilateral Black Sea (Table 1)[2].

[1] General budget of the European Union for the financial year 2013.

[2] Kish E.B. Central Europe in the modern system of Euro regional integration / E. B. Kish – Uzhgorod: Lira, 2008. – p.5.

Table 1: Cross-border cooperation programs Ukraine-EU

Cross-border programs and its participants	Indicative allocations for a program, in million EUR		
	2007-2010	2010-2013	Total 2007-2013
The land border programs			
Poland/Belarus/ Ukraine	97.107	89.094	186.201
Hungary/Slovakia/Ukraine/ Romania	35.796	32.842	68.638
Romania/Moldova/Ukraine	66.086	60.632	126.718
Sea basin programs			
Black Sea	9.025	8.281	17.306

Local governments of Ukraine and their representatives take an active part in the work of leading international political organizations and associations that work in the development and strengthening of local and regional democracy: the Council of Europe's Congress of Local and Regional Authorities, the Assembly of European Regions (AER), the Council of Europe municipalities and Regions (CCRE), International Union of local authorities (IULA), the Association of European Border Regions (AEBR), Foundation to promote effective and sustainable development of the regions of Europe, the Council of Local Authorities for International cooperation (CLAIR), of the twin cities (UTO), etc.

Association Agreement between Ukraine and the EU (Chapter 27, „ Cross-border and regional cooperation") requires that Parties shall promote mutual understanding and bilateral cooperation in the field of regional policy formulation and methods of implementation of regional policies, including multilevel governance and partnerships, with special emphasis on the development of backward areas and territorial cooperation in order to create communication channels and intensify the exchange of information between national, regional and local authorities, socio-economic formations and civil society. The Parties shall support and strengthen local and regional authorities in the cross-border and regional cooperation and appropriate management structures to enhance cooperation through the creation of a new legal framework, support and capacity building development and strengthening of cross-border and regional economic relations and business partnerships. The Parties shall strengthen and promote the development of components of border and regional cooperation, inter alia, transport, energy, communications networks, culture, education, tourism, healthcare and other areas covered by the Agreement that include cross-border and regional cooperation. The Parties shall, in particular, contribute to the development of cross-border cooperation on the modernization of equipment and coordination of services providing assistance for emergency situations[1].

In order to achieve these objectives and increase the effectiveness of the implementation of the CBC local executive bodies and local authorities should be given more autonomy in dealing with joint administrative-territorial units of the issues surrounding cross-border development, particularly in the formation of local budgets and their use. This question is closely related to the introduction of new approaches to the implementation of regional policy and administrative-territorial reform in Ukraine in accordance with the principles adopted in the European Union.

However, a partial solution to these problems will be possible in the context of a new state program, which is focused on a support and development of the cross-border cooperation for 2012-2015. It is also necessary to develop a comprehensive national program to educate and train qualified managers and management training for local governments to work in the field of cross-border cooperation. The preparation and implementation of this strategy should be done together with leading academic centers, national associations of local authorities, NGOs and international institutions dealing with the issues of local and regional development.

Based on these problems that exist in the field of the cross-border cooperation of Ukraine, it is necessary to carry out such activities as:

[1] EU – Ukraine Association Agreement, www.kmu.gov.ua.

1) increasing the powers of local governments and local authorities, giving them greater autonomy in common with the neighboring regions of the tasks of regional and local development, including appropriate amendments to the Law of Ukraine „On the cross-border cooperation",

„On Local State Administrations";

2) increasing availability of local government experts on cross-border cooperation with their mandatory participation in activities Twinning and TAIEX;

3) development and implementation of effective coordination patterns of cross-border cooperation at the local level.

Implementation of these measures will improve the competitiveness of border areas through joint efforts and mobilization of natural resources and human potential of the neighboring areas. This will allow for the development of small businesses, related industries, market infrastructure, create jobs and eliminate social tensions associated with unemployment and low quality of life. As a consequence, it should lead to an increase in efficiency of local government by improving human resources and exchange experience with similar foreign institutions in the framework of cross-border projects, adapting national legislation to EU standards in terms of cross-border cooperation, personnel, infrastructure preparation regions of Ukraine to deeper forms of integration to EU.

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Comparative analysis of some aspects of the legal status of the Secretary of the Chamber of Higher Specialized Court of Ukraine and the Chair of judicial chamber of the Supreme Court of Latvia

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Abstract: This paper investigates the features of the legal status of the Secretary of the Chamber of higher specialized court under the law of Ukraine and the Chair of judicial chamber of the Supreme Court of Latvia. Our analysis suggests that the Secretary of the Chamber, besides performing the duties of administration of justice, acts as an organizer, controller and information provider without having administrative authority.
Keywords: EU-Ukraine Association Agreement, Higher Specialized Court, Latvia, Supreme Court, the effectiveness of the courts, the Secretary of the Chamber, Ukraine

Ukraine is seeking an increasingly close relationship with the EU, going to gradual economic integration and a deepening of political co-operation. The possible signing of the EU-Ukraine Association Agreement (inc. Deep and Comprehensive Free Trade Agreement) at the Eastern Partnership Summit in Vilnius in November 2013 requires from Ukraine in particular to ensure the independence of the judiciary and the effectiveness of the courts.

For three years, the Ukrainian judicial system has been functioning under updated legislation in the sphere of judicial power organization. The Law of Ukraine "On the Judiciary and the Status of Judges" from 7 July 2010 # 2453-VI (hereinafter – the Law "On the Judiciary and the Status of Judges") made changes of substantial and procedural nature in the current legislative field, which encourage to search for the best ways to adapt legislative novels to established legal realities[1]. Having applied completely new approach to the development of the national doctrine in the sphere of judiciary and judicial proceedings legislator testified tries to construct contemporary model of judicial power in order to declare constitutional prescriptions concerning judicial defence of human and citizen rights and freedoms, as well as provision of this guarantee by means of creation of mechanism, due to which such defence would be realized reliably and comprehensively.

The Law "On the Judiciary and the Status of Judges" developed general constitutional prescriptions and newly outlined system of general jurisdiction courts. Today this system consists of corresponding specialized courts authorized according to procedural legislation to solve legal conflicts in the state. There have also been changed general provisions concerning inner activity of general jurisdiction courts, including administering within judicial corps. In this article we will analyze peculiarities of legal status of a secretary of a judicial chamber of a high specialized court since this issue was not a subject of scientific investigation.

The institute of a judicial chamber secretary is new for Ukrainian legal science. This fact causes the necessity to study his legal status via understanding of the Law "On the Judiciary and the Status of Judges" and perception of social role of a high specialized court as a cassation instance court. Basing on the achievements of constitutional and legislative practice in Ukraine it should be recollected that previous

[1] Про судоустрій і статус суддів : Закон України від 7 липня 2010 р. № 2453-VI // Офіційний вісник України. – 2010. - № 55/1. – Ст. 1900. (On the Judiciary and the Status of Judges from 7 July 2010 # 2453-VI // Офіційний вісник України. – 2010. - № 55/1. – Page 1900.)

Law of Ukraine "On the Judiciary of Ukraine" has introduced organizational structure of a cassation instance court. Its authorities in the sphere of civil and criminal judicial proceedings were exercised by the Supreme Court of Ukraine. In its composition such organizational structure foresaw activity of judicial chambers headed by chairpersons of judicial chambers (article 53 of the Law). Herewith, authority, judicial chambers formation order, authority of a judicial chamber chairperson, order of his\her appointment and dismissal, term of authority were subject to detailed regulation by separate norms.

However, in the current Law "On the Judiciary and the Status of Judges" (articles 32-34) legislator regulated authority of high specialized courts, president and judges of high specialized court and avoided provisions concerning authority of judicial chambers. Therefore, to provide analysis of current legal status of a judicial chamber secretary it is necessary to compare competence workload of secretary of a judicial chamber of high specialized court and authority volume of Chairperson of Judicial Chamber of the Supreme Court of Ukraine (during period when it acted as a cassation instance court) using systemic, comparative and historical methods of studying.

Taking into account authority of the Supreme Court of Ukraine determined by article 47 of the Law of Ukraine "On the Judiciary and the Status of Judges", under article 53 of the noted Law it was assumed that judicial chambers exercise judicial proceedings concerning cases referred to their jurisdiction in the order established by procedural legislation. Judicial chambers analyze court statistics, study court practice, prepare drafts resolutions of Plenary Session of the Supreme Court of Ukraine and exercise other authority foreseen by legislation. In return, authority of a judicial chamber chairperson included:

1) activity organization of corresponding judicial chamber;

2) formation of judges panel to consider judicial cases, chairmanship in court sessions and appointment of judges for this purpose;

3) organization of court statistics conducting and analysis, studying and generalization of court practice for the jurisdiction of the chamber; right to reclaim from courts cases, concerning which judicial decisions entered into force;

4) informing the Presidium of the Supreme Court of Ukraine about activity of the chamber;

5) making proposal to the Plenary Session of the Supreme Court of Ukraine concerning necessity to provide courts with clarification of separate issues of legislation application in court practice;

6) provision of lower level courts with methodological assistance for correct application of legislation;

7) performance of other statutory authority. i. e. authority of chairperson of judicial chamber consisted of widened (inexhaustible) spectrum of functional duties in solving of general issues of procedural and organizational nature of activity of corresponding chamber.

According to the article 32 of the Law "On the Judiciary and the Status of Judges" a high specialized court:

1) considers cases of corresponding judicial jurisdiction in cassation order according to procedural law;

2) in cases foreseen by procedural law the court considers cases of corresponding judicial jurisdiction as first instance court or appeal court;

3) the court analyzes court statistics, studies and generalizes court practice;

4) provides lower level courts with methodological assistance for equal application of the Constitution and laws of Ukraine in court practice on the basis of its generalization and analysis of court statistics; the court provides lower level specialized courts with recommendatory clarifications as for application of legislation concerning solving of cases of corresponding judicial jurisdiction;

5) the court exercises other authority determined by law.

Article 31 of the noted Law foresees that in a high specialized court there are chambers of separate categories of cases within corresponding judicial jurisdiction. Judicial chamber is chaired by a secretary. One of the judges of this court is appointed to this position. Decisions on establishment of judicial chamber, its staff, as well as decision on the appointment of judicial chamber secretary are taken by meeting of judges on the proposal of the court President. Secretary of judicial chamber organizes work of corresponding judicial chamber, controls performance of analysis and generalization of judicial practice on

cases referred to the chamber competence, informs meeting of judges of high specialized court about activity of the judicial chamber. It should be remarked that given legal issues are realized in all high specialized courts of Ukraine due to adoption of corresponding decisions by meeting of judges of corresponding courts.

Taking into account literal interpretation it can be concluded that authority of judicial chamber secretary consists of three basic competence blocks:

1) work organization;

2) control over performing of analysis and generalization of court practice;

3) informing of meeting of judges. This list of authority is comprehensive. Nevertheless, on analyzing the above mentioned norms it can be concluded that authority is not foreseen by the Law "On the Judiciary and the Status of Judges". However, this authority follows from legal status fixed by the Constitution and laws of Ukraine and general social significance of a high specialized court as a cassation instance court. At the same time, determination of volume of other authority of judicial chamber secretary is possible due to realizing of legislative idea, laid in basis of this institution, and revealing of features of power and management activities.

As it was mentioned, sphere of authority of judicial chamber secretary includes organization of judicial chamber activity, control over analysis and generalization of judicial practice on cases referred to competence of the chamber and informing of judges meeting of high specialized court about its activity. Disclosure of the significance of such concepts as "organization" and "control" enables to distinguish from general sphere of authority of judicial chamber secretary the separate functional duties within judicial chamber activity and combine them in a single mutually agreed system. Reference books of modern Ukrainian language determine notion 'to organize" as commitment of following measures by a person, who is obliged with corresponding duty:

1) to create, to establish engaging others, relying on them;

2) to exercise certain measures of public importance elaborating their preparation and holding; to provide, arrange searching necessary possibilities for this;

3) to join with a specific purpose; to concentrate, to mobilize, to direct;

4) to install, to organize in a proper way. [1]

In return, concept "control" and "to control" in the researched context means:

1) verification of controlled object's compliance with established requirements;

2) check, activities record, supervision;

3) control held on the basis of studying, documents analysis (documental control). [2]

Besides, work organization and control foresee presence of: corresponding recourse (staff, materials, finances, information, etc.); dependence on external environment (normative and legal acts, social changes, etc.); horizontal and vertical distribution of functions (highlighting of specific tasks, coordination of work, management process, etc.); subdivisions which provide activity; necessity to manage; implementation of certain type of activity, etc. Therefore, from contents of the article 31 of the Law "On the Judiciary and the Status of Judges" is revealed real standardization of organization functions and control exercised by a judicial chamber secretary, which foresees realization of a range of organizational and regulatory functions. These separate directions of activity are vividly included into its competence sphere and reveal role and significance of the investigated institute of judiciary in activity of judicial chamber as well as cassation instance court. However, attention should be paid to the fact that article 20 of this Law foresees that this post is not administrative since post of the President and Deputy (Deputies) President are determined as administrative ones.

Within the context of investigation it is necessary to compare institute of a judicial chamber secretary in a high specialized court of Ukraine and chair of a judicial chamber of the Supreme Court of the Republic of Latvia. According to the article 43 of the Law of Latvia "On Judicial Power" from 15

[1] Великий тлумачний словник сучасної української мови (з дод., допов. та CD) / Уклад. і голов. ред. В. Т. Бусел. – К.; Ірпінь: ВТФ «Перун», 2007. (Big Explanatory Dictionary of the Ukrainian Language (with amendments and CD) / Complier and chief editor V. T. Busel. – Kyiv; Irpin: Publishing and trading company "Perun", 2007.), p. 835

[2] *ibid* p. 569

December 1992 the Supreme Court consists of the Senate, the Plenary Session and four judicial chambers: the Judicial Chamber of Civil Cases, the Judicial Chamber of Criminal Cases, the Judicial Chamber of Commercial Cases and the Judicial Chamber of Constitutional Supervision. Judicial chambers are headed by their chairs, who are elected by the Plenary Session for five years.

Taking into account the above mentioned during the comparing there is a range of essential moments which differentiate institutes of a judicial chamber secretary of a high specialized court of Ukraine and a judicial chamber chair of the Supreme Court of Latvia (secretary, chair):

1) secretary is not a judge who has administrative position and executes a range of organizational functions connected with functioning of the judicial chamber while the chair has administrative authority;

2) the law does not foresee term and amount of terms of being on the secretary position and Latvian legislator established five-year term;

3) secretary is appointed by the meeting of judges – judicial self-government body; chair is appointed by the Plenary Session, which is not such a body;

4) basic directions of secretary's activity are determined in the law; chair's authority is not determined at legislative level.

Therefore, it can be stated that Ukrainian legislator preserves more democratic approaches concerning issues on determination of status of judicial chamber secretary of a high specialized court of Ukraine and activity organization of judicial chamber at the highest judicial body level.

While Developing investigation of character of separate functions assigned to judicial chamber secretary it should be remarked that exercising of organizational and regulatory duties, which follow directly from authority provided by the Law "On the Judiciary and the Status of Judges", foresees that judicial chamber secretary: organizes, schedules activity of judicial chamber; exercises direct control over activity plans followed by the judicial chamber, compiles report documentation; deals with organization and holding of judges' meetings; controls preparation of generalizations and determines their topics in the sphere of law enforcement; determines directions of analysis exercising of judicial chamber judges' work by means of workload distribution between them (taking into account inner specialization and specifics of separate cases categories), etc. Another important function is representing of judicial chamber in judges' meeting and informing in judges' meeting about judicial chamber activity, making suggestions of organizational and law-enforcement nature. Appropriate execution of the noted duties by judicial chamber secretary is guaranteed by smaller per cent of given cases to him as a reporter-judge in comparison with other judges of judicial chamber. [1]

At the same time, comparing authority of chairman of a judicial chamber of the Supreme Court of Ukraine with authority of secretary of a judicial chamber of a high specialized court, such important matters for activity of judicial chamber as forming panel of judges, presidency of court sessions of judges appointment for this, etc. were left outside legislative regulating. Nevertheless, these matters are reflected within realization of prescriptions of the Law "On the Judiciary and the Status of Judges" concerning functioning of Provision on Automated System of Document Flow. They are regulated by inner acts of corresponding cassation instance court.[2]

It should be remarked that realization of prescriptions of articles 33, 35 of the Law "On the Judiciary and the Status of Judges" concerning authority of the President of a high specialized court foresees assignment of administrative authorities within the court. In order to provide appropriate execution of authority of corresponding judicial chamber and realization of functions and authority of a

[1] Рішення зборів суддів Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ № 7 «Про затвердження Переліку засад формування колегій суддів та особливості розподілу справ відповідно до Положення про автоматизовану систему документообігу суду» (ред. від 27.12.2010). (Resolution of judges' meeting of the High Specialized Court of Ukraine for Civil and Criminal Cases # 7 "On approval of the List of Judges Panels Forming Principles and peculiarities of cases consideration according to the Provision on automated document flow system of the Court" (edit from 27 December 2010.)

[2] Про автоматизовану систему документообігу суду : Положення (ред. від 26.11.2010) // Закон і Бізнес. – 2010. - № 51. (On automated document flow system of the Court: Provisions (edit from 26 November 2010) // Закон і Бізнес. – 2010. - № 51.)

high specialized court the judicial chamber secretary, whose post is not administrative, is involved in the general process of management, subjects of which in subordinate dimension are the President of a high specialized court, his deputies and secretaries of judicial chambers. Taking into account fact that administrative authority includes execution of such functions as control, management, organization, coordination, interaction, etc., which are administered in order to provide efficient court activity. Authority of a judicial chamber secretary foresees accumulating and exercising of primary analysis of current condition of organizational, informational and analytical provision of judicial chamber activity, problem issues in the sphere of law enforcement, studying and generalizing of court practice in order to provide court leadership with this information.

Besides, other moments are also important. According to the article 31 of the Law "On the judiciary and the Status of Judges" a judicial chamber secretary is appointed by meeting of judges of high specialized court on the proposal of the court President. It means that the President of high specialized court and meeting of judges are legislatively established subjects of a judge's appointment on the position of judicial chamber secretary. At the same time, the Law does not regulate such matters as term of being in the secretary position and amount of appointments, age restrictions, professional and qualification requirements (for instance, presence of certain experience as a judge), dismissal mechanism (including pre-term one), volume of rights and duties, etc.

The current appointment procedure of judicial chamber secretary, in our opinion, does not cause separate comments since, firstly, it is democratic (foresees direct judges' participation), secondly, it establishes legal status of court President as a leader of state institution (candidacy submission), thirdly, it eliminates the possibility of using subjective impact in activity of judicial chamber. Besides, during realization of such mechanism basic criteria of judge's appointment on the position of a judicial chamber secretary must be his high qualification, profound knowledge in the sphere of organization of judicial power and judicial proceedings, sufficient life experience and judicial activity experience, skills in the sphere of management activity, ability to take decisions independently to solve current issues, coordination of judicial chamber judges' potential and colleagues' trust.

At the same time, taking into account provisions of articles 31, 32, 116 of the Law "On the Judiciary and the Status of Judges" there is necessity to suggest amendments to the current Law by means of norms concerning order of a judge's dismissal from position of judicial chamber secretary, which will procedurally correspond to the appointment mechanism. It means that judge's dismissal from this position will be executed by meeting of judges on the proposal of the court President or not less than half of factual corps of judicial chamber under their signatures. As for determination of tenure and amount of appointments on position of judicial chamber secretary, in our opinion, this issue can be solved by means of legislation due to application of prescription of previous Law of Ukraine "On the Judiciary of Ukraine" having foreseen that judicial chamber secretary is appointed by meeting of judges for five years, and he\she cannot be appointed for this position for more than two terms in sequence.

To sum up, we draw attention to one more aspect. Norms of previous Law of Ukraine "On the Judiciary of Ukraine" foresaw that chairman of judicial chamber of the Supreme Court of Ukraine had a deputy, who provided organization of cases consideration in court sessions, exercised other instructions of the chamber chairman as for organization of judicial chamber activity, as well as executed duties of the judicial chamber chairman during his absence. Due to this there is a question: is it appropriate to introduce in a high specialized court a position of Deputy Secretary of judicial chamber, if it is not fixed in law? For example, resolution of judges' meeting of the High Commercial Court of Ukraine introduced posts of Deputies Secretary of judicial chambers.[1]

Taking into account workload of judges of a high specialized court (especially volume of civil jurisdiction cases), execution of functions concerning court practice analysis and generalization by judges along with the direct justice administering, and taking into account the amount of judges in corresponding judicial chamber (for example, in the High specialized Court of Ukraine for Civil and Criminal Cases the

[1] Рішення зборів суддів Вищого господарського суду України № 3 «Про призначення заступників секретарів судових палат» (ред. від 15.12.2010). (Resolution of judges' meeting of the High Commercial Court of Ukraine # 3 "On appointment deputies secretaries of judicial chambers" (edit from 15 December 2010. - # 51.))

amount of judges in the Judicial Chamber on Civil Cases is 70, the Judicial Chamber on Criminal Cases – 50 persons) implementation of the position of Deputy Secretary of judicial chamber can promote efficiency in increase of realization of assigned cases to the judicial chamber authority. But in that case issues of inner judges' specialization must be studied (for example, creation of judicial chambers on separate categories of civil and criminal cases).

Therefore, having studied peculiarities of legal status of judicial chamber secretary of a high specialized court of Ukraine and on the assumption of authorities provided to it by the Law "On the Judiciary and the Status of Judges" it can be concluded that judicial chamber secretary is a judge, who holds the position in corresponding court. The law does not refer this position to administrative ones. Except for judge's duties, the secretary exercises duties of organizational, control and informational nature within corresponding judicial chamber.

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2. Великий тлумачний словник сучасної української мови (з дод., допов. та CD) / Уклад. і голов. ред. В. Т. Бусел. – К.; Ірпінь: ВТФ «Перун», 2007. (Big Explanatory Dictionary of the Ukrainian Language (with amendments and CD) / Complier and chief editor V. T. Busel. – Kyiv; Irpin: Publishing and trading company "Perun", 2007.)
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The institute of bona fide purchase under the legislation of Georgia and its comparison in terms of the example of the countries of the European Union

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Abstract: This research is dedicated to the problem of protection of a bona fide purchaser in modern jurisprudence. Necessity of law enforcement persistently requires theoretical development of more problematic aspects of the institute of bona fide purchaser. It became necessary to study the issues of relationship between bona fide acquisition and long-standing acquisition as well as restitution and vindication of property acquired in good faith, to identify criteria of institution of acquisition from an unauthorized person, to determine the rule of distribution of burden of proof of good faith, to establish ways and means of solution of the problem of maintenance of encumbrances over property purchased in good faith, etc. Determination of scientific-theoretical approach to the aforementioned problems is impossible without complex study of the institution of bona fide purchase of rights from an unauthorized person, all the more the significant part of the range of problems related to this institution has ultimately been left without grounded and unambiguous scientific solution while separate conceptual provisions adopted in science require thorough revision with consideration of new economic and legal realias. There is no point in studying and researching the aforementioned problem without sharing legal solutions and practice of other countries. From this viewpoint our target is to share experience of the countries of the European Union and make comparison with Georgia. The aforementioned grounds are exactly those determining significance and vitality of legal analysis of the institution of good faith purchase.
Keywords: Non-legal factors determining good faith; good faith as the factor excluding guilt of a purchaser; non-legal side of acquisition of property from an unauthorized person; institute of bona fide acquisition in post-Soviet area, attitude of the countries of the European Union towards the institute of bona fide purchase; harmonization – the European Union and Georgia, chain of Salomons events (continuum).

I. INTRODUCTION

Good faith represents one of the most inscrutable and less studied issues in Georgian legal science significance of which conditions constant growth of interest to this issue. Good faith calls attention as a regulatory construction based on moral grounds.

It has an extensive role in the private law; particularly in civil law, which is proved by numerous references to good faith in the Civil Code. Part 3 of Article 8 of the Civil Code of Georgia states that the participants in a legal relationship shall be bound to exercise their rights and duties in good faith. This is a general norm acknowledging particular significance of good faith in civil relationships. Separate parts of the Code provide for precise content and role of good faith. For instance, the lawmaker speaks about good faith of a manager and a representative of a non-commercial legal entity[1], the Code requires from a party to the transaction to treat grounds for the transaction according to the principles of good faith[2], the Code is aware of the concepts of bona fide owner[3] and bona fide purchaser[4], good faith is represented in the Code as a general principle of behavior or standard[5], in respect of a particular

[1] The Civil Code of Georgia, Article 37
[2] The Civil Code of Georgia, Articles 73, 81
[3] The Civil Code of Georgia Articles 159-163, Article 252
[4] Tolstoy U. K. Content and Civil Protection of Ownership Right in the USSR, L., 1955, pg.133-134; Judelson K.S. Problem of Proof in Soviet Civil Procedure, M., Gosurizdat, 1951, p. 262
[5] The Civil Code of Georgia, Articles 98, 231, 346,361

agreement significance of good faith is highlighted[1], more than that, good faith as subjective attitude of a spouse is also emphasized in the family law[2].

L.V. Shchennikova observes the requirement of good faith in a wide scope and considers that "civil science as well as legislation must be conscientious to the greatest possible extent not only when establishing separate civil norms, but in the course of construction of the whole building of civil statutory regulation". We assume, that such a wide understanding of the concept of good faith must be a little bit overstated, since on the one hand the author tries to make a wide-scale representation of good faith as of a standard determining behavior, but on the other hand it causes intermixibility of the essence of law and law-making. If a law-maker is not conscientious and aspires to reflection of own interests in the law, then we deal not only with rejection of good faith but may even encounter a criminal offence.

Thus, good faith is interesting not as the standard of law-maker's behavior in the course of legislative activity but as the value of private law and one of the most important virtues.

II. NON-LEGAL FACTORS DETERMINING GOOD FAITH

Intellectual properties of a person make significant influence on good faith. Information cannot be perceived and processed by all people in the same way. Therefore, the process of perception and the factors making influence on it is rather noteworthy.

There is no doubt that formation of incorrect perception is in close relationship with a purchaser's consciousness. Incorrect perception, as a psychological aspect, represents one of the components of purchaser's apprehension. According to metaphysical conception, existence of subjective phenomenon completely depends on mental perception. If we state that subjective conscientiousness is valuable and legally significant for property law, then we have to share the opinion that subjective conscientiousness is a certain product of mental perception valuable for legal phenomena and acknowledged by virtue of law.

Mental perception is related to intellectual properties of a person thus giving rise to logical connection between intellectual properties of a person and subjective conscientiousness. To be more precise the latter is somewhat conditioned by intellectual properties.

In case under our consideration, perception is a psychical process of direct reflection by the purchaser of phenomena and circumstances approving or disapproving powers of a seller which, in unity of their different peculiarities and elements, is related to understanding of entirety of reflected[3].

In thinking and perception one of the attributes of consciousness – cognition is revealed and expressed. Incorrect notions of the purchaser from this point of view represent illusion of perception (as one of the forms of consciousness), i.e. "curved reflection", the phenomenon of incorrect, inaccurate subjective reflection of objective reality by physical, physiological or psychological reasons[4].

Thus, the purchaser's mistake made in the course of acquisition of property from an unauthorized person provides ground for origination of legal defect. Mistake, incorrect perceptions at their end is conditioned by non-legal factors. Formation of the purchaser's mistake is preceded by accomplishment by him of cogitative-logical, analytical, organizational and investigative activity directed to search, collection, perception, critical analysis, study, examination and grounded assessment of the circumstances proving authority of the seller[5].

By making subjective analysis with the purpose of determination of the limits of authority of the seller the Purchaser makes a mistake, since he develops incorrect understanding which ultimately leads to a legal problem - conflict of rights between the bona fide purchaser and the original owner.

If the mistake is related to intellectual properties of and perception of reality by a person it leads to an opposite assumption. A person meeting minimal requirements of a rational man but still failing to realize existence of circumstances hampering acquisition of property, acts in good faith. "Rationality and

[1] The Civil Code of Georgia, Articles 609, 731, 765, 781, 785, 935, 969

[2] The Civil Code of Georgia, Articles 1146, 1147

[3] Psychology/under the editorship of Kornilova K.N. , Teplov B.M. Shvartz L.M., M., 1938, p. 94

[4] Platonov K.K., System of Psychology and Theory of Reflection, M., 1982, p. 106-107

[5] Ibid. p. 157

conscientiousness are to be intellectual and moral properties of a person revealed in course of realization of civil rights and having legal significance in cases stipulated under the law"[1].

If existence of a mistake is conditioned by wrong perception, we may assume that people of different intellectual properties would have different perceptions. We believe that in such case a very popular notion of a reasonable man[2] should be applied who in legal relationship expresses will on the basis of reasonable assessment.

III. MISTAKE AS A RESULT OF ACTION OF THE PURCHASER

Existence of a mistake should be considered within the scope of active and passive action of the bona fide purchaser. To the first instance belongs the circumstance when the bona fide purchaser is unaware that the seller is unauthorized and it is absolutely natural in that particular situation. Together with this leader there should exist a circumstance "justifying" the mistake - the purchaser does not and cannot know about ineligibility of the seller. He has expressed relevant diligence and/or deliberation with the purpose of clarification of the issue of the seller's authority however relevant information was not available to him.

In the second instance the purchaser himself is a passive subject and even does not try to find out whether the seller is authorized to dispose the property. In this case the purchaser completely relies on information provided by the seller; he does not doubt authority of the latter and acquires property.

The way the purchaser acted or to what extent the mistake was caused by his passive action is to be determined by the court in the result of assessment of all factual circumstances. The action caused by the purchaser's passive action and lack of deliberation excludes his conscientiousness. If in the first instance works the assumption that the purchaser did not know and could not have known about ineligibility of the seller, in the second instance works the following assumption – the purchaser did not know but could have known or assumed existence of defect in authority of the seller.

For example, when a person sells a stolen antique for high price, there are little grounds for doubting his authority or there are no grounds at all. But when the same antique is sold for inadequately low price, the purchaser may doubt that the seller does not act legally and consequently his "mistake" cannot be protected by law. Moreover in such case existence of "apologizing mistake" should be excluded.

Taking into consideration the aforementioned, mistake implies only the circumstance when mistake could not be prevented despite active action of the purchaser. He expressed relevant deliberation, which excludes negligence, but notwithstanding this he could not learn about ineligibility of the seller. The wording "could not have known" expresses requirement that in the purchaser's action was excluded not only particular, but a simple negligence. Thus, the purchaser does not realize existence of mistake in his own action since he acted in good faith. Mistake occurs even when a party caused incorrect understanding by accident or negligence[3]. Focusing on a mistake is conditioned by a circumstance that existence of non-conscious mistake gives rise to the issue of legal protection of the purchaser in legal science and existence thereof within the framework of various national legislations.

Sklovsky notes that "the purchaser acting with sufficient prudence is considered conscientious. In addition rational deliberation shall not be deemed as excessive circumspection"[4] Rationality of a purchaser, as the golden mean, should be considered a compulsory element of civil turnover.

We cannot speak about existence of a mistake when the purchaser has an opportunity granted by law and factual circumstances to examine authority of a seller. Submission by the seller of an old extract from the Public Registry can exemplify such instance. Nowadays such extract cannot be referred to as an "apologizing mistake". First of all because one of the most important principles of existence of the Public Registry is its publicity. Besides, existence of informational technologies and internet space available to

[1] The Civil Code of the Russian Federation, Part one, Scientific-practical comment/under editorship of Abova T.E. , Kabalkin A.U., Mozilin V.P., M., 1996 pg.25

[2] A reasonable man

[3] Rabinovich N.V. Invalidity of Transactions and Consequences Thereof. K., 1960, p. 64

[4] Sklovsky K. I., Acquisition of Property from Unauthorized Seller//Law and Economics, 1999, No.6 p.18

almost anyone provides any person with opportunity to check the owner of property or if the owner was changed staying inside[1].

A notary act authorizing seller to sell property (.e.g. a power of attorney) can serve as a second example. Transparency of registration of notary acts and registration thereof in a special registry provides an opportunity to check whether the seller was indeed granted an authority to dispose the property. Thus, the purchaser can go without special skills related to determination of authenticity of notary's signature and seal.

Most of the instances of purchaser's mistakes/erroneousness arise and develop without outside influence but by reason of mislead of a seller, i.e. when the seller, firstly acts in a manner to inspire the purchaser, deliberately creates a wrong impression regarding a certain fact related to his authority which in reality does not exist. This is achieved by concealment of really existing circumstances, false representation or when the purchaser develops incorrect impression independently from the seller but the latter purposefully keeps silence and does not say anything[2].

We should agree with Rene Savatie who noted that in fact the vice of expression of will caused by deception constitutes a mistake[3]. Thus, existence of a mistake conditions defect of the process of formation of will and expression thereof.

In so far as a mistake in the process of acquisition from an unauthorized person is concerned, it is disputable whether the mistake in transaction is obvious, creating the right of rescission pursuant to Articles XX of the Civil Code of Georgia. First of all it should be mentioned that "only essential mistake is considered by the law as the grounds for making transaction voidable"[4]. In the course of the dispute it should be clarified what kind of mistake should be considered as grounds for invalidation of a transaction. Legal consequences of invalidation of the transaction should also be taken into consideration: "Acknowledging the transaction to be invalid implies invalidation of legal consequences following such transaction. I.e. the status quo existing prior to making the transaction has to be restored"[5] Hence, if we try to assess the transaction made by the bona fide purchaser of the property with a person unauthorized to dispose the same property as a transaction made by mistake, we will obtain reality which will serve as the grounds for making conclusion opposing to existence of voidable transaction. We will try to represent this argumentation in the form of theses:

1. Rescission in case of a transaction made by mistake causes invalidation. In case of bona fide acquisition rescission gives rise to a dispute between the original owner and the purchaser of property, rescission is initiated by the original owner and not the subjects to the transaction on the basis of which unauthorized disposal was accomplished, therefore, here subjects of relationships are represented in composition different from the one that would be in case of transaction made by mistake.
2. Raising claims by the original owner to the bona fide purchaser does not unambiguously entail invalidation of transaction. In such instance it is important how conscientiousness of the purchaser is determined and to what extent he is protected by law.
3. In case if the person acquiring property from an unauthorized person is obliged to return the property, then the picture is different than simple restoration of status quo after invalidation of the transaction. Notwithstanding good faith, the purchaser of the property will be obliged to return the property not to the person it was acquired from, as it would happen in case of invalidation of the transaction due to mistake, but he would return property to the original owner. Thus, in such case we cannot speak about classical restitution.

[1] We mean administrative proceedings accomplished in order to reflect changes to the title in the Public Registry. At the moment one of the most important elements of operation of the Public Registry is administrative proceeding status of which can be searched on internet.

[2] Rabinovich N.V. Invalidity of Transactions and Consequences Thereof. K., 1960, p. 63

[3] Rabinovich N.V. Invalidity of Transactions and Consequences Thereof. K., 1960, p. 63

[4] Chanturia L., General Part of Civil Law, Publisher "Samartali" 2011, p. 366

[5] Chanturia L., General Part of Civil Law, Publisher "Samartali" 2011, p. 398

Therefore, in case of bona fide acquisition of property from an unauthorized person mistake is evident only in action of a bona fide purchaser which originates due to independent, objective circumstances and consequently excludes guilt of the purchaser. This is the mistake which serves as the ground for invalidation and rescission shall be made on its basis.

It is worth mentioning that any external influence (physical or psychical influence) on the will of the purchaser is excluded, since in such case it would be impossible to say that the purchaser did not know and could not have known about ineligibility of the seller. Then we would face not the mistake of the purchaser, but transaction made by means of making physical or psychical influence on him. Such transaction shall be subject to rescission as per Article 85 of the Civil Code of Georgia[1]. Duress the Civil Code speaks about is represented in the form of physical influence, while in case of psychical influence we will deal with threat mentioned in the Article: "In this case fear caused by the fact of using duress in the future makes the person express the will corresponding to the will of other person"[2]. Under all circumstances "the purpose of duress is making transaction"[3], while the bona fide purchaser makes the transaction willingly and there exists no similar interference in the process of expression of will.

IV. BONA FIDE ACQUISITION AS AN ILLEGAL ACTION

Bona fide acquisition of property from ineligible person can be considered from two angles: 1. Let's assume that legal protection of a bona fide purchaser conditions consideration of his action as legal. 2. Conscientiousness of a purchaser does not precondition legality of his action. It simply excludes his guilt and that is why justice strives for his protection. If it were otherwise, discussion regarding protection of a bona fide purchaser would not be important in legal science.

In our opinion consideration of an action of a bona fide purchaser to be legal just at the expense of his subjective conscientiousness would not be correct. Accepting such assumption would mean that he acts in contradiction to whatever determined by law. Considering bona fide acquisition as an illegal act (violating subjective right of ownership) obliges scientists acknowledging a purchaser acting by ordinary negligence to be a bona fide purchaser to consider his actions as infraction.

In order to exclude purchaser's guilt at the expense of determination of his good faith, he should not necessarily exhibit excessive deliberation characteristic to civil turnover. He is not required to pursue an action going beyond the boundaries of requirements of ordinary, moderate attention, care and deliberation.

We should share the opinion that bona fide acquisition of property vindication of which is statute-allowed, as "objective" violation of subjective right of ownership cannot be considered as an infraction and should be gradually isolated from it[4].

V. CONSCIENTIOUSNESS AS A FACTOR EXCLUDING GUILT OF PURCHASER

Alienation of property by an unauthorized person is always deliberate. Speaking in terms of law the seller knows that he is not entitled to dispose property but breaches the law on purpose. Cause and effect relationship between the occurred result and his deliberate action always conditions his guilt and there would be no sense in speaking about circumstances excluding his guilt.

As for the issue of guilt of a bona fide purchaser, it should be mentioned that the whole discussion on proving or determination of conscientiousness of purchaser and searching mechanisms of his legal protection initially serves the idea to prove that the action of bona fide purchaser acquiring property from an unauthorized person does not contain elements of guilt, thus his guilt is excluded.

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[1] The use of duress (violence or threats) for the purposes of making a transaction shall entitle the person subjected to the duress to demand voidance of the transaction, even when a third person exercised the duress.

[2] Commentary to the Civil Code of Georgia, Book 1, Publisher "Samartali", Tb. 1999 p. 247

[3] Commentary to the Civil Code of Georgia, Book 1, Publisher "Samartali", Tb. 1999 p. 246

[4] Alekseev S.S. Problem of the Theory of Law. Vol.1, Sverdlovsk, 1972, p.353-354; Dontsov S.E. Civil Non-contractual Means of Protection of Socialist Property, M., 1980 p.37

If the purchaser takes all relevant measures of precaution and does not find any circumstance providing grounds to doubt authority of contractor in the course of alienation of property, we should speak not about ordinary negligence of a purchaser but in general about non-existence of his guilty action[1]. Although we admit that the action of the bona fide purchaser is not legal, it should be taken into consideration that he was unaware of the grounds of his own illegal action and consequently, having breached the law he did not act deliberately or by negligence.

VI. NON-LEGAL SIDE OF ACQUISITION OF PROPERTY FROM UNAUTHORIZED PERSON

Limits of authority of a seller to dispose property are very hard to determine**.** For instance, in modern market relationships we cannot rely only on the title embodied in ownership, all the more if we take into account that informational technologies offer modern methods of civil turnover which, in respect of law and in particular purchaser of property is connected with origination of new risks.

In respect of acquisition of property we can distinguish factors of non-legal nature which on its part creates the risk that the seller acts illegally and does not have the right to dispose the property[2]. These circumstances at their end draw the purchaser's attention to ineligibility of the seller or just indirectly provide him with information on existence of risk.

Various circumstances making influence on development of the will of a purchaser can be divided into objective and subjective criteria. To the objective criteria belong the conditions of transaction including the price of alienated property, its state, quality, uniqueness, determination of the seller's authority; while the subjective criteria are the subjective peculiarities of a purchaser, his personal qualities (life experience, legal knowledge), as well as qualities of the seller. Let's consider some of them.

Price of Property. Amount of price can be assumed with consideration of qualities of the property. When the price is much smaller than the price of property of similar quality and peculiarities at the market, it already provides certain indirect information to the purchaser of the property and indicates that the seller might be acting illegally.

Acquisition of property at so called "Bazrobas" (Bazaars). It is a common knowledge that buying a thing at such places is related to the risk that the seller acts illegally.

Acquisition of Property through Auction. Participation at auction is often subject to the special rules established by organizers. Under such circumstances a seller might be required to present document certifying his authority to sell property. This rule is applied as an exception since the title to the property by virtue of presumption belongs to the person exercising ownership of such property.

In case of auction the biggest risk related to competition between purchasers increasing the purchase price of property and figural expression of the latter does not make any indication to authority of the seller. The risk increases even more in case the auction is conducted electronically through internet sites[3].

Everybody is not required to assess events in the same manner. It would be erroneous to assume that everyone makes similar assessment of facts and circumstances. Therefore a person with average abilities should be used as a bench mark and his ability of assessment should be relied on for determination of whether the purchaser of the property could have assumed existence of circumstances excluding authority of the seller.

It is deemed that the purchaser's action should be considered in conjunction with the mentioned circumstances and on the basis of assessment thereof. Evaluation of these circumstances also provides for the precondition to determine conscientiousness of the purchaser's action. Circumstance is assessed not per se but to the extent it made or could have made influence on consciousness and will of an actor[4].

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[1] Eroshenko A.A. Private Property in Civil Law, M. 1973, p. 177

[2] Eroshenko A.A. Private Property in Civil Law, M. 1973, p. 177

[3] Caspar Rose, The Transfer of Property Rights by Theft – An Economic Analysis, Lefic Working Paper 2005-09, p. 4 http://openarchive.cbs.dk/bitstream/handle/10398/6802/wplefic092005.pdf?sequence=1(22/07/2013).

[4] Tolstoy U.K. Content and Civil Protection of the Right of Ownership in the USSR, L. 1955, p.122

VII. INSTITUTE OF BONA FIDE PURCHASER IN THE POST SOVIET SPACE

First of all let's consider the conception serving as grounds for Civil Codes of the states which gained independence after collapse of the Soviet Union. These conceptual grounds substantially condition the method and peculiarity of regulation from the point of view of regulation of right of ownership. Consequently, it is reflected on a bona fide purchaser acquiring property from an unauthorized person.

Historical process accompanying adoption of the Civil Codes was essentially different from longstanding and tense work process which was characteristic to Europe at the stage of great codification; in this case there was no longstanding bitter dispute covering decades like it was in case of France and Germany[1]. For each post-Soviet state it was an accelerated process which had to prepare grounds for development of economic relationships.

"In order to make own experience the main construction material, at least three preconditions should exist. The state drafting the Code should possess: firstly, legislative traditions at least partially reflecting principles regulated by codification; secondly, rich judicial practice demonstrating need for regulation of civil turnover in a new light and thirdly, developed doctrine reasoning necessity of codification"[2] The "order" coming from the rich judicial practice and developed doctrine regarding attitude of law-maker towards a bona fide purchaser obviously could not have been relevant to the existing political regime and the approach to the right of ownership adopted by social system.

Apparently all the states had certain historical experience in regulation of acquisition of property however the direction and nature of regulation were to some extent conditioned by non political processes. In particular, from the point of view of interference of the Civil Codes a certain part of codes came under the influence of model code of CIS and consequently Civil Code of the Russian Federation while the other part tried to escape political influence of Russia[3].

In this part of the paper through the examples of several countries we will try to demonstrate the approach of the former Soviet States regarding regulation of a bona fide purchaser acquiring property from an unauthorized person.

The fact that the Civil Code of the Russian Federation could not overpass the Soviet conception of forms of property should be regarded as its defect[4]. While our Civil Code succeeded in this respect which is regarded as its merit[5]. Incorrect understanding of the concept of property is relevantly reflected in various institutes of the Civil Code of the Russian Federation. In the Article 302 of the Civil Code of Russia of 1994 the law-maker calls purchaser bona fide if he did not know and could not have known about ineligibility of a seller. If we read point one of the mentioned Article literally, it will turn out that an unauthorized seller is a person not entitled to sell property to a bona fide purchaser but who despite such disentitlement accomplished alienation.

The doctrine of Russian Civil Code refers to ethical significance of conscientiousness. Presumably, when considering relationship between conscientiousness and ethics Russian scientists must be speaking about conscientiousness as subjective attitude.

The presumption by virtue of which "purchaser of property is deemed conscientious unless his unconscientiousness is proved" is applied in Russian doctrine[6]. Polemics regarding necessity of proving conscientiousness of a person by the court is related to acting with presumption of conscientiousness. Literature provides contradictory opinions in this regard. For instance, according to E. Bogdanov "presumption of conscientiousness is determined by law (point 3 of Article 10 CC of RF), it does not require to be acknowledged or proved by court or otherwise. It can be rejected only from the moment the decision of the court on acknowledgement of the defendant to be unconscientious comes into effect"[7].

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[1] Regarding civil codification see in details Tsvaigert K. Kotz H. Introduction to Legal Studies in the Sphere of Private Law, N. 1 Tb. 2000

[2] Zoidze B. "Reception of European Private Law in Georgia" , Educational Center of Publishing, Tbilisi, 2005, p. 92

[3] http://www.cis-legal-reform.org-juristische-zusammenarbeit-universalitaet-und kontext.ru/(22/07/2013).

[4] http://www.cis-legal-reform.org-juristische-zusammenarbeit-universalitaet-und-kontext.ru/(22/07/2013).

[5] Zoidze B., Law of Property, Tb., Publisher "Metsniereba", 2003, p. 94

[6] Godes A. Protection of Right of Ownership in the USSR//Soviet Justice, 1938, No. 10, p.5

[7] Bogdanov E. Category of "Good Faith" in Civil Law//Russian Justice, 1999, No.9, p.12

In more precise conclusions Russian scientists note that presumption of conscientiousness can be applied in case when property willfully dispossessed by the authorized person is acquired from an unauthorized person. Therefore this presumption is considered true and serving as the ground for termination of validity of presumption of guilt.

Approach of the Civil Code of Lithuania – the Civil Code of Lithuania is three years younger than our (Georgian) Civil Code[1]. Its main conception is protection of fair purchaser who relied on good faith of a seller and based on his conscientiousness assumed that the seller was authorized to sell property.

The Civil Code of Lithuania envisages the right of recovery of movable thing by general norm and also makes specific reference to the issue of acquisition of property from an unauthorized person by norms regulating sale-purchase agreement. It applies a "reasonable solution" and determines a special term for recovery of movable thing from an unauthorized person – a bona fide purchase by the first owner[2].

The precondition for recovering a thing according to the Civil Code of Lithuania is that the thing ceased to be possessed by the initial owner against his will. Loss or theft of the thing can serve as examples of ground for deprivation of possession[3]. Civil Law of Lithuania admits the principle created by the Roman law –"No one has the right to assign more right than he has himself".

In respect of movable property the Civil Code of Lithuania prefers more precise regulation. It makes stipulation against bona fide purchaser in case of occurrence of criminal offence. Particularly, if the owner was deprived of a thing by means of crime, the bona fide purchase is obliged to return the thing acquired from an unauthorized person[4].

In national legal literature it is noted with pride that Lithuanian civil law does not represent exact copy of any legal system. Significant difference was not accidental. It was the result of well-considered and preplanned steps. For instance, in case of immovable things conceptual influence was made by the fact that after collapse of the Soviet Union governmental bodies were intensively selling real estate accumulated in ownership of the state[5][6].

It is worth mentioning that in respect of immovable property reality of Georgia significantly resembles Lithuanian. Painful problem for both countries was that due to soviet system the whole fund of immovable property was accumulated in ownership of the state.

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[1] It came into effect on June 1, 2001. See Tadas Klimas, BONA FIDE PURCHASERS, VINDICATION AND THE SECURITY OF ACQUISITIONS IN LITHUANIAN LAW, LITHUANIAN QUARTERLY JOURNAL OF ARTS AND SCIENCES Volume 50, No.1 - Spring 2004, p. 66-67

[2] §4.96. Recovery of Property from a Bona Fide Purchaser

1. If a moveable thing has been acquired for value from a person who did not have the right to transfer its ownership, and if the purchaser did not know this and should not have known this (a bona fide purchaser), then the owner has the right to recover this thing only if the thing has been lost by the owner or by the person to whom he had entrusted it, or if it has been stolen from either of them, or if it has otherwise ceased to be possessed by them without their consent. These demands must be made within three years of the time of the loss of possession of the thing.
2. Immoveable things cannot be recovered from a bona fide purchaser except for those cases where the owner was deprived of possession of this thing because of the crime of another person.
3. If a thing was obtained gratuitously from a person who did not have the right to transfer its ownership, then in every case the owner has the right to recover the thing. This rule is applicable both to moveable as well as to immovable things.
4. This article is inapplicable in those instances where the thing has been sold or otherwise transferred in the manner prescribed for execution of court decisions.

[3] See Tadas Klimas, BONA FIDE PURCHASERS, VINDICATION AND THE SECURITY OF ACQUISITIONS IN LITHUANIAN LAW, LITHUANIAN QUARTERLY JOURNAL OF ARTS AND SCIENCES Volume 50, No.1 - Spring 2004, p. 3

[4] See Tadas Klimas, BONA FIDE PURCHASERS, VINDICATION AND THE SECURITY OF ACQUISITIONS IN LITHUANIAN LAW, LITHUANIAN QUARTERLY JOURNAL OF ARTS AND SCIENCES Volume 50, No.1 - Spring 2004, p. 9

[5] See Tadas Klimas, BONA FIDE PURCHASERS, VINDICATION AND THE SECURITY OF ACQUISITIONS IN LITHUANIAN LAW, LITHUANIAN QUARTERLY JOURNAL OF ARTS AND SCIENCES Volume 50, No.1 - Spring 2004, p. 12

[6] This process is analogous to privatization accomplished in Georgia. Its scale today obviously is not as wide as in 90s of the past century, but it should be mentioned that privatization process related to large-scale alienation of real estate accumulated in ownership of the state is not still finished today.

VIII. HARMONIZATION – THE EUROPEAN UNION AND GEORGIA

Study of the issue of harmonization is interesting from the point of view of study of the problem of protection of bona fide acquisition of property from an unauthorized person. Harmonization process is rather specific to regulation of private law relationships. The international institutes and especially the European Union play significant role in this respect. Creation of contractual norms has been increasingly spoken about in Europe[1]. Harmonization process in contractual law has turned into a kind of target in the framework of European private law, while the same cannot be said in respect of property law. Contractual law is more inclined to similarity within the framework of various law systems. This is conditioned by primary significance of concordance of will which is for the most part based on general concepts and has conceptual importance, however as soon as property law is at issue similarity between jurisdictions instantly turns into illusion[2]. When talking about harmonization of norms protecting a bona fide purchaser of property, possibility of achievement of such harmonization should be determined through the prism of various law systems with consideration of individual nature of property law. The legislation regulating bona fide purchase of property is different in various countries making its harmonization a priori difficult[3]. Most of European countries have chosen their own way for solution of legal problem of protection of a bona fide purchaser[4]. If we take a closer look at difference between them, we will find that the difference is not only important but essential and often even opposing to each other. Various law systems differently regulate the dispute between a bona fide purchaser of property and its initial owner (some law systems work in favor of the initial owner while the others are beneficial for a bona fide purchaser) as well as have differentiated approach to the case of sale of one and the same thing twice. However, different regulations always condition specific economic results having diverse impact on intrinsic motives of parties to the dispute[5]. Law systems protecting a bona fide purchaser point at special significance of trade relations and stability of civil turnover as their "ideological" basis. While the law systems preferring protection of an initial owner and neglecting conscientiousness of a purchaser, justify their choice by protection of the ownership right[6]. And still, although protection of the initial owner and bona fide purchaser from an unauthorized person is the subject of complicated and long-lasting discussion in the private law, there has not been provided an acceptable answer to the question what conditions different attitude of laws when regulating this issue[7].

It can be said that level of popularity of appeal to harmonization in respect of movable property is not very high. Legal regulation of the right to movable property is very important for trade law and at a glance represents an attractive factor of unified regulation. However, the legal issue being so important for trade relations is the case illustrating the circumstance that development of new Ius Commune[8] as the preparatory stage of harmonization would be vain; nevertheless, if accomplished, we would face forceful intrusion of unknown institutes upon separate legal systems. The question raised by us might be essentially differently regulated in various law systems but they would have one goal – occurrence of economically effective result. However, existence of common goal should not be understood as elimination of

[1] Chechelashvili Z., "Property Law", Publisher "Bona Causa", 2006, pg.88
[2] Rahmatian A., A Comparison of German Moveable Property Law and English Personal Property Law, 2010, p.2 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629268 (Journal of Comparative Law, Vol. 3, No. 1, pp. 197-248, 2010);
[3] Salomons A.F., Good Faith acquisition of movables, p. 1 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1515719;
[4] Salomons A.F., How to draft new rules on the bona fide acquisition of movables for Europe? Some remarks on method and content, Centre for the Study of European Contract Law Working Paper Series, No 2007/2, p. 2, http://ssrn.com/abstract=979458;
[5] Caspar Rose, The Transfer of Property Rights by Theft – An Economic Analysis, Lefic Working Paper 2005-09, p. 1-2, http://openarchive.cbs.dk/bitstream/handle/10398/6802/wplefic092005.pdf?sequence=1;
[6] Caspar Rose, The Transfer of Property Rights by Theft – An Economic Analysis, Lefic Working Paper 2005-09, p. 8 http://openarchive.cbs.dk/bitstream/handle/10398/6802/wplefic092005.pdf?sequence=1;
[7] Zhenxing H., The Economics of Good-Faith Purchase, 2005, p.1 http://www.tinbergen.nl/files/theses/mphil082.pdf;
[8] Ius Commune represented the common law of the western and middle Europe. It was Romanic canon law. For details see Chanturia L., "Introduction to the General Part of Civil Law", 2006, Tbl., publisher "Samartali", pg. 12-20;

difference between law systems. Divergence in legal technique will still remain due to difference in ideology[1].

Consideration of decisions of the member countries of the European Union regarding this question is essentially important within the framework of this discussion.

IX. CHAIN OF SALOMONS EVENTS (CONTINUUM)

While studying law-maker's attitude towards a bona fide purchaser and original owner, the Dutch professor Arthur Salomons came to the conclusion that the existing legislative diversity can still be conveyed by the scheme subjected to certain consistency. This is a table in the beginning of which is represented law systems where vitality and necessity of legal protection of bona fide purchaser is most explicitly expressed, further below this tendency weakens and the importance of granting legal protection to the owner gradually increases.

The middle part of the table covers the law of the countries characterized by more or less intermediary and more neutral regulation.

Besides, Salomons unites separate law systems in sub-groups according to homogeneity characteristic to the research issue taking into consideration non-essential (insignificant) difference. We deem it would be reasonable to demonstrate the above-described systematic wholeness in this paper.

Continuum – protection of the owner versus protection of the bona fide purchaser

Protection of a bona fide purchaser	German Law	• *„Hand wahre Hand", (hand covers hand)* except stolen things;
	Italy	• Bona fide protection of purchaser including in case of stolen or lost things. • Exception is the things title to which is registered in special state registry.
	Austria, Slovenia	• Bona fide protection of a purchaser and statement of defense to be satisfied in case of sale through public auction, by registered commercial seller or in case if the owner deprived of property willingly entrusted movable property to endorser. • No exception for stolen or lost things. • Only Slovenia: the former owner enjoys one-year personal right to redeem the property of special importance (i.e. family jewels) at market value.
	Sweden	• Until 2003 the same as in Italy. Currently the owner can recover stolen thing (within 6 months). • The owner is entitled to acquire from a bona fide purchaser at market value or at purchase price paid by the purchaser.
	The Netherlands	• The same as in France but only recovery of stolen property. • Protection of a customer buying a stolen thing in a store. • A purchaser must provide information on location of a seller. .
	France, Belgium	• Bona fide purchaser bona fide owner.

[1]Rahmatian A., A Comparison of German Moveable Property Law and English Personal Property Law, 2010, p.3 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1629268 (Journal of Comparative Law, Vol. 3, No. 1, pp. 197-248, 2010)

Protection of the owner		• The owner can withdraw stolen or lost things within three years. • Refund of purchase price to the purchaser at market or by trader.
	Switzerland	• The same as the French law, however restriction is imposed upon withdrawal of stolen and lost things after lapse of five years.
	Germany Spain, Greece	• The same as the French law, but no protection of the purchaser in respect of stolen or lost things. • Exception for trade. • In Spain: reimbursement of purchase price to the purchaser at auction.
	Scotland	• In fact no protection of a bona fide purchaser. • Exception: bona fide protection of a purchaser and the statement of defense for satisfaction in exchange for the previous transaction (ex tunc and ex nunc) and in case of double sale. No protection in case of stolen or lost things, registered property, works of art.
	England and Wales	• In fact no protection of a bona fide purchaser against a lawful owner. • Exception: a bona fide purchaser of circulated movable property; A bona fide purchaser of already transferred thing which is still held by the transferor. A bona fide purchaser of a thing already held by the transferor but transferred to him with reservation of the title; Purchaser through trade representative.
	Finland	• An owner can witdraw even from the bona fide purchaser, but only against payment provided the thing was not stolen or lost.
	Czeck Republic	• Like Portugal, but the reform is being carried out and notices are made on exceptions for trading and circulating movable property.
	Portugal	• No protection of a bona fide purchaser, purpose of different purchase and refund of purchase price paid to a trader.
	Roman law	• "Ubi rem meam invenio, ibi vindico" – where can I find my lawsuit, if it does not exist. • "Usucapio res furtivae" - No valid right for stolen property.

The above table also includes the solutions of Old German and Old Roman laws.

Austria and Slovenia, France and Belgium, Germany, Spain and Greece are united in one sub-group in this table. The basis for this union is first of all similarity of Civil Codes of these countries conditioned by the fact that some of them were used as foundation for construction of civil legislation of the rest and their reception was accomplished[1]. As for Georgia, according to the relevant legal solution, in the above given chart it would be placed in the middle, next to legal regulation of Germany and France.

[1] Regarding civil codification see in details Tsvaigert K. Kotz H., Introduction to Comparative Legal Stuies in the Sphere of Private Law, Part 1, Tb. 2000

X. CONCLUSION

Reference to good faith is made in law when one's right becomes dependent on the presumption of his conscientious action[1]. It implies that presumption of conscientious action should also be proved in case of consideration of the dispute in court. Every purchaser is deemed bona fide unless his unconscientiousness is proved[2].

The process of proving is represented as follows: one party tries to prove that presumption of conscientiousness works in his favor, while the other party tries to prove that it is impossible to apply presumption of conscientiousness since the purchaser knew or should have known about ineligibility of the seller to alienate property[3]. Obviously on the basis of evidences presented by the parties the court will take decision either in favor of the purchaser expressed in admission of presumption of conscientiousness of a purchaser or against him and in favor of the original owner denying presumption of conscientiousness of the purchaser.

According to G.N. Amphiteatrov, good faith is "an apologizing mistake always resulting in violation of rights of owner", good faith, in the opinion of G.N. Amphiteatrov "is characteristic only to desired degree of diligence of participants of turnover"[4].

Sometimes law grants a bona fide purchaser more rights than the seller of the property had[5]. In this case the principle according to which the content of assigned right is determined by the nature of right the assignor possessed is violated, i.e. the principle of Roman law is violated: no one can assign more rights than he has himself. This fact may have opponents but if we oblige the law to resolve such conflict of rights, or to be more precise, to offer specific regulation, then restriction of one of the principles of private law should also be acceptable. At the same time the content of regulation should not contradict to interests of majority of subjects of trade relationship, otherwise rejection of principles would not be justified and would definitely constitute a legal defect requiring correction. Conscientiousness is subjective attitude of participant of legal relationship determination of existence of which would eliminate legal defect. This happens not per se but on the basis of will of law since legislation wishes to protect a bona fid purchaser but establishes this protection as an exception since reasonable limits of such protection guarantee stability of civil turnover.

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[1] Lâle Sirmen**,** Acquisition of Movables in Good Faith, p. 307, http://dergiler.ankara.edu.tr/dergiler/38/302/2842.pdf(22/07/2013)

[2] Godes A., Protection of Right of Ownership in the USSR// Soviet Justice, 1938, No. 10, p. 5

[3]Lâle Sirmen**,** Acquisition of Movables in Good Faith, p. 307, http://dergiler.ankara.edu.tr/dergiler/38/302/2842.pdf (22/07/2013)

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Future enlargements of the European Union

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In July 1st, 2013 Croatia became the 28th member state of the European Union[1] who had previously had 5 enlargements[2]. The enlargement of the European Union is expected to continue and affect most of the European continent.

The criteria of the membership were laid down at the June 1993 European Council in Copenhagen. Below are three Copenhagen criteria for candidate members to join the EU.

1) The political criterion
The candidate country must have achieved stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities.[3]
2) The economic criteria
- the existence of a functioning market economy
- the capacity to cope with competitive pressure and market forces within the EU.
3) The ability to take on the obligations of membership
That includes **legislative alignment with the acquis, implementation and administrative capacity of the candidate country.**

The leaders of the European Union agreed in December 2006 that the Copenhagen criteria should in future be combined with the **EU integration (absorption) capacity**. According to the Commission, integration capacity is a functional concept. It is measured by the ability of the EU to welcome new members at any given time or in a given period, without jeopardizing the policy objectives established by the Treaties.[4]

Five countries have received the **candidate status:** Turkey, Iceland, FYROM (the former Yugoslav Republic of Macedonia), Montenegro and Serbia. Kosovo, Bosnia-Herzegovina and Albania are potential candidates (in January 2014). The Thessaloniki European Council in 2003 has confirmed the European perspective of Western Balkans.[5]

Neighboring countries of Eastern Europe (Belarus, Ukraine, Moldova, Armenia, Georgia and Azerbaijan) were offered in December 2003 a policy of cooperation known as the European Neighbourhood Policy. Its main goal is to offer to those countries a possibility to reform themselves in order to achieve better democratic and economic performances, and to develop their relations with the EU but without a clear EU Membership perspective.[6]

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[1] OJEU OJL 112 24/04/2012.
[2] EU successive enlargements:
1973: United Kingdom, Ireland and Denmark
1981: Greece
1986: Spain and Portugal
1995: Austria, Finland and Sweden
2004: Cyprus, Estonia, Lithuania, Latvia, Poland, Hungary, Czech Republic, Slovakia and Slovenia; 2007: Romania and Bulgaria
[3] Labori Michel et Costea Simion, *Le management des politiques européennes* (chapitre 16 Les futurs élargissements de l'Union européenne pages 262 à 269), Prodifmultimedia Paris, 2011.Saidi Hyna, *L'élargissement de l'Union européenne aux Etats postcommunistes d'Europe centrale et orientale,* Paris, 2005.Enlargement, in
http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/index_en.htm
[4] Ibidem.
[5] Ibidem.
[6] Ibidem.

1) CANDIDATE COUNTRIES

TURKEY

Turkey has a population of 74 million inhabitants and an area 784,000 km2. The fertility rate is 2.1 and it ensures the renewal of generations. The 2025 projections estimate the population to 85.4 million. The GDP per capita in purchasing power standard is 52% of that of the EU.

Turkey signed an Association Agreement with the European Economic Community in September 12th, 1963 which came into force in December 1st, 1964. It offers to Turkey a possibility to join the European Economic Community when it is able to fulfill the requirements of the Treaty of Rome. In May 6th, 1995 an agreement creating a Customs Union is signed and the status of candidate country is granted at the European Council in Helsinki in December 1999. An Accession Partnership was concluded in December 2000 and the European Council decided opening accession negotiations in December 2004. The negotiations are formally opened in October 2005 and are underway. In June 28th, 2005 Turkey signed an Ankara Protocol extending its Customs Union to 10 member states in 2004 but it refuses to apply it to Cyprus. Turkey also refused to open its ports and airports to Cyprus.

The negotiations have not progressed a lot because of the Turkish attitude but also because of the **reluctance of some EU Member States, especially Cyprus, France and Germany.** Nicolas Sarkozy said he was opposed to the EU-Turkey accession preferring a privileged partnership. Angela Merkel has also demonstrated hostility to Turkish EU Membership. European public opinion is generally unfavorable.

14 negotiation chapters out of 35 have been opened and among them only one chapter („Science and Research") has been closed until January 2014. The EU suspended accession talks on 8 chapters because Turkey had refused to implement the Ankara Protocol to Cyprus. In June 30th, 2010 the chapter „Food Safety, Veterinary & Phytosanitary Policy" was opened. In 2011 the Commission requested further efforts to guarantee fundamental human rights (freedom of expression, women's rights, freedom of religion).

Turkey has frozen relations with the European Union in the second half of 2012 during the Cypriot Presidency and the Commission responded by emphasizing the need to respect the Presidency, so the European institutions. In May 2012 **Positive Agenda** intended to bring fresh dynamics into the EU-Turkey relations was launched. In June 25th, an agreement in principle for reopening of negotiations was reached at the European Council thanks to France's more favorite attitude.

On the 28th June 2013 Germany, the Netherlands and Austria refused further negotiations by criticizing the violent repression of demonstrations in Istanbul. Member States have decided to wait for the report of the Commission in October 2013 for the reopening of negotiations. EU and Turkey opened Chapter 22 „Regional Policy" of the accession talks in November 2013, which ended a three-year freeze mainly due to Turkey's long-standing dispute with Cyprus. [1]

The **Turkish public opinion is less favorable** given the slow pace of accession negotiations. The Turkish government plays increasingly important role of a **regional power in the Middle East.** It is getting closer to the Turkic states of Central Asia and the **Shanghai Organization** (Russia, China) without, however, considering its membership at the moment.

FYROM

The Former Yugoslav Republic of Macedonia has a population of 2.1 million inhabitants and an area of 25,713 km2. Its fertility rate is 1.6 and does not allow the renewal of generations. The population will decrease in 2025. The Albanian minority represents a quarter of the population. GDP in terms of purchasing power standard per capita is 36% of that of the EU. Corruption is important.

FYROM signed a Stabilization and Association Agreement with the European Union in April 9th, 2001. The problems of the Albanian minority were settled by the Ohrid Framework Agreement (August 2001) which set the groundwork for improving their rights and presence in institutions. The European

[1] EU calls for more chapters in accession talks with Turkey, in http://news.xinhuanet.com/english/world/2013-11/09/c_125675332.htm

Council of 16th December 2005 decided to grant the status of candidate country.[1] **The Commission recommended the opening of accession negotiations in October 2009, 2010, 2011, 2012, 2013.**[2] The dispute with Greece over the name Macedonia delays the opening of accession talks despite the arbitration attempts of the UN. The Commission Reports in 2009-2013 state that the **FYROM fulfills the political criteria for membership.** The 2012-2013 report notes that the country still faces **several challenges** such as freedom of expression, rule of law, ethnic relations, electoral reform, reform of public administration, strengthening the market economy and good neighborly relations.

MONTENEGRO

It is the least populated Balkan country with 600,000 inhabitants and an area of 13,812 km2. Fertility is 1, 9 and population growth is expected in 2025. GDP per capita per capita in purchasing power standard is equal to 43% of that of the EU. Corruption is high. In 2006 Montenegro is declared independent from Serbia by a referendum. In October 2007 a Stabilization and Association Agreement with the EU was signed and had been implemented since May 2009. In December 2008 Montenegro applied for EU membership and the **candidate status was granted in December 2010. Accession negotiations started in June 29th, 2012.**

The Progress Reports of the Commission of 2012-2013 emphasized the need to make further efforts **to improve the rule of law and fight against organized crime and corruption.**[3] The Commission complains about the attitude of Montenegro who enjoys the Visa liberalization granted to the Western Balkan countries to grant visas improperly in order to facilitate requests for political asylum in the EU.

SERBIA

Serbia has a population of 7.3 million inhabitants and an area of 77 474 km2. The fertility rate is 1.4 and the population is estimated to 6.8 million in 2025. The GDP per capita in purchasing power standard is 35% and it is the weakest one among the EU candidate countries. Corruption is a major problem.

Serbia is firmly committed to joining the EU with the election of a pro-European President Boris Tadic in 2004 and the success of parties supporting the European rapprochement in parliamentary elections in 2008. Cooperation of Serbia with the International Criminal Tribunal for the former Yugoslavia was decisive with the arrests of Radovan Karadzic, Ratko Mladic and Gorad Hadzik accused of genocide and crimes against humanity. Election of nationalist **Nikolic Tomislav** as the President of Serbia in March 20th, 2012 against Boris Tadic has not challenged the European orientation of Serbian politics.

Serbia applied for the candidate status in December 22nd, 2008 and was granted it in March 1st, 2012. The opening of accession negotiations is mainly due to the agreement with Kosovo signed in April 19th, 2013 and approved by the Serbian Parliament in April 26th. The 15-point agreement has seven pointes related to Kosovo law applicable to the whole territory. Kosovo has granted **large autonomy** to its northern part with mainly Serb population. The European Council of June 2013 authorized the opening of negotiations which really started in January 2014. [4]

ICELAND

Iceland has a population of 320,000 inhabitants and an area of 103,125 km2. The fertility rate is 2.2 and the number of people is expected to grow in 2025, despite a negative net migration rate. The GDP per capita in purchasing power standard is 110 compared to the EU. This is by far the least corrupt candidate country. Iceland belongs to the European Economic Area (EEA) and the Schengen area.

[1] FYROM in http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/index_en.htm
[2] Progress Reports in http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/index_en.htm
[3] Montengro in http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/index_en.htm
[4] Serbia in http://ec.europa.eu/enlargement/countries/detailed-country-information/fyrom/index_en.htm

Iceland was the **victim of a major financial crisis in July 2008.** This has forced the Parliament to adopt in July 16th, 2009 a resolution supporting a candidate application for accession to the EU. The government formally applied for EU membership in July 27th, 2009 and the European Council of 16th – 17th July 2010 decided to open negotiations that started in October 2012. The 2012 report of the Commission stated that „the European Union would be enriched by the robust democratic reputation of Iceland." The negotiations have progressed well since half of the chapters have been opened and ten are closed. The main obstacle to negotiations is the issue of fisheries. The economic and financial situation has improved after the dark 2008 and 2009 years where the GDP fell by 18.9% and 15.8% respectively. This resulted in a shift of public opinion and politicians' vis-à-vis the European Union. The negotiations were suspended in mid-January 2013 at the initiative of Iceland. The parliamentary elections of April 27, 2013 were won by the two centre-right opposition parties with the Eurosceptic Gunnlaugsson, the leader of the Progressive Party. The negotiations were suspended permanently in June 14th by the new right-wing government. In September 12th, the Minister of Foreign Affairs Gunnar Bragi Sveinsson **declared suspension of negotiations during all legislative session.**

2) POTENTIAL CANDIDATE COUNTRIES

Albania, Bosnia-Herzegovina and Kosovo are potential candidates because of the EU commitments of the European Union towards the Western Balkans.

Albania submitted its application in April 25th, 2009. The General Affairs Council imposes meeting of 12 key priorities in the areas of democracy and the rule of law. The government has adopted with the help of the Commission an action plan addressing the 12 key priorities the achievement of which is imperative for a "candidate country" status. In June 12th, 2006, Albania signed a Stabilization and Association agreement which entered into force in April 1st, 2009.

Bosnia and Herzegovina is undermined by political instability. Therefore it requires the presence of a High Representative of the UN, an EU Military mission (EUFOR/Althea) and an EU Police Mission (EUPM). Corruption is widespread. Its symbol is the arrest of the President of the Bosniak-Croat Federation Zivko Budimir in April 26th, 2013 who has since been released by decision of the Constitutional Court. The economy is in crisis and the underground economy is booming. Bosnia and Herzegovina signed a Stabilization and Association agreement in June 2008.

Kosovo declared its independence in February 17th, 2008 and was recognized by 99 countries including 22 EU members. The country is plagued by corruption which is inside the top of the state. The protection of the Serbian minority should be ensured. The situation is getting clearer since the agreement between Serbia and Kosovo was signed in April 19th, 2013. Instability in the country requires the maintenance of KFOR (a NATO-led international peacekeeping force) and the EU Rule of law mission (EULEX) in charge of strengthening the rule of law and training of police, justice and customs staff. The Commission recommended to start negotiations for a Stabilization and Association Agreement in June 2008, but **they have actually started only in October 28th 2013.**[1]

3) CONSEQUENCES OF FUTURE ENLARGEMENTS ON THE EUROPEAN UNION

The European Union will undergo significant enlargement with the accession of Iceland, the Western Balkans and possibly Turkey. By 2030 it could comprise more than 36 member states, including one with an 80 million population (Turkey) and seven with less than 4 million inhabitants. Its population may reach 600 million of citizens.

The questions over the EU governance will arise again. The rotation of Commissioners will be no longer appropriate given that a majority of member countries have small populations. The distribution of the number of parliamentary representatives between the Member States should be reviewed with the need to set up lower thresholds for the less populous Member States.

[1] EU starts the Stabilisation and Association Agreement negotiations with Kosovo
http://europa.eu/rapid/press-release_MEMO-13-938_en.htm

The **issue of the EU budget** will come up again. Additional funding will be needed. The New Member States will be net beneficiaries because of their economic backwardness and the EU is expected to fund new policies such as the European Security and Defence Policy (ESDP) or the fight against global warming. Allocation of green taxes (carbon tax, sale of greenhouse gas emission allowances, etc.) would provide the budget with additional resources without extra taxation of new European citizens.

Cohesion policy based on financial solidarity and support to the regions and less developed countries may be totally affected to new Member States while the members of the former **EU-15 have their own disadvantaged areas**. It may need an additional funding. The Common Agricultural Policy (CAP) as it currently stands will be the most inappropriate European policy to those new memberships. It must be completely reformed but how? It is at risk of being renationalized as a result.

Furthermore, it will be increasingly difficult to cope with **social dumping** along with relocations. Transitional arrangements for the **free movement of workers** should be amended from current 7 years for a longer period for all EU New Member States.

The adoption of the Euro as the single currency within the EU will require much more time because of differences in GDP that will increase significantly.

CONCLUSION

The European Union has 28 members since Croatia became a member in July 1st, 2013. The enlargement to Iceland is delayed by the suspension of negotiations decided by the Icelandic government.

The enlargement of the **EU to the Western Balkans is positive** because it will stabilize the region. It will provide a solution to the problems of minorities such as the Roma. Recognition of Serbia as a candidate state and the **EU accession negotiation with Serbia** are very positive achievements resulting from the agreement with Kosovo. The enlargements to those countries will need from 10 to 15 years.

The issue of Turkish membership is very complex. It is not progressing much **because of both sides.** The EU delays the negotiations because of Cyprus, France and Germany unfavorable for Turkish membership but left the negotiations to continue. On the other hand Turkey does not respect the Ankara Agreement, appears reticent with regard to Armenia, slows down reforms and demonstrated undemocratic attitude during the demonstrations in June 2013. The membership of Turkey to the EU will have several advantages: demographic, geopolitical, geostrategic and economic. By shifting the borders to Iraq, Iran, the Caucasus and Syria, the EU would have many new responsibilities it could not take on without becoming a real political power.

The issue of the Eastern borders of the EU can be addressed by the Neighbourhood Policy through the Association Agreements with Ukraine, Georgia and Moldova. The EU should also provide a new policy to Russia by offering to join the internal EU market. The Euro would gradually become the exchange currency to be then adopted in the internal EU market.

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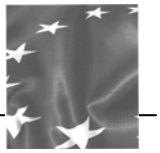

United Kingdom Attitudes to European Union Enlargement

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Abstract: The UK was an enthusiastic advocate of EU enlargement up until 2004. In 2001, 8.3 per cent of the UK population was foreign-born; by the beginning of 2014, it was 13 per cent. In the decade between 2004 and 2014, the immigration issue rose up the list of concerns voiced by the general public, and in consequence it grew in political importance. EU enlargement came to be associated with mass immigration, in spite of the fact that immigrants from EU countries account for only one third of the total. In consequence, the UK now sets a slow-down in the enlargement process as a condition of continued membership of the EU.
Keywords: enlargement, immigration, employment.

The writing of this paper commenced on 31 December 2013 and it was completed in the early part of January 2014. From this perspective, a survey of UK attitudes to EU enlargement seems to fall (like much else) into three parts. In the first place, a warm welcome was given to the accession of eight ex-Soviet satellites in Central/Eastern Europe, in 2004. This positive attitude, though, must be set against the long-standing scepticism of a rather large section of the British population that never had quite reconciled itself to membership of the European Community, let alone of the Union. Secondly, following the influx of large numbers of Poles, in particular, into the UK in 2004 and subsequently there was both a feeling on the right of the political centre that immigration had had largely negative effects, and a left-of-centre confidence in the positive pay-off from enlargement and from the fact the UK had received the lion's share of immigrants. As 1 January 2014 approached with the lifting of controls on immigrants from Romania and Bulgaria, the right-of-centre voices grew more strident. The third part of this survey can only be undertaken and understood in consideration of these first two parts since it concerns UK attitudes (to the extent that these can be generalized) towards further enlargement in the medium to long term.

PART 1: BEFORE 2004

Former Social Democrat Chancellor (1974-82) of what was then West Germany, Helmut Schmidt, had this to say in an interview just before Christmas 2013:

> I had been very disappointed by Harold Wilson and Margaret Thatcher. I had thought it was absolutely necessary to include Britain into the European Community. It happened in the end under Ted Heath. He was the only British leader who believed in Europe. The others only paid lip service. Neither Harold Wilson nor Margaret Thatcher wanted the EC to be a success; they only wanted a thumb in the pie.

When he was asked whether he thought Britain would ever adopt the common currency, he replied:

> I don't know. I don't know whether I would like Britain to join. The British are very stubborn. The Queen, the Commonwealth and the special relationship with the US is much more important than Europe. Britain still believes in the old values and it has every right to do so. Britain is less European-minded than Greece.[1]

Helmut Schmidt was right: Britain never has been 'European-minded', and he put his finger on the reasons for British scepticism. He was looking rather far back, though: in talking about Wilson, Heath, and

[1] Helmut Schmidt, 'Britain has a problem; you can be hurt', in an interview with Larry Elliott, London: *The Guardian*, 23 December 2013.

Thatcher, he neglected to mention the genuine delight in Britain at the events of 1989. This delight is reflected in the measured tones of journalist Peter Jenkins writing on Valentine's Day, 1989:

> Caught up in the heady excitement of history-making, the talk is of crossing Rubicons. Perhaps that fatal crossing took place this weekend when the Central Committee of the Hungarian Socialist Workers Party opted for 'the pluralisation of the political system…in the context of a multi-party system'. Whatever that turns out to be exactly, it would seem to mean the end of one-party rule in the classic communist manner.[1]

It meant precisely that: within a year, the 'iron curtain' was no more. From that time until 2004, Britons shared Prime Minister John Major's positive attitude towards the eventual EU membership of the eight newly-free states. He expressed himself thus in his autobiography: 'I was a convinced advocate of enlargement as a historic obligation to nations we had left on the wrong side of the iron Curtain.' Then he went on to say: 'But I did not relish changes that diminished the prerogative of the British Parliament.'[2] Major's Euro-enthusiasm always was tempered by his alertness to scepticism on his own back benches, and it justifies Robin Cook, Foreign Secretary in the 1997-2001 government of Tony Blair, in his estimate of Blair as 'arguably the most pro-European Prime Minister in modern times, certainly since Edward Heath…It is to Tony Blair's credit that in his first term of office he transformed Britain's relations with Europe.'[3]

Meanwhile, though, the United Kingdom Independence Party (UKIP) had been established in 1993, 'dedicated to Britain's withdrawal from the European Union'. The party in Reigate, Surrey, cited in a 1997 election communication a Daily Telegraph poll in which (unsurprisingly) 'only 10% voted for a European Superstate'.[4] In the same election year, and in the same Reigate constituency, Conservative MP, Sir George Gardiner, stood for Parliament in the name of the newly-established Referendum Party. His fear was that whichever government was returned in the general election of 1997, the pound would be 'scrapped', and Britain would 'stay trapped on this escalator to a European Super-State, our fishermen betrayed, our farmers sacrificed, diktats flowing from Brussels and the European Court negating our democratic laws.'[5]

The Referendum Party sank without trace, and, though UKIP was the beneficiary, and though it won three seats in the 1999 European Elections, UKIP was still some years from being a serious influence on politics at a national level. The Conservative Party under William Hague (1997-2001) was itself more 'eurosceptic' than ever, pledging to oppose adoption of the single currency 'during the next parliament', and to 'reject a federal United States of Europe'. At the same time, it was acknowledged that: 'Conservatives are committed to British membership of the European Union. We will make the EU work for Britain's interests. Conservatives will: create a flexible Europe of Nation States; [and] bring the new democracies into the European Union'; indeed, 'We will press for the new democracies of Eastern and Central Europe, Cyprus and Malta, to be allowed to join the European Union as a top priority'.[6]

It may be that the enthusiasm for enlargement on the right and the left of politics at the turn of the millennium was not unconnected with the concurrent anxiety about European federalism: 'The larger the European Union, the less likely it is to develop into a true political union.' This might well have been the thinking. 'It's no coincidence that the British, whose vision of the EU is little more than a free-trade zone, are the biggest apologists for enlargement'.[7] So wrote a contributor to an EU online debate. After all, surely, countries that had laboured for so long under the yoke of Moscow would not tolerate direction from Brussels; on the contrary, they would be allies in the right-of-centre campaign for a 'Europe of nation states'. Be that as it may, it is worth adding as a tailpiece to this section some further supporting evidence for Schmidt's contention that Britain has never been very 'European-minded'. In a 1999

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[1] Peter Jenkins, 'Hungary's new tomorrow', London: *The Independent*, 14 February 1989
[2] John Major *John Major: The Autobiography*, HarperCollins Publishers, 1999, page 581
[3] Robin Cook *The Point of Departure*, London: Simon & Schuster, 2003, pages 130,131
[4] UKIP, in an 'Election Communication – Reigate Constituency', Redhill, Surrey, 1997
[5] Referendum Party, 'Alert to the British People', London: The Referendum Party, 1997
[6] Conservative Party, 'In Europe, not run by Europe', Election Communication, South East Region, 1999
[7] 'Arguments for and against enlargement', www.debatingeurope.eu, 2014

Eurobarometer survey of feelings of identity with one's home country, or with Europe, 67 per cent of respondents in the UK ticked the 'nationality only' box, and only 24 per cent ticked the 'nationality and European' box; in so doing, the UK was the highest among EU countries in the former category, and lowest in the latter.[1]

PART 2: FROM 2004 UNTIL 2013

It is hazardous to predict trends in patterns of migration, nevertheless, in 2003 the Blair government commissioned research into the likely inflow of immigrants following the accession of ten countries to the EU in May 2004. The prediction offered by economist Christian Dustmann[2] and his research team was that perhaps between 5,000 and 13,000 nationals from the E10 would arrive in each year after enlargement. In fact, according to Jill Rutter, 540,000 accession-state nationals had migrated to the UK by 2008. Although ministers did not endorse Dustmann's findings, Rutter says, 'the then government did not listen to other advice',[3] and, in consequence, the UK, along with Sweden and Ireland, did not impose entry restrictions.

A Worker Registration Scheme (WRS) was introduced in the UK, however, and, according to Home Office estimates, some 600,000 migrants from the new member states applied to join the scheme within the first two years after accession. [4] If it was difficult to predict migrant numbers, it was equally difficult to count net inflow in and after 2004. This is amply demonstrated on a European Citizen Action Service (ECAS) website, where it is variously stated that 'there were, by the end of 2006, 685,000 EU8 nationals employed in the EU15, of which 34 per cent were in the UK'; 'between May 2004 and December 2006 around 487,000 EU8 nationals entered the UK labour market'; and 'in summer 2006 it was reported that the UK had received over 1million citizens from the new member states since the 2004 enlargement'.[5] This last suspiciously round number was a media over-statement following reports of strains on local services, and the voluntary repatriation of destitute Poles on the streets of London (Poles accounted for something like two thirds of all immigrants in 2004) – but it might not have been a wild over-statement. In addition to data from the WRS, we have the numbers of employees and of the self-employed who were obliged to register for a National Insurance number. Blanchflower and Lawton give us figures up to 31 March 2008, which include migrants from new members Romania and Bulgaria: 812,000 applicants were approved on the WRS from the E10 countries, and 38,620 from the new E2, giving us a total of 844,620; from all twelve countries, 879,168 applied for, and received, NI numbers – so the authors are justified in saying that 'since 2004, nearly 900,000 workers from these countries registered to work in the UK'.[6] The British National Party put the figure of 'illegal immigrants and "asylum seekers" in Britain' at 2 million[7]; UKIP went further, and claimed that 'under the last Labour government over 3,000,000 immigrants were allowed to enter this country'.[8]

Responsible commentators noted that migrants from EU countries only accounted for around one third of the total net inward, non-British, migration to the UK, and that the evidence was that migrants from Eastern Europe entered the UK in search of work, not in order to claim welfare benefits.[9] Such

[1] Alexander B. Murphy, 'The May Enlargement of the European Union: view from two years out' www.colorado.edu/geography/class_homepages, 2007
[2] Christian Dustmann et al. 'The impact of EU enlargement on migration flows', London: Home Office Online Report 25/03
[3] Jill Rutter 'Bulgaria, Romania, concerns about immigration and attitudes to EU membership', www.leftfootforward.org, February 2013
[4] House of Lords: European Union Committee, 'The Further Enlargement of the EU: threat or opportunity?', London: The Stationery Office Ltd., November 2006
[5] ECAS, 'Who's afraid of the EU's latest enlargement? The impact of Bulgaria and Romania joining the Union on the free movement of persons', www.ecas-citizens.eu, 2008
[6] David G. Blanchflower and Helen Lawton, 'The Impact of the Recent Expansion of the EU on the UK Labour Market', Kiel: Leibniz Information Centre for Economics, IZA Discussion Paper No. 3695 page 2
[7] BNP Election Communication, England North West Region, Welshpool: British National Party, June 2004
[8] UKIP publicity in the North West, 2011, www.ukip.org
[9] Open Europe, 'Open Europe submission to the UK Government's Balance of Competence Review: Free Movement of Persons', www.openeurope.org.uk, July 2013

evidence was provided by a Department of Work and Pensions finding of February 2011 to the effect that just 6.6 per cent of non-UK citizens were claiming benefits, compared with 16.6 per cent of UK nationals – and EU citizens barely figured even among the 6.6 per cent: the majority of claimants were from India, Pakistan, Somalia, and Bangladesh. Migrant workers from the EU8 countries were net contributors to the public purse.[1]

Blanchflower and Lawton pointed out that the average age of EU migrants was 20.1 years; that they were generally 'highly educated'; and that only 7 per cent had dependants. They came to this glowing conclusion, in 2008:

> The fact that the UK opened its borders to a flow of highly-skilled, motivated, educated, low-cost mobile workers upon EU enlargement was a stroke of genius for which the UK government should be given credit… Contrary to the fears of some, these recent post-enlargement arrivals from Eastern Europe appear to have had no difficulty in assimilating into the native population who have welcomed them with open arms.[2]

This overstates the case: the House of Lords European Union Committee came to the more realistic conclusion that 'there is a sharp contrast between public perceptions (and some political rhetoric) about the impact of the last round of enlargement and the assessment of it by most experts'.[3] The Committee cited the results of a Eurobarometer survey ('The Future of Europe'), undertaken in May 2006: 49 per cent of UK respondents agreed that 'enlargement has been a positive thing', whilst 64 per cent felt that 'it increases problems in the job market'. The UK Government was so disturbed by signs of public unease about the free movement policy that, though it had been among the first to grant free access to workers from the E10 in 2004, it announced in October 2006 that restrictions would be applied for the maximum permissible seven years for workers from Romania and Bulgaria.

It has become the accepted narrative that the government of Tony Blair grossly under-estimated the number of migrants who would choose to register for employment in the UK in 2004. Ed Miliband, leader of the present-day Labour opposition, said this, in a speech to the Institute for Public Policy Research in June 2012:

> When I was running for the Labour Party leadership, I said that one of the areas where we had got things wrong and needed to change was immigration....The truth is that the public were ahead of us in seeing some of the problems caused by the rapid pace of migration, especially from the expanded EU.[4]

Of course, the coalition government was not slow to agree that Labour had 'got it wrong'. Such is the consensus, that, as 1 January 2014 approached, Cameron announced that extra controls would be placed on welfare benefits for new arrivals. Even Peter Dominiczak in the Daily Telegraph admitted that these new rules were 'rushed out' to 'make the UK a less attractive place for EU migrants'.[5] Others mocked Cameron for dressing up in UKIP's clothes. If this was, indeed, his motive it was well judged since recent 'polls have suggested that the rise in popularity of UKIP is due to the growing unease over the impact of migration on Britain, more than dislike of the European Union as a whole'.[6]

In a recent BBC Panorama programme it was estimated that 100,000 Romanians and 57,000 Bulgarians would seek work in the UK. Nigel Farage of UKIP was quoted as saying that London was experiencing a 'Romanian crime wave'; the London district of Cricklewood was singled out as one where Romanians, many of them Roma, form 'an underclass'; and Slough, west of London, was featured as a borough 58 per cent of whose residents are non-native, 'and the people of Slough are sick of it. There are Sloughs up and down the land', it was said.[7]

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[1] Tim Harford 'A "simple rule" about migrants and benefits', www.ft.com, March 2013
[2] David G. Blanchflower and Helen Lawton, op. cit., pages 16,17
[3] House of Lords: European Union Committee, op. cit.
[4] Ed Miliband, 'Ed Miliband's immigration speech in full', 22 June 2012, www.politics.co.uk
[5] Peter Dominiczak, 'Vince Cable compares David Cameron to Enoch Powell', London: Daily Telegraph, 22 December 2013
[6] Tim Ross, 'Ed Miliband: Labour will cut immigration if we win next election', London: The Daily Telegraph, 22 September 2013
[7] 'The Romanians are coming?', London: BBC Panorama, 16 December 2013.

There can be no question but that what Business Secretary Vince Cable has called 'immigration panic' conditions much UK thinking about the EU in general, and about EU enlargement in particular.

PART 3: AFTER 2014

The UK was one of the most outspoken advocates of EU enlargement under Labour and Conservative governments before 2004. In the 1990s, Conservative Prime Minister John Major looked ahead to an EU that would stretch as far as the Urals. 'No-one could explain how he proposed to persuade the Russians that their country should be divided,' Julie Smith observes, 'but the message was clear: a wider Europe would inevitably mean a looser Europe and should therefore be encouraged.'[1] In 1999, Tony Blair championed the cause of Romania and Bulgaria; and perhaps the one product of the UK's presidency of the Council, in the second half of 2004, was that negotiations with Turkey on its possible accession to the EU were begun as planned on 3 October 2004.

The House of Lords EU Committee, back in 2006, had been large-minded:

> We believe that it would be politically undesirable for the EU to attempt to define its final boundaries and also that it would be a mistake for the EU to impose an artificial "pause" on enlargement. We urge Member States to keep their commitments to offer full membership to both Turkey and the countries of the Western Balkans if and when they are ready to assume the obligations of membership.[2]

It noted ruefully, though, that only Poles and Lithuanians supported Ukrainian membership, and no member was a conspicuous advocate of the accession of any of the countries of the Caucasus region. Furthermore, whilst some acknowledged the benefits of Turkish accession, 'these seem to count for little at the level of the general public'.

EU leaders had promised the countries of the Western Balkans that they would join the Union on the condition that they fulfilled the Copenhagen accession criteria; this was at the EU-Balkan 'summit' meeting in **Thessaloniki in 2003.** Macedonia was accepted as a candidate country at the end of 2005; Stabilisation and Association Agreements were signed with Albania in June 2006, and with Serbia and with Bosnia-Herzegovina in April and June 2008, respectively. Croatia, the second of the nations of former Yugoslavia to accede, was admitted as a full member of the EU in July 2013. It was observed on the BBC 'News Europe' website on accession day, that: 'The welcome for Croatia was somewhat muted as surveys suggested that **"enlargement fatigue" and anxiety about migrant workers were widespread in Europe'**.[3] On the same site, outstanding issues inhibiting EU membership were listed for each of the 'next seven' accession countries (including 'corruption', 'human trafficking', the 'need to consolidate the rule of law', and 'organized crime').

It was reported by the BBC that: 'The UK Foreign Office says it expects Turkey to be ready for membership "in a decade or so"'. Even that distant date may be in jeopardy: Egenem Bagis, Turkish minister for EU affairs in 2013, has said that his country must accept that 'its long-cherished goal of joining the EU was likely to end in disappointment'.[4] Among other reasons given for this pessimism (**Iceland's withdrawal** from accession negotiations, rising anti-EU sentiment among existing members) was cited the forthcoming **referendum on EU membership promised by David Cameron**, following a Conservative Party majority in the General Election in 2015. The promise was given in response to a fairly constant noise from the Conservative Party back-benches, **UKIP success** in local council elections in May 2013 (when the party won, on average, 25 per cent of the vote), and incendiary stories about immigrant numbers in the right-of-centre press. Cameron has undertaken to re-negotiate EU treaties, in such a way as that he will be able to campaign for an 'In' vote in the 'in-out' referendum – and it is

[1] Julie Smith, 'How to lose friends and influence – the UK and the new EU member states', The Federal Trust, www.fedtrust.co.uk, January 2006

[2] House of Lords: European Union Committee, op.cit.

[3] BBC 'EU Enlargement: The next seven', www.bbc.co.uk, 1 July 2013

[4] Alex Spillins, 'Turkey "will probably never be EU member"', London: The Daily Telegraph, 21 September 2013

becoming clear what at least one of the conditions for his positive vote will be. According to Ian Traynor, the Guardian's correspondent in Brussels, Cameron hinted at an EU 'summit' on 20 December 2013 that **Britain might veto the admission of new member states unless curbs on 'mass population movements' were introduced, although, Traynor adds, 'there is no prospect of any further countries joining the EU over the next decade'.**[1] Apparently, Cameron envisages slowing down access to the labour markets of 'old' member-states until the wage levels and GDP of 'new' countries is at a level that would obviate large-scale 'economic migration'.

'It's a big reversal of Britain's [EU] enlargement policy,' one EU official is quoted as having said. 'The UK has always been the champion of enlargement. That's changed'.[2]

Indeed it has: it is ironical that it should have changed at a time when it was feared there would be an influx of Romanians and Bulgarians into the UK, when the fact is that there were already 160,000 Romanians and Bulgarians in the UK before 1 January 2014. What has changed is that we are now talking about it. In a BBC programme entitled 'The Truth About Immigration', Gus O'Donnell, Cabinet Secretary 2005-2011 admitted to presenter Nick Robinson: 'There wasn't a lot of discussion about what enlargement would mean for immigration'.[3] **Enlargement has come to be synonymous with immigration, and that has dulled what enthusiasm for enlargement the UK once showed.** If the UK had reasons of its own for this enthusiasm, it is not now alone in its wish to slow the enlargement process; as Cameron rather pointedly reminded ministers at that same Brussels meeting, before a candidate country is admitted to the EU, the unanimous agreement of all 28 member countries is required. None of the 'next seven' can count upon that level of support.

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[1] Ian Traynor, 'Cameron urges curb on EU freedom of movement', London: The Guardian, 21 December 2013

[2] Ian Traynor, ibid.

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Le concept européen d'un système de justice adaptée aux enfants et ses développements en Albanie, en perspective d'adhésion a l'Union Européenne

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Abstract: The purpose of the juvenile justice system is to develop a suitable answer to crime and offenses committed by minors, which must be unique and special just for them, compared to adults. Ensuring the best interests of the child is essential. In many European countries, the main objectives of the juvenile justice system are: to make the minor accountable for their actions, to promote effective prevention, balanced attention to the offender, the victim and the community, to make effective decisions based on the risk of crime, for a better rehabilitation and reintegration of children into society.
Keywords: EU enlargement, juvenile justice, children's rights.

Dans la plupart des pays européens, les objectifs principaux du système de justice pour mineurs sont les suivantes: faire les mineurs responsables de leurs actes; prévenir efficacement; protéger le public contre tous les actes et les comportements criminels; faire attention au délinquant, la victime et la collectivité; imposer des sanctions en proportion de la gravité de l'infraction.

La 28e Conférence des Ministres européens de la Justice tenue à Lanzarote, a adopté la Résolution nr. 2 sur la justice des mineurs. Ceci a été précédé par le Conseil de l'Europe pour préparer des lignes base sur la justice des mineurs. Le Parlement européen a adopté une résolution sur la base de la Charte européenne des droits de l'enfant[1]. Puis, en 1996, il a été complété par une série de mesures relatives à la protection des enfants et pour la lutte contre l'exploitation sexuelle, par les institutions européennes. Le développement de la justice des mineurs en Europe est associé à la réception des responsabilités par les enfants et leurs familles, les parents dans les cas d'enfants qui commettent des crimes et dans le même temps par le développement de la justice réparatrice comme l'un des moyens alternative à la justice pénale, qui donne une place particulière pour la victime, la communauté et toute la société. Entreprendre des politiques communes en matière de prévention et de traitement de la délinquance juvénile est important. Aujourd'hui, en Europe, on trouve de nombreux exemples de la justice pour les mineurs. Chaque jour, résultent de nombreux formes de criminalité et de la délinquance juvénile et que ce phénomène a augmenté. Selon l'UNICEF, 1,1 millions d'enfants dans le monde sont aujourd'hui en prison. De nombreux pays ont mis en place des tribunaux pour mineurs, des unités spéciales de la police ou des procureurs pour les affaires de mineurs, il y a des procédures spéciales pour le traitement des mineurs, etc. Les éléments principaux du système de la justice pour mineurs sont: prévenir la délinquance juvénile; procéder judiciairement et quand il ya de l'espace la possibilité de régler par la médiation des conflits, l'âge minimum pour la responsabilité pénale; les garanties d'un procès équitable; la restriction et la privation de liberté, y compris la saisie, la détention et la peine d'emprisonnement. L'âge minimum de la responsabilité pénale en fonction des rapports que les États parties de la Convention des Nations Unies relative aux droits de l'enfant soumissent au Comité des Nations Unies, varie d'âge 7-8 ans à 14-16 ans. Fixer un âge minimum pour la responsabilité pénale, veut dire que les mineurs qui ont commis l'infraction prévue à cet âge ne peuvent être tenus responsables selon la législation et la procédure pénale. Mais pour le meilleur intérêt du cette catégorie des mineurs, on peut prendre des mesures spéciales de protection. Alors que pour les enfants au minimum ou au-dessus de la responsabilité pénale mais moins de 18 ans, ils sont susceptibles de sujets de droit et de la procédure pénale[2]. Il est également considérées totalement

[1] Résolution du 8 Juillet 1992, nr. C 241
[2] Le paragraphe 31 de l'Observation générale no 10 (2007) du Comité des Nations Unies sur les droits de l'enfant.

inacceptable sur le plan international, la détermination de l'âge minimum de la responsabilité pénale de 12 ans[1]. Parmi les garanties d'un procès équitable on comprend l'absence de la rétroactivité de la justice pour mineurs, la présomption d'innocence, le droit à l'information au cours de leur détention ainsi que lors de l'interrogatoire par l'officier de police, le procureur ou le juge. Cela signifie que l'enfant, pour participer efficacement à la procédure, doit être informé non seulement de la charge, mais aussi avec l'ensemble du processus et les mesures punitifs. Des autres garanties sont: le droit à la participation effective à la procédure, le droit à l'information le plus rapidement et directement dans la procédure, le droit à une assistance juridique au cours de sa défense et le droit à la protection de sa vie privée et la correspondance. Pour les enfants en conflit avec la loi, il est largement reconnu que le calendrier et le temps du procès doit être effectuée le plus court possible, en raison de non-stigmatisation. Le principe de l'égalité des armes[2] revêt une importance particulière dans l'administration de la justice pour mineurs. Au cours de la privation de liberté des mineurs, il devrait fournir une assistance éducative, psychologique et médicale, s'il est nécessaire pour faciliter sa réhabilitation. La détention des mineurs par la police s'ordonne comme un dernier recours pour le temps et le plus court possible. Mais l'arrestation provisoire ou la détention d'un mineur ne peut excéder une période de 24 heures.

Lors de sa réunion nr. 1134 (15 Février 2012) le Comité des Ministres du Conseil de l'Europe, a adopté une nouvelle stratégie sur les droits de l'enfant de 2012 à 2015, où l'un des objectifs était de promouvoir un système de justice plus adaptée aux enfants. Dans le plan d'action de la stratégie pour "les enfants qui souffrent de la peine d'emprisonnement" est déterminé "à promouvoir et à évaluer la mise en œuvre par tous les États membres du Comité des Ministres la Recommandation 11(2008) sur les Règles européennes pour les délinquants mineurs[3] aux sanctions et mesures punitives".

Aujourd'hui, en dépit du fait que de nombreux documents internationaux importants sont adoptés au niveau mondial pour les droits des enfants et leur accès à la justice internationale, encore une fois, ils ne sont pas correctement reconnus et que les enfants n'ont pas la même protection dans tous les pays. L'accès à la justice internationale des jeunes et des enfants, n'est pas une chose si simple perçu à se développer. Les lignes du Conseil de l'Europe pour une justice adaptée aux enfants sont basées sur cinq principes fondamentaux: la participation, le meilleur intérêt de l'enfant, la dignité, la protection contre la discrimination et la priorité du droit.

ACCES AU SYSTEME JUDICIAIRE POUR LES ENFANTS

Même si elle est acceptée que les enfants sont légalement détenteur des droits, le fait est que, pour beaucoup d'entre eux efficacement cette approche est absent, pour des raisons telles que l'âge, des coûts financiers qui nécessitent des procédures judiciaires, les conflits d'intérêts avec les parents, le manque d'information, les obstacles de la législation nationale, etc. L'accès à la justice et la consultation juridique aux mineurs, sont étroitement liées les unes aux autres, et elles sont très importants dans cette démarche[4]. Il est également important que l'enfant soit traité en tenant pleinement compte de l'âge, la maturité et la capacité émotionnelle et intellectuelle, afin de comprendre les procédures, il est impliqué et participer à eux. Comme le jugement de la Cour européenne des droits de l'homme (CEDH), les États devraient prêter attention aux cours d'un processus, que les intérêts du témoin mineur et de la victime ne sont pas menacés. Par exemple, lorsqu'il s'agit de juger la violence sexuelle contre un mineur, les mesures pour protéger la victime doivent être tel qu'il convient également de garantir une protection efficace. L'interrogatoire des mineurs doit être effectué en présence d'un psychologue afin d'éviter la victimisation des mineurs par processus de préjugés. Les exemples de la jurisprudence de Strasbourg, ont mis en évidence la nécessité de la formation des professionnels et des personnes qui s'occupent des mineurs, dans différentes situations et problèmes. De même, l'éducation des enfants avec l'idée d'être actif, de participer

[1] Expressément spécifié dans le paragraphe 32 de l'Observation générale no 10 (2007) du Comité des Nations Unies sur les droits de l'enfant.
[2] Article 40/2 paragraphe 'b' de la CDE
[3] https://wcd.coe.int/ViewDoc.jsp?id=1367113&Site=CM
[4] Voir le cas Salduz contre la Turqie, du 27 novembre 2008, CEDH.

et d'être informé qu'il a des droits, constitue une étape importante dans le processus de la sécurisation multilatéraux des droits humains. L'idée d'un médiateur spécial pour les enfants et le rôle précieux des ONG va multiplier la voix de milliers d'enfants afin de s'assurer qu'ils ont des droits. Un tribunal ou des juges qui ne traitent que des questions des mineurs, ainsi que les garanties d'impartialité et de la présomption d'innocence de l'enfant, sont d'une importance primordiale. La Cour européenne des droits de l'homme protège l'anonymat des mineurs, par leur application et sur sa propre initiative, les audiences peuvent être menées à huis clos. Les changements récents dans les règles de procédure de la Cour européenne[1] ont établies le concept de donner la priorité aux questions qui ne changent en fonction de l'ordre chronologique, mais en fonction de la gravité de l'application. La première catégorie de priorité, parmi les autres sont celles qui remettent en question le bien-être des enfants. Le problème de la spécialisation des juges des mineurs, doit être un objectif pour l'État lui-même. En CEDH peuvent gérer leurs applications les personnes physiques, les ONG et tous les groupes d'individus qui se prétendent d'avoir été la victime d'une violation de la CEDH et de ses protocoles. Donc, du point de vue de l'intérêt commun de la société, il est possible d'améliorer la détermination du moment 'quand' et 'qui' peut adresser l'application à la CEDH, dans le but d'une meilleure justice adaptée aux enfants, et pas seulement en termes de procédures.

L'ensemble de l'appareil de justice pénale en 'réponse' donnée à l'auteur de la victime, doit tenir en compte l'âge de la personne, tandis que les établissements pénitentiaires doivent garantir les droits des mineurs contre les traitements inhumains et dégradants. Les mineurs ne sont pas de simples statistiques ou des preuves sur la balance de la justice, il faut aborder le plus grand en termes des alternatives de l'emprisonnement pour les délinquants mineurs. Les procédures légales sont plus évasifes sur les enfants et ils ont besoin de plus de conseils pour mieux comprendre le système juridique et leurs droits. Une étape importante pour le système de justice pénale en Albanie est la création d'un nouveau service de probation comme un organe de l'Etat chargé de superviser la mise en œuvre des peines alternatives par le tribunal, en aidant le condamné à remplir les obligations découlant des peines alternative et favoriser leur réinsertion sociale. Le Conseil de l'Europe joue un rôle particulier dans l'évolution de la protection des droits des victimes, à travers le développement de programmes d'indemnisation et d'assistance pour eux, et pour amener la 'lumière' aux problèmes des victimes. Un premier pas dans cette direction a marqué l'adoption de la Convention européenne relative au dédommagement des victimes d'infractions violente[2]. Ce document contient la rémunération de base, minimum que l'Etat doit donner aux victimes, et encourage d'autres Etats à réglementer la question de l'indemnisation des victimes. Deux ans plus tard, le Comité des Ministres du Conseil de l'Europe a rédigé la Recommandation R(85) 11 sur le renforcement de la position de la victime dans le droit pénal et de procédure[3], ainsi que la résolution des Nations Unies sur les principes fondamentaux de la justice pour les victimes de la criminalité et abus de pouvoir[4]. En outre, le Conseil de l'Europe a adopté une recommandation sur l'assistance aux victimes et la prévention de la victimisation[5]. Tous les documents, déclarations internationales et les recommandations, se concentrent principalement sur ces droits et principes: le droit à un traitement juste et équitable, le droit à l'information sur les procédures judiciaires et la décision rendue, le droit à l'assistance et la protection juridique, l'indemnisation (qui peut être matériel, physique, social et mental). Le phénomène de la victimisation est tout aussi complexe que le problème lui-même de la délinquance juvénile, et la réponse ne peut donner que la solution ou la décision judiciaire. Le but principal serait l'augmentation et le renforcement des services et de l'assistance aux victimes, permettant aux modes alternatifs de résolution des conflits et de la médiation. Le système juridique en général et en particulier la justice pénale, constituent l'épine dorsale de la démocratie et de l'Etat de droit en Albanie. Les droits des enfants en Albanie, après la ratification de la CDE, sont de plus en plus partie de l'agenda dans l'élaboration des politiques nationales et du cadre

[1] En juin 2009.

[2] European Convention on the Compensation of Victims of Violent crimes, Strasburg, 24 novembre 1983.

[3] Recommendation (1985)11 on the Position of the Victim in the Framework of Criminal Law and Procedure, adoptee en 28 juin 1985.

[4] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, 29 novembre 1985

[5] Recommandation R(87)21 sur l'assistance aux victimes et la prévention de la victimisation, 17 septembre 1987

juridique et institutionnel. Des changements ont eu lieu à la perception des droits de l'enfant par le législateur et la société. On souligne que l'inclusion des enfants dans les clauses des lois ou des lois spéciales est une indication de 'l'inclusion' des droits de l'enfant dans la législation nationale. La base de la justice pénale en Albanie est la Constitution albanaise, le Code pénal, le Code de procédure pénale, les lois spéciales judiciaires, du ministère public, de la police et de l'exécution des jugements. L'objectif de l'approche de la législation avec l'acquis du communauté, a amélioré le Code pénal par les réformes juridiques dans les années 2001 - 2003, 2004, 2007 et 2008 et enfin en 2013. En fait, ces réformes sont venues à la suite de la ratification de l'État albanais des actes juridiques internationaux. Seulement avec la réforme de 2008[1] sont augmenté 22 articles pour des nouvelles infractions. Mais le problème de la dépénalisation reste controversé. Lorsque nous parlons de la réforme du droit pénal, nous considérons non seulement l'amélioration de la réforme de la législation dans notre pays, mais aussi dans le système judiciaire, tout en préservant l'indépendance du pouvoir judiciaire, l'amélioration de la performance de la police et des poursuites judiciaires. Le problème principal est la formation professionnelle des juges, des procureurs et des officiers de police judiciaire pour surmonter les défis qui se présentent à eux. La lutte contre la corruption dans le système de justice pénale, en évitant le retard des enquêtes préliminaires sont des autres défis objectives en Albanie.

"La politique pénale doit être guidée par les principes fondamentaux des Etats démocratiques. 1. Protéger les intérêts de la victime doit être l'une des fonctions de base de la justice pénale. 2 Chaque État membre adopte une politique pénale cohérente et rationnelle, basée sur la prévention de la criminalité, l'individualisation des comportements criminels, la promotion des alternatives aux peines privatives de liberté, le redressement social des détenus et l'aide pour les victimes "[2]. Une expression claire de l'humanité de la politique criminelle dans notre pays est la réduction des sanctions pénales impliquant des mineurs, la mise en place de peines alternatives à l'emprisonnement et la création de probation un mécanisme juridique pour le contrôle de leur mise en œuvre. La Criminologie doit être développée en termes d'analyse de l'activité pénale des mineurs, ainsi que la politique et le droit pénal peuvent avoir des stratégies efficaces de prévention et de lutte contre la criminalité. Les amendements du 2013[3] au Code pénal commencent par la définition dans le premier article de la défense du principe de l'intérêt supérieur de l'enfant. De même, l'article 5 prévoit une meilleure protection des enfants, en fournissant la non-atténuation de la peine pour la personne qui a commis une infraction contre un enfant, ou qui a commis la violence conjugale. Également en faveur de la protection de la vie et de la santé de l'enfant, est ajoutée la condamnation pénale pour des infractions de nature sexuelle de la violence sexuelle à l'article 107/a, l'article 117 sur la pornographie des mineurs, l'amendement à l'article 124/b sur les peines plus sévères à quiconque oblige un mineur à travailler et à prier, endommageant son développement mental et physique. Ainsi, le nouvel article 117 est lié non seulement en termes de punition pour la pornographie, mais que tous les matériaux pornographiques produites, quelle que soit la forme ou le mode de distribution, doivent être saisis et détruits. Dans certains pays européens, comme le Royaume-Uni, sont établi des records nationaux pour des infractions sexuelles, comme une bonne base pour les familles et les enfants, et les familles sont informées sur les personnes pédophiles qui ont commis des crimes contre les mineurs. Grâce à un registre national, notamment les enfants atteints d'une protection internationale. L'ajout du terme "exploitation" des mineurs au travail et à la génération de revenus, est un pas en avant pour les droits des enfants. La justice pénale doit avoir un agenda social et pas seulement punitive. Il serait conforme à l'intérêt supérieur de l'enfant, s'il serait ajouté à l'article 51 que la détention des mineurs qu'en dernier ressort pour le mineur. L'augmentation des peines minimales et maximales aura un impact positif sur la prévention de la criminalité. L'efficacité dans la lutte contre la criminalité, rend nécessaire des peines plus sévères pour certaines infractions. Les changements récents du Code pénal résultent:

Tout d'abord, la sévérité des sanctions pour certaines infractions, en raison de l'augmentation du taux de criminalité et de violence contre les enfants, ainsi que pour les employés qui ont l'autorité de l'Etat.

[1] Loi nr.9859 du 21 janvier 2008 et Loi nr.10023 du 27 novembre 2008.

[2] Recommandation nr.96/8 "Sur la politique criminelle en Europe en transformation" du Comité des Ministres du Conseil de l'Europe

[3] Loi 144/2013 du 05/02/2013, JO nr.83/2013

Par conséquent, il est d'une importance cruciale pour la protection de la violence familiale, la protection de la vie et la santé des enfants, en particulier la santé sexuelle comme un élément fondamental non seulement pour le développement physique normal de l'enfant, mais aussi sur le développement de la personnalité et de l'identité enfant. Deuxièmement, une meilleure individualisation des peines dans des cas particuliers aidera le travail des procureurs et des juges, et permettrait d'éviter plus de minimiser la subjectivité dans la détermination de la peine. Ce sera le meilleur moyen d'unifier la pratique judiciaire en Albanie, donnée par les tribunaux du pays. Les juges ou les procureurs vont mettre en œuvre ces dispositions dans la pratique, devenant ainsi la garantie d'une procédure régulière, sur la base des principes constitutionnels de l'Etat de droit, l'égalité devant la loi, l'équité dans la peine, la présomption d'innocence de l'humanité. Maintenant, la prochaine étape est de lancer la meilleure information pour tous les publics, en particulier tout ce qui concerne les infractions contre les mineurs, la croissance de l'information permettra d'accroître la sensibilisation des citoyens, en réduisant les infractions. Le but de la punition n'est pas une punition, mais la réadaptation et l'intégration du condamné dans la société. En raison de conditions socio-économiques et politiques, le Code de la procédure pénale a été élaboré et est entré en vigueur avant la rédaction et l'adoption de la Constitution. Alors il a changé de parfaire en stricte conformité avec la Constitution, qui est entrée en vigueur en 1998. Le Code de la procédure pénale contient le terme "endommagé par l'infraction". Le terme "victime" est de plus en plus utilisé dans le vocabulaire de tous les jours, et dans certaines lois a utilisé ce terme pour indiquer les personnes qui ont subi un préjudice de plusieurs infractions pénales[1]. Dans la partie générale du Code de la procédure pénale, devrait être la définition du terme "victime" par l'approche des actes internationaux. Et il y a place pour des notions telles que le traitement des victimes dans la justice et le respect de la dignité humaine, pour éviter la re-victimisation des raisons différentes et le droit de demander la poursuite de l'agresseur et la réparation des dommages. Aussi, je pense qu'il serait augmentation très juste que les victimes ont le droit d'être entendu par le tribunal, même si aucune des parties ne l'a pas convoqué comme témoin. En comparant les codes de la procédure pénale de la France et de l'Italie, respectivement, pour le premier il ya un chapitre distinct sur les droits des victimes et les états généraux de dispositions que les autorités judiciaires veillent à ce que les victimes soient informées et que leurs droits soient respectés lors de toute procédure pénale[2]. Les victimes d'actes criminels ont droit à une indemnisation de l'Etat si ne soit recevu pas au contrevenant. Quant à l'Italie il ya un chapitre distinct sur les droits des victimes, mais sont définies deux catégories de personnes: la personne offensée par le délit (victime) et la personne lésée par l'infraction (la victime). Souvent, la personne a les deux qualités en même temps. La victime a de plus le droit d'intervenir dans la procédure pénale que la personne blessée. Ils peuvent coopérer avec le procureur pour faire appel d'une décision de justice, mais la victime joue un rôle important au cours de l'enquête préliminaire.

Selon le rapport du Département d'Etat Américain sur la traite des êtres humains, l'Albanie a pris des mesures concrètes pour améliorer la stratégie de la lutte contre la traite, mais "la corruption généralisée, en particulier dans le système judiciaire continue d'entraver la mise en œuvre globale de la loi anti-traite et les efforts visant à protéger les victimes"[3].

Le statut de l'enfant dans le système judiciaire (pénal), est considéré comme à la position du délinquant, de la victime ou d'un témoin. Nous pouvons dire que, malgré les efforts d'aborder la pratique de la législation communautaire, le droit pénal reste essentiellement punitive. La compilation et la publication de données sur la justice des mineurs aideront à soutenir le processus de réforme du système judiciaire. Le droit à un procès équitable implique également le respect du principe constitutionnel d'être jugé dans un délai raisonnable par un tribunal indépendant et impartial établi par la loi[4].

[1] Loi nr. 9669 du 18.12.2006 "Sur les mesures contre la violence dans les relations familiales", Loi nr. 10192 du 3.12.2009 "Sur la prévention et la lutte contre le crime organisé et le trafic par des mesures préventives contre la propriété", Loi nr 10494 du 22.12.2011 "Sur la surveillance électronique des personnes, dont le mouvement a été limité par décision judiciaire"

[2] Article 1 du Code de procédure pénale français

[3] Information sur le website: www.files.amnesty.org/air12/air_2012_full_en.pdf

[4] L'article 6 de la CEDH dispose: "Toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable par un tribunal indépendant et impartial, établi par la loi"

Une procédure rapide devrait s'appliquer à tous les types de procédures impliquant des mineurs - de la nature pénale, civile ou administrative. La mise en place de tribunaux pour mineurs est un impératif de l'époque. L'égalité d'accès à la justice est une dimension essentielle de l'égalité devant la loi et implique nécessairement l'accès à l'information, ce qui signifie la procédure et une justice plus adaptée aux enfants. La création d'un ombudsman indépendant ou un commissaire aux enfants, aide les enfants à améliorer la communication avec les organismes nationaux et internationaux. Pour recevoir le témoignage des enfants victimes d'abus sexuels, il devrait être entendu à l'audience sans y être présent, notamment à travers l'utilisation des technologies de communication approprié[1]. Une politique de la justice des mineurs sans une série de mesures visant à prévenir la délinquance juvénile souffre de graves lacunes. L'accent devrait être mis sur les politiques de prévention facilitant la socialisation et l'intégration réussie de tous les enfants. La société civile doit être considérée comme une partie intégrante du cadre institutionnel, et tous les acteurs concernés, tels que les ONG et les réseaux professionnels, devrait être inclus dans la conception de la mise en œuvre intégrée de la stratégie. L'objectif de tous les professionnels de la justice mettrait en évidence la concurrence supposée entre les deux systèmes de protection des droits de l'homme, et donc des droits de l'enfant, se référant au Conseil de l'Europe et l'Union européenne. Si des mineurs sont considérés comme pénalement responsables, ils ne doivent pas nécessairement être jugés, et que conformément à l'article 40/3 de la CDE prévoit que les États parties doivent promouvoir des mesures pour traiter les enfants qui ont enfreint la loi pénale sans recourir à la procédure judiciaire, chaque fois qui semble appropriée. Lorsque des poursuites judiciaires sont engagées, les mineurs font face à des accusations criminelles et les procès doivent être équitables et efficaces ainsi que pour les adultes, pour répondre à toutes les exigences de l'article 6 de la Convention à un procès équitable. Toutefois, la procédure de jugement ordinaire ne serait pas appropriée si l'enfant est trop immature pour une telle procédure, pour s'assurer qu'un procès équitable. Un enfant accusé d'une infraction criminelle doit être traitée en tenant compte de son âge, de sa maturité et de ses capacités intellectuelles et émotionnelles. Les difficultés provenant du traitement des jeunes délinquants du système de justice pénale sont confrontés, dans de nombreux systèmes pénitentiaires, la création de tribunaux pour mineurs, avec des règles de procédure spécifiques pour l'application de mesures de protection ou pénale visant à corriger ou de rééducation des mineurs.

Aspects éducatifs et psychologiques de traitement et de formation pour les juges pour mineurs doivent être considérés pour atteindre ces objectifs. La CEDH ne voit pas l'exercice cumulé de ces fonctions (la détention, le procès et l'exécution de la décision) par le même juge pour mineurs comme une violation de l'article 6/1 de la CEDH. Certains systèmes pénaux nationaux n'ont pas mis en place des tribunaux pour mineurs. La formalité des tribunaux pour adultes peut-être incompréhensible pour un enfant. Selon la Cour, l'article 6/1 n'exige pas un enfant à un procès pénal, comprendra ou sera capable de comprendre tous les points de droit ou de détails de la preuve. C'est pourquoi l'article 6/3 (c) souligne l'importance du droit à la représentation juridique. Par conséquent, le mineur devrait être, en tout cas, représentés par des avocats compétents et expérimentés, sinon il ya une possibilité d'une violation de l'article 6/1 de la CEDH. Les procédures judiciaires peuvent être non seulement déraisonnables, mais aussi effrayant pour un enfant. Le Code de procédure pénale a défini une série de garanties pour la protection des mineurs et de leur personnalité, à savoir: l'interrogatoire des mineurs à huis clos, le droit à la représentation légale des mineurs pour protéger ses intérêts dans la qualité de blessé accusateur; la protection professionnelle requise pour le mineur de moins de 18 ans interdiction de publication sur les détails et les photos des prévenus et des témoins accusé mineur ou lésés par l'infraction. Ceux-ci répondent aux garanties de procédure judiciaire en matière pénale, et donnent les dispositifs de protection des mineurs appartenant nécessaires en raison de l'âge. Sur la base de toutes les normatives nationales, les initiatives de l'UE, on peut conclure de multiples efforts pour l'intégration européenne au sein de la justice pour mineurs. Aujourd'hui, il est difficile de parler d'un modèle unique dans le domaine de la justice pour mineurs, au niveau européen. Donc, chacun des États membres a son propre droit pénal et son approche aux mineurs.

[1] Voir l'article 36/2 de la Convention pour la protection des enfants contre l'exploitation et les abus sexuelle, du Conseil de l'Europe

LES DEFIS:

1. La sensibilisation des jeunes sur les normes morales et les valeurs de la société, ainsi que la réévaluation de la peine de privation de liberté, à cet égard. L'amélioration des lieux de détention pour les jeunes et d'augmenter les peines alternatives et des politiques de la médiation.2. Renforcer les droits des mineurs délinquants, comme objet de poursuites pénales et non comme un sujet de droit. 3. Une plus grande sensibilisation de toute la société et de sa volonté croissante du jeune délinquant, ou qui sont à risque d'ajouter le travail sur la prévention. 4. Les procédures judiciaires rapides, pas de traitement si bureaucratique de la délinquance juvénile. Les dispositions des accords internationaux et des contenus européens ont un caractère général. Le défi est d'équilibrer les processus d'enseignement-temps de pénalité, et de mettre la responsabilité des jeunes en conflit avec la loi, en éduquant les meilleures valeurs de la société, mais également la réévaluation de la privation de liberté à cet égard. Le terme "justice des mineurs", veut dire la législation, les normes, les procédures, les institutions, les mécanismes et les acteurs qui traiteront de mineurs délinquants. Mais les enfants en conflit avec la loi constituent un aspect du problème. Voir l'autre côté du travail de prévention pour lutter contre le phénomène "de la délinquance juvénile". La prévention vise à éviter que les enfants en conflit avec la loi et éviter davantage de contact direct d'un enfant du système formel de justice pénale. Nous avons donc affaire à la justice réparatrice, qui comprend la communauté, qui développe des stratégies et des moyens de prévenir la récidive. La protection des enfants en conflit avec la loi est la meilleure façon qu'il ne devienne catégories proies de violations des droits de l'homme et victime. Le système de la justice pour mineurs peut être développé au sein du système de justice pénale pour les adultes, et peut se développer en dehors de ses groupes de travail spécialisés. Le principe de base d'un système de justice pour mineurs est et doit être le traitement des enfants atteints de l'humanité. Comme le Convention des Droits de l'Enfant de l'ONU définit clairement que la peine de privation de liberté pour les mineurs devrait être accordée pour une période aussi courte que possible, selon le cas, et doit être considérée comme une sorte de dernier recours. L'ensemble du système devrait se concentrer sur l'intérêt supérieur de l'enfant qui fait l'objet de droits de l'homme et des libertés fondamentales, et c'est son guide dans le traitement de quelque "rôle" dans le processus, la victime, délinquant ou auteur, témoin. Après les années 90, le nombre d'infractions commises par des mineurs en Albanie a augmenté, il est donc important de connaître toutes les raisons et les besoins d'intervenir à un stade précoce pour les prévenir, et pour éviter le récidive. Ainsi, la pauvreté, le manque de moyens de subsistance de la famille, l'abandon scolaire, les problèmes familiaux, la toxicomanie, etc, sont quelques-uns des problèmes qui ont conduit à une augmentation des taux de délinquance juvénile. Développements positifs dans la législation albanaise et pratiques pour les droits des enfants comprennent: la création de divisions spécialisées dans les tribunaux de district , des procureurs spécialisés et de l'unité de police spécialisée, de rénovation et d'éliminer la surpopulation dans certains établissements de détention, l'accès à grandes détenus mineurs à l'éducation, des travailleurs sociaux, des psychologues et des conseillers religieux, des projets d'aide juridique et psycho- social, peines alternatives et de la médiation. Quand on parle du mineur, il est important de parler de la prévention du crime, à laquelle peut inclure le suivi de la fréquentation scolaire, l'intégration économique des jeunes, des programmes de soutien aux enfants des rues, la création d'environnements et de divertissement pour enfants, la prévention l'abus d'alcool et de drogues, la création d'installations sportives comme un outil d'intégration sociale, la création de services sociaux, y compris le soutien de la famille. Il est nécessaire d'élaborer une politique pénale fondée sur l'intérêt supérieur de l'enfant, avec la contribution de tous les acteurs au sein du système de justice pour mineurs. On doit mieux faire appliquer la législation relative à la probation, d'éliminer les retards dans l'enquête et le jugement des affaires impliquant des mineurs, en réduisant le recours à la détention et l'utilisation accrue de solutions de rechange sont très importants. L'impact du crime sur les victimes enfant est différent, mais il affecte le bien-être de ses conséquences physiques, psychologiques et sociales peuvent être immédiats et à long terme. Donc, pour rendre les procédures judiciaires plus convivial pour les enfants victimes, les juges doivent faire preuve de souplesse, en évitant les questions préjudicielles, de sorte que l'ensemble du processus pour répondre à ses besoins.

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La politique de securite et de defense commune : bilan et perspectives

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Abstract: This article brings arguments in favour of an effective EU Security and Defence Policy. "It is necessary to make a balance and think the future of the Common Security and Defenmse Policy (PCSD) to inform the European Council. Taking into consideration the international tensions; the publication of the French White Book on National Defense and Security; the permanenece of the economic and financial crisis, which affects the European Union and its defense structures; at a moment when the US pivot to Asia gives it more responsibilities in security, it is convinient that all actors who can propose concrete action to the relaunching of the CSDP do so.
Moreover, the concept of European identity, essential to know what we want to defend, covers very different realities, depending on the people it is addresed to, European citizenship remains a largely abstract concept for many. The following reflections are articulated in four parts: after a review of the context, we try to identify the reasons for the apparent failure of the Europe of Defence and open the analytical perspectives before suggesting concrete ways of recovery."

Keywords: EU Security and Defence Policy

I. LE CONTEXTE

On peut retenir plusieurs évolutions majeures du contexte stratégique depuis 2008, date de publication du rapport de mise en œuvre de la stratégie européenne de sécurité élaborée en 2003 sous l'impulsion de Javier Solana, alors haut représentant de l'UE et ancien SECGEN de l'OTAN, mais aussi de diffusion du précédent Livre Blanc français sur la Défense et la sécurité. A l'examen, six éléments de contexte paraissent dominer :

1. En premier lieu **la crise économique et financière,** partie des Etats Unis, a durement frappé l'Europe, avec pour conséquence au plan de la défense une baisse significative des budgets, tandis que les dépenses militaires s'accroissaient en revanche dans les pays émergents, particulièrement en Chine et en Russie. Ainsi la Chine aura-t-elle doublé son budget de défense en 8 ans (2007/2015) pour l'amener à 180 Md de dollars et la Russie aura atteint les 100 Md de dollars (77 Mds d'Euros) en 2015. Ajoutons que s'agissant des BRICS et plus particulièrement de la Chine et de la Russie, le PIB brésilien a désormais dépassé celui du Royaume Uni tandis que la Russie talonne l'Italie.

2. En Asie les choses pourraient dégénérer rapidement, en Corée comme on l'a vu récemment, mais aussi en mer de Chine. Que veut la Chine ? Continuer à être traitée comme un « grand » au plan mondial, alors qu'elle porte un intérêt toujours plus marqué pour les ressources géologiques en Afrique, dont elle a un impérieux besoin pour sa propre croissance. Simultanément elle n'en conforte pas moins une influence régionale exclusive. S'agissant de l'économie de marché, au prix de quelques concessions obligées, le parti communiste chinois n'entend pas pour autant lui sacrifier un système auquel il doit sa survie. Sa politique de grandeur et de retour à l'identité se traduit de manière visible par une remise à l'honneur du confucianisme en ce qu'il est chinois, tout comme par le rapatriement des œuvres d'art pillées par les étrangers notamment au 19ème siècle.

En Chine, le mode de pensée reste fondamentalement chinois : on aurait tendance à vouloir penser que Pékin ne commettra pas l'irréparable car, considéré d'un œil occidental, il n'est pas dans son intérêt de mettre la région à feu et à sang. Mais souvenons-nous seulement de l'actualité en mai 1989 : la plupart des observateurs s'accordaient alors pour dire que la Chine était sur la voie inéluctable du libéralisme

économique inspiré par le « réformateur » Deng Tsiao Ping: pourtant, le même Deng, un mois plus tard, donnait l'ordre de tirer sur les manifestants place Tien an Men.

Quant à la Russie, les choses apparaissent à la fois plus claires et plus complexes. Vladimir Poutine réarme, comme les données disponibles l'attestent. Si l'on peut souhaiter le développement de relations harmonieuses entre l'UE et la Russie, tant au regard de l'économie que de la culture et d'une part d'histoire commune, il faut rester lucide, car pour valser, il faut être deux, ce qui actuellement n'est pas le cas. Malraux, auquel un journaliste demandait si la Russie se situait en Europe ou en Asie, avait alors répondu : *« la Russie…est en Russie…* », traduisant bien par des mots l'originalité de ce pays. Et tant le chassé-croisé Poutine-Medvedev, que les relations ambiguës entre les capitaines d'industrie et le Kremlin, la mise à l'écart des contestataires ou de rivaux potentiels tels que Kodorkovsky, mais aussi l'omniprésence du FSB ex KGB et l'attitude russe sur le dossier syrien ou sur la défense anti-missile, conduisent à observer que pour l'heure, presque rien n'a changé dans ce pays en matière de gouvernance.

3. L'autre phénomène significatif porte sur **les révolutions arabes** du début 2011, qui, il faut le relever, n'ont pas touché l'Afrique subsaharienne, ce qui mériterait une autre réflexion. Ce mouvement n'est pas achevé, comme en témoignent la situation en Syrie ou en Egypte, alors qu'au Proche et au Moyen-Orient, les relations demeurent conflictuelles entre chiites et sunnites, les relations israélo-palestiniennes sont au point mort et les récents développements politiques en Iran restent fort peu lisibles.

4. **L'OTAN perdure**, et même plutôt bien pour une structure dont on prédit régulièrement la disparition depuis 1991. Elle a ainsi survécu au Pacte de Varsovie, voyant ses capacités renforcées avec le retour de la France en 2009 et mène encore à cette heure cinq opérations: en Afghanistan, au Kosovo, en Méditerranée (Active Endeavour), au large de la Corne de l'Afrique (Ocean Shield) et un soutien à la mission de l'Union africaine en Somalie (AMISOM). Au-delà, elle se trouve engagée dans une nouvelle réflexion sur son existence-même, avec la fin annoncée de son engagement en AFG. Nul doute que la Division « Défis émergents » de son secrétariat international n'ait déjà dégagé des pistes pour la faire rebondir : au nombre de celles-ci, la *« SMART defense »* et le déjà ancien concept de gestion globale des crises intégrant une dimension civilo-militaire.

5. C'est aussi **le retour de l'Afrique**, que beaucoup d'Européens étaient en train « d'oublier » sous l'effet de la crise financière: comme en Libye, l'opération au Mali est assez exemplaire du type de crises à gérer sur ce continent, nécessitant de solides moyens de projection et des capacités stratégiques durcies, notamment en matière de logistique et de renseignement ; on y affronte des adversaires, dans le cas du Mali, techniquement plus proches du Hezbollah que des Talibans, comme en témoignent les découvertes faites immédiatement après les affrontements majeurs du printemps 2013. Enfin, les actions strictement militaires ne suffisent plus : *« nation building », « building integrity »* et réforme du secteur de la sécurité sont autant de nouvelles tâches qui doivent systématiquement être prises en compte dès la phase initiale de planification.

6. Enfin, le dernier paramètre mais non le moindre est la réorientation *(« le pivot »)* des Etats-Unis vers l'Asie et notamment vers la Chine, adversaire pour l'heure économique et demain, pour certains géopoliticiens, peut-être également militaire ; mais cela n'en signifie pas pour autant, comme on a pu le dire trop rapidement, que l'Amérique se désintéresserait du continent européen. L'Union européenne reste pour elle un partenaire stratégique, comme le prouve le besoin d'« écoute » technique de Washington sur ce continent. En revanche, la condition est que les Européens prennent davantage en charge leur propre sécurité, ce qui n'a rien de choquant et ce que France particulièrement réclamait depuis longtemps ; la difficulté tient à ce que cette opportunité survient à un moment où ces mêmes Européens, quoique très conscients de la dangerosité croissante du contexte international due à l'imprévisibilité de certains acteurs, révèle un déficit de volonté et de moyens pour la satisfaire.

II. LES DIFFICULTES DU MOMENT POUR LA POLITIQUE DE SECURITE ET DE DEFENSE COMMUNE (PSDC)

Dans ce climat, l'Europe peine à se définir, si ce n'est au travers de valeurs périodiquement réaffirmées en une antienne convenue, et donne le sentiment d'être finalement assez peu concernée par l'aspect militaire de sa défense, d'autant que le processus décisionnel en apparence simple, se révèle dans les faits beaucoup plus complexe.

1. Première difficulté : la relation demeure ambiguë entre l'UE et l'OTAN.

En premier lieu, **on évoque toujours, de manière simpliste, la relation UE-OTAN**. De fait, ces deux organisations n'étant pas de même nature, il faut alors préciser qu'en matière de défense et sécurité, il s'agit d'une relation de l'UE conduite dans le cadre spécifique de la PSDC : l'Union reste en effet un projet politique global, tandis que l'OTAN est une organisation de sécurité (dotée de moyens militaires conséquents où le Conseil atlantique, de nature politique, a la prééminence).

- Tous les membres de l'OTAN n'appartiennent pas à l'UE, dont les Etats Unis, le Canada, la Turquie et la Norvège, et inversement pour les « neutres » que sont la Finlande, la Suède, l'Autriche, l'Irlande.

- Au plan conceptuel/opérationnel, l'OTAN a eu longtemps privilégié une défense à l'intérieur de ses « frontières », le concept *hors-zone* n'ayant disparu qu'à sa prise en charge de l'ISAF en 2003, tandis que l'UE, avec la PESC et la PESD, s'interrogeait davantage sur son action hors de ses frontières.

Dans l'état actuel des choses, il ne saurait y avoir de concurrence mais une nécessaire complémentarité entre les deux organisations précisément due à leur différence de nature, permettant à l'UE d'intervenir avec toute la gamme de ses capacités dans des régions où l'OTAN serait moins bien perçue.

La seconde réflexion est que **l'Union européenne d'aujourd'hui doit beaucoup à l'OTAN** :

- parce que c'est bien l'OTAN, et non l'UEO, qui a très concrètement assuré sa protection durant la Guerre froide,

- parce que sa géographie actuelle est largement due aux effets du Partenariat pour la Paix élaboré à l'OTAN à partir de 1994, qui a peu à peu su intégrer les pays d'Europe centrale et Orientale. S'agissant de cette démarche, contrairement à l'idée communément reçue qui ne considérerait l'OTAN que comme une structure exclusivement militaire, le plan d'adhésion (MAP) qu'elle propose comporte des volets très « civils » : politique, économique, financier/budgétaire, sécuritaire et juridique.

En conséquence**,** pour leur sécurité, les Etats-membres de l'Union issus du défunt Pacte de Varsovie se sentent redevables d'abord à l'OTAN, qui reste aussi pour ses membres fondateurs de taille modeste l'instrument le plus fiable avoir rempli avec succès sa mission face à l'Est ; ils se prononcent généralement en faveur d'un mode de *« financement en commun »,* avantageux pour eux en ce qu'il leur évite de financer nationalement certaines capacités stratégiques coûteuses. Pour eux, une contribution à un budget militaire renforcé dans le cadre de l'UE reviendrait donc à dupliquer un effort qu'ils mènent déjà pour l'Alliance ; à cet égard, on se souviendra qu'en cumulé, les 5 premiers contributeurs de l'Alliance (Etats Unis, Royaume Uni, Allemagne, France, Italie) fournissent 70% de son budget global. D'où la nécessité d'un dialogue précis et permanent entre les deux organisations pour ne pas développer de programmes identiques.

En troisième lieu, les Etats-Unis dominent certes l'Alliance ne serait-ce qu'au regard des moyens fournis[1], mais la règle du consensus fait que chaque pays a une voix théoriquement égale. **Ainsi des coalitions d'occasion peuvent parfois venir équilibrer la puissance américaine :** en 2003, plusieurs alliés ont à l'occasion de la guerre en Irak, bloqué certaines initiatives poussées par les Etats Unis et les nouveaux membres Centre et Est européens, tandis que **la France et l'Allemagne s'opposaient en 2008 au projet américain d'inviter l'Ukraine et la Géorgie à entamer les négociations d'adhésion à l'OTAN.**

Cette dernière a de fait su, depuis 1991, s'adapter à un environnement international en perpétuelle évolution, alors que certains plaidaient pour une dissolution homothétique à celle du Pacte de Varsovie:

[1] 55% des ressources et 75% des capacités militaires.

avec le Partenariat pour la paix (PfP) elle a transformé les rapports dans l'aire euro-atlantique, puis elle est intervenue avec détermination dans les Balkans avec l'IFOR puis la KFOR, avant que les attentats du 11 septembre ne déclenchent la première invocation de l'article V de son histoire, puis n'entraînent les première projections de grande envergure « hors zone », terrestres, aériennes et maritimes. Ce furent alors l'ISAF en Afghanistan, mais aussi sur mer *Active Endeavour* en mode contre-terroriste et *Ocean Shield* pour la contre-piraterie, puis le soutien à une organisation tierce comme l'AMISOM.

Depuis 2005 l'OTAN souhaite élargir la palette de ses activités à la dimension civilo-militaire sur la base du concept **«** d'approche globale » *(Comprehensive Approach)*, ce qui tend à la faire évoluer d'une alliance militaire traitant de défense collective vers une organisation de sécurité régionale à caractère politique.

En conclusion, la différence de perception de cette organisation par les Européens et les Américains ressort clairement des propos de Kurt Volker, ancien ambassadeur US à l'OTAN, pour qui *« lorsque l'on parle de l'OTAN aux Européens, ils comprennent « les Américains », et lorsque l'on parle d'OTAN aux Etats-Unis, les Américains comprennent « les Européens »… ».*

L'OTAN reste capitale pour l'UE, lieu d'expression du lien transatlantique autorisant la coopération militaire avec les Etats Unis mais aussi l'interopérabilité entre Alliés (STANAGs, procédures, l'entraînement) et disposant de structures de commandement et de planification éprouvées. D'ailleurs, le Traité de Lisbonne ne dit pas autre chose, à savoir que la défense de l'Europe repose sur l'Alliance atlantique[1].

2. Un dossier stratégique: l'industrie de défense

Si **le Sommet de l'OTAN à Chicago en 2012 a reconnu l'importance d'une défense européenne** y compris dans sa dimension industrielle, il a également lancé le concept de ***« SMART defence »,*** **en miroir de l'initiative *« Pooling & Sharing »* portée par l'Agence européenne de Défense (AED), ainsi que le programme de défense anti-missiles, auquel la France ne s'est pas opposée mais qui reste un problème pour beaucoup d'observateurs. En effet, malgré les conditions très encadrantes que nous avons mises pour y participer (contrôle politique, adéquation entre la capacité et la menace, maîtrise des coûts, financement commun limité aux capacités de « *Command & Control* »/C2, garantie d'élévation du niveau de sécurité, dialogue avec la Russie), aucune d'entre elles n'apparaît à ce jour remplie: pour l'essentiel, c'est peu dire que la Russie ne considère pas l'initiative positivement, les coûts s'avèrent colossaux pour une efficacité à 100% non garantie, le dynamisme industriel américain risque fort de ne laisser que des miettes aux opérateurs européens.**

L'un des dangers pour l'UE réside donc bien là: dans une période de budgets militaires contraints, le **risque est de se laisser entraîner dans des programmes coûteux** qui assècheraient nos disponibilités, sans garanties de contrats pour nos industries.

Par ailleurs, s'agissant des capacités critiques, l'autre difficulté tient au choix à opérer entre la préservation d'une base industrielle technologique de défense (BITD) et l'achat sur étagère pour parer au plus pressé. C'est le cas aujourd'hui pour la capacité « drones », pour laquelle Français et Allemands sont en négociation avec les Etats Unis.

D'où l'exercice délicat en matière de BITD(E) : identifier les capacités industrielles clés, en déterminant celles qui doivent être préservées et développées en Europe et quelles autres peuvent l'être sans trop de dommages auprès d'un acteur tiers.

Or, en période de crise, la priorité de chacun reste subordonnée à la préservation de ses emplois nationaux. Le projet de fusion avorté en octobre 2012 entre EADS-BAE reste un parfait exemple de la difficulté à mettre le discours en pratique : cette fusion aurait pu conduire à la création d'un bloc industriel européen de taille critique, mais les trois Etats concernés, pour des raisons diverses, n'ont pu porter le projet à son terme, certains observateurs croyant pouvoir relever en la circonstance un déficit de soutien résolu de la Commission.

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[1] Traité de Lisbonne, PSDC, section 2, 49, alinéa7 : *« Les engagements et la coopération dans ce domaine demeurent conformes aux engagements souscrits au sein de l'Organisation du traité de l'Atlantique Nord, qui reste, pour les États qui en sont membres, le fondement de leur défense collective et l'instance de sa mise en oeuvre.»*

Le 3ème point, en apparence iconoclaste, tient en une question: **une Europe de la Défense, pour quoi faire ?** Beaucoup d'acteurs ne ménagent pas leurs efforts depuis des années pour la faire éclore, et pourtant, au-delà des discours, les choses ne progressent que très lentement.

Il y a pour commencer une vraie difficulté à circonscrire l'Europe, où se côtoient désormais plusieurs espaces auxquels les 28 n'adhèrent pas de manière identique :

-la Norvège appartient à l'espace Schengen mais pas à l'Union, le Royaume Uni n'est ni dans Schengen ni dans l'Eurozone, tandis que le Danemark bénéficie d'une clause d'exclusion pour la défense tout en étant très actif dans l'OTAN.

-L'espace géographique pose également question. Sans même qu'il soit besoin d'évoquer le dossier turc, on recense côte à côte l'espace de l'UE en tant que telle à 28, Schengen à 26 (22 UE + 4 associés), l'Eurozone à 18, le Conseil de l'Europe à 47 avec Azerbaïdjan, Turquie ou Ukraine... La géographie pré-oriente en outre naturellement certains Etats membres : les Britanniques et les Scandinaves vers l'Atlantique et la Baltique, l'Allemagne et les pays d'Europe centrale vers l'Est, la France et les Etats du Sud vers la Méditerranée et l'Afrique.

En fait, l'Europe de la Défense qui apparaît jusqu'ici en panne, connaît tout autant un problème de moyens que de volonté politique. La France s'estimant parfois être assez seule à la promouvoir et ses deux partenaires majeurs que sont l'Allemagne et le Royaume Uni ayant chacun leurs raisons pour ne pas s'impliquer davantage, n'est-il alors pas illusoire de vouloir à toute force faire coïncider des intérêts nationaux extrêmement divergents, dès lors qu'il s'agit d'aller au-delà des propos convenus ?

III. QUELLES PERSPECTIVES ?

Malgré ces difficultés, il faut relever des raisons d'espérer:

- Pour la première fois depuis longtemps, **la réunion du Conseil européen, le 20 décembre** prochain, consacrera ses travaux aux questions de défense et de sécurité, pour lesquelles tant le Président du Conseil que celui de la Commission sont récemment apparus, semble-t-il, très motivés. Dans ce contexte, Hermann van Hompuy déclarait en mars 2013, lors de la réunion annuelle de l'AED : *« les Européens possèdent tous ensemble davantage de forces que les Etats Unis, mais en font moins avec elles »……« il ne s'agit pas tant de savoir combien on peut dépenser dans ce domaine, mais comment on dépense ».*

- L'UE reste d'une part la seule organisation globale, capable de mobiliser un ensemble très large de moyens civils mais aussi militaires, en complément de l'OTAN, par exemple dans la cadre de la lutte anti-piraterie (*ATALANTE/UE* et *OCEAN SHIELD/OTAN)* et dispose de moyens non négligeables : en cumulé, les dépenses militaires des Etats-membres se montent tout de même à 190 Md d'Euros, même si, selon les modes de calcul, presque plus aucun Européen désormais, à l'exception notable du Royaume Uni, ne dépense les 2% du PIB préconisés par l'OTAN pour son budget de défense.

- La PESD, puis la PSDC, ont des résultats à présenter : née de la rencontre de Saint Malo en 1998 sur le constat établi après la guerre en Bosnie que les intérêts américains ne coïncidaient pas toujours avec ceux des Européens, sa première expression opérationnelle ne date que de 2003 (*Concordia* en mars pour l'**Ancienne République Yougoslave de Macédoine** et *Artemis* en juin au Congo). Elle s'est dans l'intervalle dotée d'instruments institutionnels, a mené une vingtaine d'opérations impliquant 7000 experts, militaires et civils. Elle a créé des *battle groups*, a su réagir promptement lors de la crise géorgienne en 2008, contrairement aux atermoiements des années 90 dans les Balkans, et a bâti un programme de formation militaire de type Erasmus. Dernier succès en date, **l'accord entre Serbes et Kosovars** arraché de haute lutte en avril 2013.

- **Les Etats Unis sont désormais tenants d'une Europe de défense forte** ; en dépit de budgets encore considérables mais désormais eux aussi soumis à de sévères restrictions, ils sont eux-aussi contraints à la spécialisation, ils ne sont plus en mesure de mettre sur le terrain, partout dans le monde, l'ensemble des capacités correspondant à la palette de toutes les missions.

- **La Russie** reste pour sa part encore motivée sur son projet de traité pour la sécurité européenne, proposé en 2009 par l'ex président Medvedev, mais se révèle **difficilement lisible** et prévisible, mue en priorité par son rêve de grandeur.

- **A l'OTAN**, même si la prépondérance américaine est indéniable, **les Européens tiennent un certain nombre de postes-clés** : le secrétaire général est danois et son adjoint pour les questions politiques ainsi que le directeur de l'état-major international sont allemands. S'agissant de la France, un officier général français est placé à la tête du 2ème commandement stratégique de l'OTAN[1], tandis qu'au quartier général de Bruxelles, un ingénieur de l'armement occupe le poste de secrétaire général adjoint pour les investissements de défense. Nonobstant, il est illusoire d'imaginer un retour à l'idée de pilier européen de la Défense et encore moins de « caucus » européen, idée soutenue par la France dans les années quatre-vingt-dix au travers du concept d'IESD (identité européenne de sécurité et de défense).

A l'Union européenne, la France préside le Comité militaire, détient les fonctions de Secrétaire général exécutif du Service européen d'action extérieure (SEAE) et de Directrice de l'Agence européenne de défense (AED).

On observera donc que trois Français traitent actuellement de dossiers capacitaires dans les deux organisations.

- L'instrument diplomatique qu'est **le Service européen d'action extérieure (SEAE) possède un réel potentiel**. Il n'a que deux années d'existence et son premier rapport d'évaluation sera produit à l'été. Il offre de belles potentialités, mais requiert encore quelques années pour être pleinement opérationnel (5 ans?). La difficulté tient au fait qu'il faut en un temps très court faire cohabiter trois cultures différentes: un tiers d'anciens fonctionnaires européens venus de la DG RELEX (Commission européenne), un tiers de diplomates nationaux et un tiers de contractuels. Cela dit, sa capacité d'analyse est juste: cependant, le Sahel ayant été identifié comme zone critique depuis deux ans, le paradoxe est que l'UE (en fait les Etats membres, car l'UE ce sont d'abord des nations) a dans un premier temps livré une impression de paralysie, la réactivité française l'ayant soudainement précipitée dans une aventure africaine que beaucoup redoutaient.

- Enfin et surtout, il y a désormais **une prise de conscience** que les besoins et capacités sont tels, dans le contexte de crise financière et de restrictions budgétaires, qu'aucun Etat-membre ne peut plus les produire et les acquérir toutes. Partage, mutualisation, coopération donc désormais les seules voies raisonnablement possibles.

IV. RECOMMANDATIONS

Partant des constatations qui précèdent, on peut imaginer un « paquet » de recommandations dont certaines pourraient être mises en œuvre très rapidement après la réunion du Conseil européen de décembre. Les priorités retenues vont à des suggestions concrètes, facilement mesurables et à forte visibilité, susceptibles d'entraîner l'adhésion des opinions publiques, dans une période où il faut pouvoir justifier chaque euro dépensé. Le plus souvent, les outils existent déjà et, combinés les uns aux autres, pourraient modifier rapidement la donne.

1. Sur les exemples de Weimar ou Weimar Plus, mais aussi des coopérations nordiques ou baltiques, **recherche systématique de nouvelles coopérations structurées permanentes,** dépassant la facilité consistant à qualifier d'européennes les coopérations bilatérales, qui n'en restent pas moins très utiles.

2. Dotation de la PSDC d'un budget à la hauteur de ses ambitions en orientant les efforts, à commencer par une meilleure répartition des lignes budgétaires dont 20% seulement portent actuellement sur les équipements.

3. Préservation et développement d'une industrie de défense européenne performante, s'appuyant pleinement sur les outils existants :

a. en dotant l'AED d'un budget qui lui permette vraiment de remplir sa mission au travers de ses 4 fonctions[2]*;*

b. par un dialogue renforcé avec l'OCCAR (*Organisation Conjointe de Coopération en matière*

[1] Allied Command for Transformation (ACT).

[2] Développement des capacités de défense, promotion de la R&T en matière de défense et de la coopération pour les équipements, création d'un marché européen d'équipements de défense, renforcement de la Base industrielle et technologique de défense européenne (BITDE).

d'Armement) et les acteurs de la LoI (*Letter of Intent*) ;

c. en pressant le processus de mutualisation induit par l'initiative *Pooling & Sharing*, conjugué à une coopération équilibrée avec l'OTAN, spécialement pour les capacités manquantes révélées lors des opérations les plus récentes *[le ravitaillement en vol, le renseignement, la cyber-sécurité/défense et le transport stratégique];*

d. en s'attachant le plus possible à une dualité de programmes susceptibles d'un emploi civil/militaire, tournés vers la sécurité extérieure/intérieure.

4. Identification systématique de **programmes d'action communs,** lorsque l'initiative individuelle ne s'avère plus possible face aux enjeux et moyens requis disponibles *[criminalité/cybercriminalité, terrorisme, gestion de conflits majeurs/lointains]*, et parmi ceux-ci :

- **Mise en place d'un coordonnateur européen du renseignement**, à l'image de celui placé auprès du Conseil pour la lutte contre le terrorisme. Une phase ultérieure consisterait idéalement à bâtir un **service du renseignement européen**, doté de capacités de traitement coordonnées dans les domaines intéressant la sécurité intérieure et extérieure de l'Union.
- En matière de formation, création d'**un programme européen de perfectionnement** en matière de renseignement au profit des experts du domaine dans la cadre du Collège européen de sécurité et de défense (CESD), en complément des formations nationales. A cet égard, il ne faut pas négliger les effets d'une **coopération avec l'OTAN**, à condition que les difficultés d'ordre politique affectant les relations entre certains Etats-membres des deux organisations puissent être aplanies.
- Le niveau politique peut en décembre donner immédiatement une vigoureuse impulsion à un **programme européen de drones d'observation (pour commencer),** capables d'opérer à moyenne altitude et de longue endurance **(MALE)** utilisables en mode dual**,** avec à terme, la perspective de mise en œuvre d'une **flotte européenne**.

5. Au plan de la cyber-sécurité, l'Union n'a pas d'autre alternative qu'**une cyber-stratégie européenne** combinant cyber-défense et lutte contre la cybercriminalité. Il s'agit notamment d'inciter les acteurs publics et privés à se protéger par une meilleure information sur les risques encourus, et d'instituer un **coordonnateur à la cyber-sécurité** qui s'attacherait à la rationalisation des actions en matière de recherche, de politique industrielle et de sécurité des systèmes d'information, encore trop souvent conduites en ordre dispersé :

- en s'appuyant sur les outils juridiques existants et à venir, dont la Convention de Budapest sur la cybercriminalité (2001), instrument international contraignant et la directive sur la cybercriminalité (2012) ;
- en coordonnant l'action des acteurs compétents au niveau institutionnel**,** des Etats et l'Union mais aussi des secteurs public et privé, afin d'éviter les brèches dans le dispositif et de coûteuses duplications. Le Comité politique et de sécurité (COPS) pourrait pour sa part désigner des points de contact chargés du suivi de la cyber-sécurité/cyber-défense ;
- en encourageant une politique volontariste d'échange d'informations entre Etats, en liaison avec d'autres structures pertinentes telles que le centre d'excellence (COE) de l'OTAN en matière de cyber-défense, EUROPOL ou l'ENISA ;
- s'agissant des capacités, en se donnant réellement les moyens financiers et humains d'aboutir :

  - au plan conceptuel ;
  - en matière de formation aux technologies de l'information, de la communication (TIC) et de la sécurité des systèmes d'information (SSI) ;
  - au plan opérationnel**,** par la systématisation des CERT (Computer Emergency Response Team/Equipe d'intervention informatique d'urgence) et par la mise en place d'un volet Défense au Centre européen de lutte contre la cybercriminalité (EC3) récemment créé ;
  - en matière de recherche et développement (R&D), par un soutien plus affirmé à l'Agence Européenne de Défense (AED) dans la conduite de ses missions ;
  - au plan industriel, par une promotion active des secteurs de la cyber-sécurité et des CIS,

appuyée sur l'activité de la Commission dans le cadre de la *« Task Force Défense »*.

6. La création d'un centre de planification et de conduite permanent des opérations de l'UE ayant été source de difficultés, la situation internationale ne nous en presse pas moins d'**identifier des solutions plus permanentes** que celles mises en place de manière empirique et dans l'urgence, particulièrement lorsque l'OTAN ne peut ni ne souhaite s'engager.

7. Inscription formelle de l'état-major du Corps européen au titre des instruments de la PSDC ; associant cinq Etats-membres de l'Union, il est l'exemple même de coopération structurée permanente.

8. Recours opérationnel prioritaire aux **groupements tactiques** existants ainsi qu'à la **Brigade franco-allemande/Deutsch französische Brigade**[1] (BFA-D/F Brigade)

9. Association systématique du Parlement européen, pour amener le débat sur les questions de défense et de sécurité à la portée des citoyens par une communication compréhensible de tous, lui conférant de ce fait une légitimité effective accrue dans ce domaine.

CONCLUSION

Autant sinon davantage que la politique, l'économie régit aujourd'hui le secteur de la défense : selon les responsables américains, la plus grave menace pour leur sécurité, *« c'est l'état de notre économie dont la dette se creuse en permanence »*.

L'option la plus probable est que l'OTAN restera seule en scène (mais d'ailleurs jusqu'à quand ?) si l'UE ne fournit pas l'effort requis pour assumer ses responsabilités, sur son sol et à ses approches ; en juin 2011, quittant ses fonctions, Robert Gates déclarait que les Alliés risquaient *« une inconséquence militaire collective »*. Pour preuve la baisse du budget de défense des Européens, enregistrée entre 2009/2011, est de l'ordre de 45 Md de dollars, soit à titre comparaison plus que le budget de la défense allemand pour 2013 (33,3 Mds d'euros).

Il faut donc inventer de nouveaux schémas, au-delà des seules structures familières : les opérations en Libye ont ainsi associé deux Etats membres de l'UE, agissant dans le cadre de l'OTAN, avec un soutien américain logistique et en renseignement, sans lequel rien n'eût été possible, mettant en exergue nos forces (réactivité, planification) mais aussi nos faiblesses (capacités critiques).

Il est clair en tous les cas que les engagements militaires tels que nous les vivons dans un certain nombre d'états défaillants depuis le début des années quatre-vingt-dix doivent impérativement prendre en compte, dès la phase de planification initiale, les opérations de reconstruction et de restauration de l'Etat. En cela l'approche globale est désormais indispensable, afin d'éviter de reproduire une situation à l'irakienne, et demain, peut-être, à l'afghane…L'opération de l'Union européenne au Mali doit à cet égard être l'occasion d'une concrétisation exemplaire de cette nouvelle conception des interventions extérieures.

Cela dit, la racine des risques auxquels l'UE fait aujourd'hui face et qui doivent dimensionner son effort de défense, n'apparaît à cette heure toujours pas traitée au fond: tant que les questions capitales du développement, de l'éducation et de la bonne gouvernance des régions les plus déshéritées du globe, d'où nous viennent la plupart des problèmes du moment, ne seront pas réellement prises à bras le corps, rien ne sera réglé.

Redonner aux populations de ces régions des raisons d'espérer en leurs propres Etats, leurs propres cultures et leurs propres forces, participe pleinement de la défense des intérêts de l'Union européenne.

Au-delà, nos sociétés apparaissent comme à la recherche du temps perdu ; or, il faut bien nous convaincre que nous ne le retrouverons pas. Si nous sommes entrés dans un autre monde avec la dernière décennie du XXème siècle, nous l'avons certes intellectuellement admis, mais nous n'en avons toujours pas tiré les conséquences pratiques.

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B. EU area of freedom, security and justice

Non-refoulment and Dublin rules

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Abstract: The article is elaborating on the *non-refoulment* principle in Dublin cases. Dublin system was created to deal with the problem of asylum seekers moving between different EU jurisdictions, the Dublin Convention[1] was introduced in 1990, because there were no provisions available under the EC Treaty. Dublin II regulation was issued in 2003 nevertheless the situation of asylum seekers cannot be consideredgood. Cooperation was purely intergovernmental and, therefore, out of the scope of the EC Treaty. There is a tendency for some asylum seekers to reapply for asylum in another country when their asylum claim is rejected in the first country in which they apply for protection. Therefore there emerged a need to agree upon which country was responsible for the review of every asylum application. The Dublin Convention has an impact on the distribution of asylum seekers within the European Union and the general perception is that it influences border countries more than countries situated in the middle of the European Continent. In order to analyse how it really influences the access of third country nationals to Europe, it is first necessary to give an overview of what the convention contains. Non refoulment principle can be found in art 33 of the Geneva Convention on Refugees from 1951. As Dublin procedure is regulated with regulation it is directly applicable in all EU member states. Problems arise when the countries where the asylum seekers are returned do not have effective asylum procedures which might lead up to the violation of non-refoulment principle.
Keywords: Dublin regulation, Dublin Convention, non-refoulment, refugee, asylum seeker

DUBLIN CONVENTION AND REGULATION

The "Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community" from 15 June 1990, more commonly referred to as the Dublin Convention, was the first legally binding text agreed upon by EU Member States on asylum. According to article 63(1) no. 1 a) of the EC Treaty, the Council was obliged to create a follow-up instrument under Community law to replace the Dublin Convention by the year 2004.

The Dublin Convention came into force on 1 September 1997 for the first twelve signatories (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom); on 1 October 1997 for Austria and Sweden; and on 1 January 1998 for Finland. Agreement was also reached with two non EU Member States, Norway and Iceland, on the mechanisms determining the state responsible for examining asylum requests lodged in one of the states. Later, other EU Member States signed up to the Dublin Convention and new member states which joined the EU after 2004 were automatically obliged to follow the Dublin rules. Switzerland started to apply the Dublin II Regulation in 2008.

The provisions for determining which State is responsible for examining applications for asylum are set forth in Article 3(1). Article 3(5) stipulates that any Member State shall retain the right, pursuant to its national laws, to send or deport an applicant for asylum to a third State, in compliance with the provisions of the Refugee Convention. It is intended to ensure that one Member State will undertake responsibility to examine the application of any alien who applies at the border or in their territory for asylum.

Various technical and legal instruments have been created in order to facilitate the implementation of the Convention. The Eurodac Regulation[2], a system of fingerprint comparison designed to assist

[1] In force from September 1997, OJ C 254/1
[2] Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 316 of 15 December 2000, p.1

decision makers identify asylum applicants and the responsibility for the examination of their applications is one important example. It was approved in 2000 when there were still no common rules for refugee recognition or reception. In 2002 another regulation to implement the Eurodac Regulation was issued[1].

The Dublin Convention must be seen first and foremost against the backdrop of the freedom of movement of persons and the abolition of internal border controls within the Schengen area. The abolishment of internal borders by art. 17 of the Schengen Agreement allows for free and uncontrolled cross-border traffic. In addition to the various benefits this created, it also caused certain problems. Three particular problems were encountered in the field of asylum. Dublin was designed to stop so called *secondary migratory movements*. These related to cases when asylum applicants entered Member State A. Instead of lodging an asylum application, they travelled to State B or C through state B, where they then applied for asylum. The reasons for such conduct varied. The existence of certain social benefits in one country and the presence of ethnic communities in certain countries were just some of the reasons behind such movements. Member States agreed that such migratory movements needed to be prevented because they would lead to unequal burdens being placed on some Member States. The general principle is that since an asylum application is a request for protection in an emergency situation, protection should be sought and secured primarily in the first safe country entered. One can also argue that the 1951 Refugee Convention does not state that the asylum applicants have a right to lodge an application for asylum in the country of their choice.

The Dublin provisions place a significant burden on the EU's external border states, especially at the EU's southern border where most irregular immigrants arrive. Dublin provisions create a contemporary need for a different kind of burden sharing between southern EU countries and northern EU countries.

The second problem involves the *multiple applications* the Dublin Convention focuses upon. Once the asylum application has been rejected in state A, a person moves to state B where he or she files another application for asylum and if the state B rejects the application he or she can then move to state C to file another application for asylum. It can be claimed that these multiple applications are unfounded because all EU member states apply and recognize the 1951 Refugee Convention and thus the same standards should be applied in each state where the asylum application is assessed.

UNHCR Executive Committee Conclusions from 2 October 1983 address the issue of manifestly unfounded or abusive applications and note that this type of application is burdensome to the affected countries and detrimental to the interests of those applicants who have good grounds for requesting recognition as refugees.[2]

This paper does not specifically address the issue of the first country of asylum etc. but in its further statements UNHCR also mentions that states may consider an accelerated procedure for those applicants who clearly have made false statements and are „clearly fraudulent". UNHCR also mentions that „where applicants have already had their claim for asylum rejected in another country upon examination of the substance of their claim, UNHCR agrees that such applications could appropriately be considered in the procedure for manifestly unfounded applications".[3] The aim of the Dublin provisions was to limit these kinds of emerging problems. The provisions stated that only one single contracting state shall be responsible for examining the asylum application that is lodged on the borders of or in the territory of a Member State.

The Dublin Convention dealt insufficiently with certain related problems. Therefore, Council Regulation 343/2003 of 18 February 2003 was adopted to deal with responsibility for the application of

[1] Council Regulation (EC) No 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, OJ L 62 of 5 March 2002, p. 1

[2] UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983

[3] UN High Commissioner for Refugees, UNHCR's Position on Manifestly Unfounded Applications for Asylum, 1 December 1992, 3 European Series 2, p. 397, This "another country" can be the other EU country where the applicant has applied for asylum.

asylum in Member States (Dublin II Regulation)[1]. It provided criteria to establish which Member State was responsible for the examination of an asylum application submitted in one Member State. It was based on the so called 'single application' principle, prohibiting a person from applying for asylum in more than one country. Member States may refuse an asylum application with a reasoned decision and refer the asylum applicant to the authorities of another Member State. The system was set up to prevent refugees from 'shopping around' for the best destination and to cut down on the expenses caused by more than one country processing the same application.

Although the Dublin Convention and the subsequent regulation dealt with asylum applicants, the consequences of their application have deeper impacts. Countries of first entry have become responsible for determining the status of persons. When persons are granted refugee status or another type of protection, the burden falls entirely on that state. The Dublin provisions have created disproportionate burdens on southern EU member states, such as Italy, Greece, Malta and Spain, which lie closest to northern Africa and the Middle East and through which most asylum seekers must pass in order to reach central and northern Europe. Those who are not granted any status in these countries and, as a consequence, have to be returned to their countries of origin now become the burden of those southern EU states.

The negative impact of the Dublin Regulation has been heavily criticised by ECRE[2], which states that the burden has been firmly placed on EU border states and on new Member States.

"Far from promoting inter-state solidarity, a long-standing EU goal, the Dublin system shifts responsibility for refugee protection towards the newer Member States in Europe's southern and eastern regions. In 2005, every border state except Estonia reported more incoming than outgoing transfers, and of the non-border Member States, only Austria reported more incoming than outgoing transfers."[3]

The EU has tried to solve the problem by increasing burden sharing by establishing different funds such as the European Return Fund[4], the European Refugee Fund[5] and the External Borders Fund[6] to support Member States. The Dublin provisions definitely limit the access of third country nationals to certain countries. But, as can be seen from the Maltese case, funds are not always enough to ensure asylum seekers receive access to fair treatment and certain rights.

In late 2008, the European Commission proposed amendments to the Dublin Regulation[7], creating an opportunity for urgently needed reform. The Dublin system that was initially created for the six countries has turned out to be a time and resources consuming procedure with a heavy administrative burden of communication between the member states. Besides, the current case of Greece has shown that there are cases when asylum seekers cannot be sent back to the first country of entry to EU.[8]

ECREs position is that the determination of the country responsible for a claim should not result in transfers to Member States that cannot guarantee a full and fair hearing of asylum claims and provide reception conditions that at the very least comply with the EU Reception Conditions Directive. The Commission should be empowered to instigate a process to suspend such transfers. Applicants must have a right of judicial appeal against transfer, with suspensive effect. The Dublin Regulation should explicitly

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1 2003 OJ L 50/1

2 European Council of Refugees and Exiles

3 ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, ECRE. ECRE, P 4

4 Decision No 575/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Return Fund for the period 2008 to 2013 as part of the General Programme Solidarity and Management of Migration Flows, OJ L 144, 6.6.2007, p. 45–65

5 Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC, OJ L 144, 6.6.2007, p. 1–21

6 Decision No 574/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the External Borders Fund for the period 2007 to 2013 as part of the General programme Solidarity and Management of Migration Flows, OJ L 144, 6 June.2007, p. 22–44

7 COM (2008) 820 final, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person

8 ECrtHR, Case M.S.S. v. Belgium and Greece, Strasbourg, hearing done in September 1, 2010

require that all transferred cases be examined fully on their merits so that all claimants subject to Dublin procedures receive the same reception conditions as are required for other asylum seekers, and that detention may be used only as an extraordinary measure of last resort where non-custodial measures demonstrably fail.[1]

ECRE's position is reasonable in the light of events occurring in Europe. For example, Greece has been repeatedly criticized for not efficiently managing its asylum applications and sending people back to their country of origin or pushing them back to Turkey without ensuring their rights are protected according to EU standards. This can lead to violation of the 1951 Refugee Convention which says that no one should be sent back to the country where he or she might face persecution. Here is the evidence that while using the legitimate Dublin system a state can violate another important principle of non-refoulment.

The most important role in determination of the responsible state for the examination of the application, set out in the Dublin II Regulation, is on the Member State where the asylum seeker already has legally residing family members. Article 5 of the Dublin II Regulation states that the criteria it set out was to be applied in the order in which they were set out in Chapter III of the Regulation. The hierarchy criteria set out that the responsible Member State to examine the application was thus in the following order the one where:

1. a family member of an unaccompanied minor was legally present, or if there was no such state, where the unaccompanied minor made his or her application.[2]
2. a family member had been granted Geneva Convention refugee status or had an outstanding asylum application.[3]
3. a visa or residence permit had been issued.[4]
4. the country of "default", meaning the state where the asylum seeker first entered illegally, unless the applicant had been living in the current State over 6 months.[5]
5. the State where the application was first lodged.[6]

Although the family ties should be at the first place in the allocation hierarchy, the family provisions only contributed to a small percentage of actual transfers to other Member States.[7] The majority of outgoing requests given in the Member States according to the Dublin II Regulation have been conducted on the basis of Article 10 based on the Eurodac data tracing. The Member State which played the biggest part in the applicant's entry into or residence in the Union territory i.e. the default Member State is the state where the applications are actually examined. According to a research made by ECRE, it was over a half of the Member States which used the Article 10 referring to irregular border crossing as the most used criterion for the allocation.[8]

In the Dublin recast the provision of irregular border crossing maintained the same meaning[9].

So there is a great chance that the hierarchy criteria is not expected to be changed in the future either. The second most frequently used criteria of the Dublin II Regulation, the Article 13, sets out that if it is not possible to allocate which Member State is responsible for the examination of the application, the state where the application was first lodged was responsible for the examination.[10] This is a clear evidence

[1] ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, ECRE. ECRE, p5
[2] Council Regulation (EC) No 343/2003, Art 6
[3] Council Regulation (EC) No 343/2003, Art 7-8 and Art 14
[4] Council Regulation (EC) No 343/2003 Art 9
[5] Council Regulation (EC) No 343/2003 Art 10
[6] Council Regulation (EC) No 343/2003 Art 13
[7] European Council on Refugees and Exiles, Report: Dublin II Regulation - Lives on hold, European Comparative report, February 2013, p. 41
[8] Ibid., p.26
[9] Recast compromise text Article 13 entry and/or stay, Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast), COM(2008) 820 final, 2008/0243 (COD)
[10] ECRE Report: Dublin II Regulation: Lives on Hold, p 26

that Member States do not follow the hierarchy criteria laid down in the Regulation, as was planned, but rather lay the responsibility on the state which is easy to allocate. It has been argued that that the allocation criteria of the Dublin II Regulation is "unworkable and dysfunctional"[1] but it can be thus argued that the presented malfunctions can be also targeted by the Member States and their poor application of the system.

Furthermore, the Regulation included provisions of the general principles, "taking charge and taking back". This chapter gives instructions to the states of the obligations to examine the application and to complete the procedure, or to claim the other State to take back the person if the responsibility was wrongly adjusted.

The Regulation also includes the chapter describing the administrative cooperation between the Member State concerning the transfer of asylum seekers and their applications. The member states were also left with some discretion in addition to the hierarchy criteria; in addition to the provisions of hierarchy criteria the Dublin II Regulation contained two important discretionary provisions, namely the sovereignty clause and the humanitarian clause. According to the sovereignty clause in Article 3(2) the Member States have „free choice" to consider which state was responsible for the application process.

Another Member State, which was not the one primarily responsible for examination, had according to the Regulation always the possibility to take the asylum application under its response irrespective of the other rules in the Regulation. ***The humanitarian clause (in Article 15)*** provided that regardless of the criteria set out in Articles 5–14, any Member State could bring together family members under certain circumstances based on family or cultural considerations not addressed in the previously mentioned articles with the consent of the concerned person. These discretion clauses reduced the obligatory nature of the Regulation, especially the first articles of the Regulation on the criteria for responsibility[2]**.**

The Dublin system was established in order to give guidance to the Member States on how they should deal with the multiple asylum applications.[3] All the 5 operative Chapters of the Dublin II Regulation gave instructions to the Member States on how to deal with the applications; which member state is responsible for the examination of the application and how the transfers between the states should be conducted. The provisions of the Regulation thus seemed to be directed solely to the Member States and not to asylum seekers as such meaning that the human rights considerations came only after the state convenience. The fact that the system was targeted most importantly to Member States seemed to serve the interest of the states rather than individuals leaving the responsibility of the protection of the asylum seekers for only little attention and the responsibility for looking after the rights and well-being of the asylum seekers to other instrument and courts.

However, a closer examination of the provisions of the Regulation reveals that the Regulation targets the individuals as well. The most important and fundamental provision of the Dublin II Regulation is the Article 3(1) ruling that the examination of an asylum claim should be conducted by only one Member State. The Article stated that "Member States shall examine the application of any third country national who applies at the border or their territory to any one of them for asylum. The application shall be examined by a single member state, which shall be the one which the criteria set out in Chapter III indicate is responsible".[4] The wording of the article thus provided that the Member States guaranteed that only one Member State would be responsible for the examination but they also undertook that the application would be examined *at least* by one of the Member State. It was a guarantee which presented a legitimate compensation for the loss of the asylum seekers to no longer be able to lodge an asylum application in several states inside the EU territory.[5] Therefore, it can be argued that the Regulation was

[1] Costello, C., p 314
[2] ECRE Report: Dublin II Regulation: Lives on Hold, supra note 51, p 6
[3] European Council on Refugees and Exiles Report, Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, Executive Summary, March 2008, p 9
[4] Dublin II Regulation, Article 3(1)
[5] Da Lomba, S., p 131

not only directed to the Member States, but was also established to secure better the examination of the asylum applications and therefor also protecting the rights of third country nationals in European Union.

CRITICS OF THE DUBLIN SYSTEM

In 2008 the European Parliament presented proposals for better system and called for the "fairness" of the system in regards of the asylum seekers and the Member States as it did not agree with the positive findings of the Commission .[1] It stated that "unless a satisfactory and consistent level of protection is achieved across the European Union, the Dublin system will always produce unsatisfactory results from both the technical and the human viewpoints" and that "in the absence of a genuine common European asylum system and a single procedure the Dublin system will continue to be unfair both to asylum seekers and to certain Member States". The UNCHR and several other NGO's and human rights experts had presented their concerns and criticism regarding the realization of human rights protection under the system and argued that the system was not fair and did not respect the human rights obligations set out in the Geneva Refugee Convention 1951, UNDHR or ECHR.

One problem with the Dublin Regulation is that it divides families if, for example, some family members are already residing in one member state. This occurs because, according to the Dublin rules, an asylum seeker has to be sent back to the country where he first landed or a country which issued him a visa.

ECRE argues that family support can benefit both asylum seekers and their host states but the Dublin Regulation gives insufficient consideration to the interests of families, as well as children and other vulnerable groups. The definition of a family – currently limited to spouses, minor children and their parents or guardians – should be extended, and refugees should be able to join any family member holding legal residence status in the EU. The Regulation's humanitarian clause should not be limited to uniting families. It should also allow Member States to prevent the transfer of vulnerable persons, such as torture victims or those with health problems that may require specialised treatment. Determination of responsibility for the applications of children and other vulnerable people should follow a separate process that focuses on their best interests and particular needs. [2] ECRE records that "the Commission's 2007 evaluation asserts that it appears that the overall allocation between border and non-border Member States is actually rather balanced. In 2005, the total number of all transfers to EU external border Member States was 3 055, while there were 5 161 transfers to non-border Member States."[3] According to ECRE, however, the Commission's view is questionable, as it is based only on reports of incoming Dublin transfers and does not reveal how many of people concerned were transferred from external to internal Member States. Looking only at outgoing transfers would lead to the opposite conclusion: 7,040 people were transferred from non-border Member states versus 307 from border Member States, a ratio of nearly 23:1". [4] ECRE's comparison shows that every border state except Estonia reported more incoming than outgoing transfers, and of the non-border Member States, only Austria reported more incoming than outgoing transfers.

When Member States are ranked by order of net Dublin transfers (incoming minus outgoing) compared to the total number of asylum applications received in 2005, the 13 border states occupy the top 11 positions, and 13 of the top 14. Net-Dublin transfers represented a particularly significant proportion of total asylum applications received in Poland (19.28%), Slovakia (12.06%), and Hungary (9.56%). [5]

ECRE claims that the Dublin system, combined with significant differences in the handling of asylum applications by different Member States, produces an 'asylum lottery' in the EU. For example, in

[1] European Union: European Parliament, European Parliament resolution on the evaluation of the Dublin system, 2 September 2008,(2008)0385, para 1-2

[2] ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, ECRE.

[3] European Commission (2007). Third Annual Report on Migration and Integration, European Commission. , p. 12. It appears that the 'border' Member States are Cyprus, Estonia, Greece, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, and Spain, as these states reported a combined 5,161 incoming transfers.

[4] ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, ECRE.

[5] ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, ECRE.

2005 recognition rates for Chechens varied from approximately 0% in Slovakia to approximately 90% in Austria, and several Member States are reported to have *refouled* Chechens to Russia and treated many aspects of their asylum cases differently, including their status as internally displaced persons prior to seeking asylum and access to reception facilities.[1] Iraqi asylum seekers also face widely divergent treatment depending upon where their claims are considered. In 2007, recognition rates at first instance were 87.5% in Cyprus, 85% in Germany, 82% in Sweden, 30% in Denmark, 13% in the UK, and 0% in Slovenia and Greece. ECRE also criticises how the fates of protection seekers often depends on which state is allocated responsibility for assessing their claims.[2]

As Kloth[3] argues, the Dublin Convention has only partly managed to accomplish the goal of halting secondary movements. He claims that *"Applicants for asylum who are not seeking protection but are merely interested in entering the territory of the Member States were very quick to find ways of circumventing the Convention, either by deliberately giving false information about the routes they have travelled or by destroying their documents*".

Indeed, most applicants claim not to have documents. These claims cannot be rejected on the basis of not providing any written proof of the origin or the route of escape. Kloth even declares that the requirement that the "first State in which an application for asylum was filled" should be responsible for reviewing the claim will not accomplish this goal because this criterion would promote secondary migratory movements and would lead to one-sided burdens being placed on Member States that are the preferred destinations for asylum seekers.[4]

Dublin has created more work for Member States' administration and its outcomes are often disputed but as it is a valid regulation it has to be followed in the way it has been designed. A lot of paper work is required and enquiries have to be answered as persons might need to be transferred to another member state if it is found responsible for the asylum procedure. The Dublin Regulation is definitely one of the instruments that limits the access of third country nationals to a particular state. It makes asylum shopping harder and limits asylum seekers' possibility to select their country of asylum.

Due to the founded malfunctions the European Commission proposed to recast the Dublin II Regulation in 2008 and admitted that there were well-founded concerns in the level of international protection of the asylum seekers in the current form of the Dublin II Regulation.[5] The recast of the current Dublin II Regulation will thus be created for better human rights protection and to strengthen safeguards of the asylum seekers and to ease the transfer and responsibility procedures. However, the Member states have been reluctant to accept many of the Commission's proposals including the proposal to enforce temporary suspension of transfers and legal provisions that would narrow member states' ability to detain asylum seekers.[6] Because of this lack of willingness of the Member States to change the foundational principles of the Dublin system the Courts, both at the national and European level, have increasingly been required to intervene to protect the fundamental rights of the asylum seekers with regard to the application of the Dublin II Regulation.[7]

Also, the Dublin Regulation recast will not change the most essential provision of the Dublin II Regulation namely the Article 3 providing that an asylum application should be considered only by one and at least one Member State. This main Article has been argued to fail in three ways.[8] Firstly, the creation of the Dublin system and its main Article 3 caused a loss of the right to lodge an application in several member states which again meant that person's possibilities to submit his asylum claim at all in EU was jeopardized because the Member States had been unwilling to agree on the asylum procedures or the

[1] The article on the EU Commission webpage confirms the different treatment of asylum seekers and the example of Chechens and Iraqis is mentioned. Some EU countries would agree to give them asylum others not.
[2] ECRE (2008). Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, ECRE. P 15
[3] Faria, C. (2001). The Dublin Convention on Asylum, European Institute of Public Administration. pg 23
[4] Ibid pg 24
[5] Commission evaluation report, Recast, supra note 39, p 3
[6] Jesuit Refugee Service Europe: Dublin Regulation, Background and Context
[7] European Council on Refugees and Exiles, "Dublin II Regulation: Lives on hold" - European Comparative Report, February 2013, p 16
[8] Da Lomba , S., p 132

definition of "refugee" in harmonized manner.[1] Secondly, there existed deficiencies in the provision and the application of family unity and thirdly, there was a problem with the third country-practices and the consequent phenomena of "refugees in orbit". In the following sub-chapters it will be examined whether there can be found grounds for the presented criticisms.

NON REFOULMENT PRINCIPLE

It is a presumption, also stated in the Dublin II Regulation recital 8, that all the European Member States meet the satisfactory basic standards for fair asylum procedures. However, despite the harmonization attempts, there exist big differences between the member states regarding the binding criteria and the discretionary provisions, application procedures, standards for the examinations and the decision making regarding the asylum application.[2] But in fact the states seem to have different views on how the Dublin procedures should be conducted and disparities exist between the procedural safeguards even if the Regulation was established in order to harmonize the common European asylum legislation. For example the time given for the procedures and for the interviews varies between the states. Despite the recommendation of the NGO's some states have been unwilling to offer longer appeal times. For example Hungary gives an asylum seeker only 3 days for submitting the appeal whereas France and Spain give 2 months.[3] These differences between the member states are often in relation to the rights of the asylum seekers as in the countries where the time for submitting appeal is short and the decision is quickly put in force the asylum seekers have less procedural rights and possibilities to have correction to a wrong decision.

At the same time Art 33 of the Geneva Convention on Refugees from 1951 is stateting a *non-refoulment* principle that should be taken into account while assessing the asylum application. The first paragraph of the article 33 of the Convention states that:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

The European Court of Human Rights (ECtHR) has used Article 3 in order to deal with the non-refoulement issue, which is not itself specifically mentioned in the Convention. Also, the right which the Convention creates (to be protected from torture) is absolute and non-derogable. So the protection given by the ECHR is broader than that of art. 33 of the Geneva Convention. All European states are part of the UN Refugee Convention and also implement the Dublin regulation.

One of the main reasons for initially establishing a common allocation mechanism (Dublin procedure) for determining the responsible member state was to secure the principle of international law called non-refoulement- This principle of international law prohibits rendering victims of persecution to the state, where their lives or freedoms could be threatened. The mechanism was also to make an end to the phenomena of "refugees in orbit" or "asylum shopping". Even if stated in the preamble (2) of the Dublin II Regulation that the Regulation was aiming to ensure the maintaining the principle of non-refoulement,[4] a real danger under the Dublin procedure exists for a person to be transferred to a country where life or freedom of the person can be threatened and it has been argued that especially the "third safe country" principle with regard to the Dublin system is endangering the principle of non-refoulement.[5]

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[1] Ibid. p 132

[2] ECRE Report: Dublin II Regulation - Lives on hold, p 6

[3] Ibid., p 61

[4] Goodwin-Gill, p 202 "The term refouler derives from French and means to drive back or to repel and is usually referring to those who illegally entered the state territory and to summary refusal of admission of those without valid papers. Refoulement is thus to be distinguished from a more formally conducted expulsion or deportation whereby a lawfully resident alien is required to leave the country".

[5] Rodger, J., Defining the parameters of the non-refoulement principle, 2001 LLM Research paper International law (Laws 509), Faculty of Law, Victoria University of Wellington, Chapter 4. B. 1, para 41

The third country practice was already debated during the Dublin Convention but was nevertheless passed to the Dublin II Regulation. The failure of the Dublin system is that it gives priority to sending asylum seekers to "third countries", meaning that the system allows the Member States under the article 3(3) of the Dublin II Regulation, which states that "Member States shall retain the right, according to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention", to prefer external transfers over internal transfers.[1] This is a practice unfortunately often used by the member states even if the principle should be applied in the Dublin system as a last resort only if none of the other criterion is found. The member states refer to the *non-refoulement* principle and send the asylum seekers to "safe third countries" referring to states other than the one where the individual claims to be at risk to treatment threatening his or her life, for example to a neighbour country of the country of origin.[2] Member states may then resort to the *non-refoulement*-principle because the principle only precludes states from transferring the asylum seeker to a country of origin where they might face persecution but does not preclude the state returning the person elsewhere.[3] These "safe" third countries often expel the seeker onwards to the country where the possible ill-treatment might take place.[4]. In most cases the receiving state does not make any efforts to examine whether the third country will be willing to substantively examine the case after receiving the person and that the asylum procedures in the country can provide adequate protection.[5] The principle of the third safe country gives therefore a convenient escape way of the obligation of the states to conduct a full and substantive examination of the asylum application.

The allocation procedure created by the Dublin system also reinforced a trend among the European member states to speed up the national procedures whereby only two or three days are allowed for the preparation of the case or appeal. Member States have been argued to restrict the asylum permits by claiming the applications "manifestly unfounded" by "fast-tracking" the asylum seekers or by denying the access of the asylum seekers to the full asylum procedures completely.[6] Fast-tracking procedures reduce substantially the chance of the asylum seeker to be granted a positive decision for their claim since not enough time is provided to them to gather evidence which would be needed for positive decision required by the state authorities such as birth and marriage certificates, required DNA-testing which also in some states must even be provided by own expenses.[7]

The asylum seekers are also often required to provide proof of the claimed thread of persecution or conducted ill-treatment such as arrest warrants and/or medical reports even if it is acknowledged by the UNCHR guidelines regarding the refugees that persons fleeing from persecution "often arrive with the barest necessities and frequently without personal documents".[8] The speedy procedures are creating another possible violation of the non-refoulment principle as there is not enough time to review the cases in depth which is one of the basic requirements of the asylum procedure.

FAMILY UNITY PRINCIPLE AND DUBLIN

Articles 7, 8 and 14 of the Dublin II Regulation are provisions that were established in order to preserve family unity as laid down in Recital 6 of the Regulation and are based on the protection of fundamental rights of the individuals regarding the family unity provided in the Article 8 ECHR and

[1] Costello, C,, p 310
[2] Ibid., p 310
[3]Ibid., p 310
[4] Mole, N., Asylum and the European Convention on Human Rights, 2007, Council of Europe Publishing, Fourth Edition, November 2007, Strasbourg, p 46
[5] Wallace, Rebecca, p 74
[6] Mole, N., Asylum and the European Convention on Human Rights, 2007, Council of Europe Publishing, Fourth Edition, November 2007, Strasbourg, p 61-62
[7] ECRE Report: Dublin II Regulation - Lives on hold, supra 51, p 97
[8] UN High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, para. 196

Article 7 Charter of Fundamental Rights.[1]According to these Dublin II Regulation Articles, the Member State where the applicant has a specified family member, who has already been granted a refugee status under the Geneva Convention, is primarily the responsible state for the examination of the asylum. ***However, ECRE claims that the member states have been argued to not to provide full consideration concerning families in the current form of the Dublin II Regulation.***[2]

The provisions concerning family unity has been one of the things criticized to be weakly composed in the original Dublin Convention. The Commission has noted that the provision regarding the family unity in the original Convention Article 4 was easy to apply comparing to some other provisions of the Convention, but it was also easier to find its restrictive scope as the article reflected western concept of families, namely including to the scope of family only the nuclear family members. The provisions were thus argued to fail to meet the factual situations when dealing with the asylum seekers who, in their culture consider the family unit more comprehensive.[3] In the Dublin II Regulation the family-related criteria was therefore reformed and also the specific needs of unaccompanied minors were added to the criteria. Also, the provisions were extended to include also siblings and married children who were present in the territories of Member States without their spouse and to include relatives who could take care of a minor to the category of family members.[4] Some of the member states[5] even included unmarried partners in stable relationships as well as same sex partnerships to the definition of family [6] as well as families that had not existed originally in the country of origin.[7]

According to ECRE in many cases the national authorities ignore the presence of a close family member in another Member State and instead applied Article 10(1) of the Regulation on basis of Eurodac tracking and thus sent the request for examination to the state of illegal entry of the asylum seeker or based on the Article 13 to the state where the asylum application was previously lodged.[8] The weak application of the transfers conducted by the member states according to family unity reasons can be visualized from the small percentages of average numbers presenting the requests and actual transfers conducted between the member states. For example, in 2010 only 0.5% of outgoing requests to another Member State under the Dublin Regulation were on the basis of family reasons.[9] The state specific statistics reveal the scarcity of the number of actual transfers conducted as for example the Bulgarian State Agency for Refugees statistics showed that in 2011 there was only one outgoing transfer conducted on the ground of family reasons and was one out of only nine requests sent under the family provisions. [10] Many cases end up breaking families which happened also in case where the Austrian authorities separated a Chechen father from his baby. Even if the child had refugee status in Austria, his father was sent to Poland under according to Eurodac-tracking under the Dublin system in spite of his requests for reunification under the family unification provisions of the Dublin system.[11]

Also, the Article 14 has been often applied instead of the Article 8[12] meaning that if several members of a family cast their asylum applications simultaneously the Member states send the applicants

[1] ECRE Report: Dublin II Regulation - Lives on hold, supra note 51, p 32-33
[2] European Council on Refugees and Exiles: Report, The application of the Dublin II Regulation in Europe, AD3/3/2006/EXT/MH, on March 2006, p 6
[3] Da Lomba, Silvia, p 134
[4] ECRE Report: Dublin II Regulation - Lives on hold, p 26
[5] The Netherlands included also same sex marriages, Ibid., p. 26
[6] i.e. Austria, Bulgaria, Greece, Spain, Switzerland and the Netherlands, ECRE Report: Dublin II Regulation - Lives on hold, p 33-34
[7] Hungary was one of such states, ECRE Report: Dublin II Regulation - Lives on hold, p.33-34
[8] ECRE Report: Dublin II Regulation - Lives on hold, p 26
[9] Ibid., p 22
[10] Ibid., p 35
[11] Press release: Little to celebrate on Dublin's 10th anniversary - New research shows that the system continues to violate the rights of refugees, Dublin transnational project, 18 February 2013
[12] ECRE Report: Dublin II Regulation: Lives on hold, supra 51, p 26

to the Member State where the biggest part of the family is residing/ to the state where the oldest person of the family is[1] rather than to examine the application by themselves.

The humanitarian clause in the Dublin II Regulation provided that any Member State may accept to examine, at the request of another Member State, an asylum application for **humanitarian reasons** based on family or cultural considerations. Also the consent of the persons concerned is needed. However the humanitarian clause, as articles 7, 8 and 14, of the Dublin II Regulation have been argued to be applied in a restrictive manner by the member states often leading to separation of families. [2] Also, the humanitarian clause has received lot of criticism as it was created in order to better protect the asylum seekers but have rarely applied by the Member States even if the applicant would have been with vulnerabilities.[3] The Jesuit Refugee Service, European Regional Office has noted that for example where a woman in her 6th month of pregnancy was transferred on her own back to Greece, despite loud protests from NGOs and church groups[4] and therefore there existed little to no use of the humanitarian clause in the Regulation.[5] The new discretionary clauses in the Dublin recast will however improve the current Regulation as they will include a "family dependency link" to the criteria which enables the Member States to allocate the responsibility for humanitarian reasons better[6] and might thus make their use more common.

According to the Article 6 of the Dublin II Regulation the responsible Member State for the examination of the asylum application of an unaccompanied child is the one where a member of his or her family is legally present, provided that it is in the best interest of the child. In case there is no family members present in Europe, then the Member State where the child lodged his/her asylum application is responsible. However, the interpretation of the member states of the article 6 of the Dublin II Regulation differs largely depending of the priority given by the state to either guardian, family tracing, assessment of the best interest of a child or age making the determining a responsible state resemble lottery.[7] The best interest of a child is given rather strong importance on the allocation and the Advocate General acknowledged in his opinion in Case C-648/11 that even if the practice of determining the responsible state of an asylum seeker according to the criteria allocating the responsible state basing on the state where the child of a person had lodged his/her asylum might increase the risk of so called 'forum shopping', the risk would be justified by the fact that the procedure would be the only way for the sufficient attention to the minor's best interests.[8]

However, diverging practice exists with respect to the application of the principles of the best interests of the child within the Dublin procedure and to the interpretation of Art. 6. The best interest of the child is in some Member States secured by national law provisions. The importance of considering the cases on their facts was visible in the Federal Administrative Court case E-8648/2010 given on the 21st September 2011 where an asylum application of a Somali child in the Netherlands was determined to be examined by Malta according to Dublin system. The child had a sister in the Netherlands and the Dutch Council of State thus decided finally that it was the best interest of the child that his application was examined in the Netherlands.[9] However, in the national law of many Member States the best interest of the child is not considered as an integral element when applying the Dublin Regulation and thus there

[1] UN High Commissioner for Refugees, *The Dublin II Regulation. A UNHCR Discussion Paper*, April 2006, p 34 available at: http://www.unhcr.org/refworld/docid/4445fe344.html [accessed 10 May 2013]

[2] Ibid. p 33-34

[3] Caritas Europa, CCME – Churches' Commission for Migrants in Europe, COMECE – Commission of the Bishops' Conferences of the European Community, ICMC – International Catholic Migration Commission, JRS-Europe – Jesuit Refugee Service, European Regional Office, QCEA – Quaker Council for European Affairs, Comments on the European Commission's Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection in one of the Member States by a third-county national or stateless person (COM 2008/820/COD), p 8

[4] Jesuit Refugee Service Europe: Dublin II: A summary of JRS experiences in Europe, October 2008, p 5

[5] Jesuit Refugee Service: Comments, p 8

[6] Ibid., p 8

[7] ECRE Report: Dublin II Regulation - Lives on hold, p 6

[8] Court of Justice of the European Union - Opinion of Advocate General Cruz Villalón in the case C-648/11 MA, BT, DA v Secretary of State for the Home Department, 21 February 2013, para 76-78.

[9] ECRE Report: Dublin II Regulation - Lives on hold, p 28

does not exist any explicit criteria for practical meaning of the best interest of the child[1] which makes the consideration of the child's interest difficult. Some of the European member states do not even have a family member tracing procedures related to the Dublin system, which means that the Article 6(1) on applications of children is rarely applied.[2]

The Dublin II Regulation neither includes a specific provision that would take the group of vulnerable people into consideration diminishing the proper protection of the asylum seeker. Also the humanitarian clause in Article 15 has been argued to be applied by the Member States in too restrictive manner leaving out from the scope other vulnerable groups namely, torture victims, persons with health problems in need of special treatment.[3] ***The article 15 (2) does however make a reference to persons who may be dependent*** on the assistance of another "*on account of pregnancy or a new born child, serious illness, severe handicap or old age*". Even if the family provisions in the Dublin II Regulation were a bit improved from the original Convention, the vulnerable groups could be better taken into consideration by creating a separate determination process especially focusing on their interest and particular needs[4] and therefore, the group of vulnerable people was taken into consideration in the Dublin recast obliging Member States to transmit health data between themselves regarding the medical care or treatment of disabled persons, elderly people, pregnant women, minors and persons that have been subject to torture, rape or other serious forms of psychological, physical and sexual violence.[5]

The transfers outside the borders of the Union are not the only problem related to the third country transfers according to the system but the transfers inside the borders of the Union might be problematic as well. Under the Dublin II Regulation all the European Member States are considered as "safe countries" and thus, the transfers to another Member State cannot be regarded as a breach of principle of *non-refoulement*. The Contracting States can thus rely on a certain extent to the fact that the other contracting state is bound by the same international legal instrument than itself and is thus considered as safe.[6] This assumption was also confirmed by the ECtHR in *Amuur v. France*[7] as well as in the CJEU's ruling in case *N.S. v. Secretary of State for the Home Department*[8] where it was held that the presumption that Member States are observing the fundamental rights enshrined in the EU Charter of Fundamental Rights must be rebuttable.

The mutual recognition is based on trust between the Member States and is applied in spite of diversity regarding the Member States' adapting of the EU legislation.[9] Many of the persons seeking for international protection have however been unlawfully returned first to another state even if it was known that this state could not be able to provide sufficient procedures for the examination or even proper reception conditions and which again send the asylum seeker onward breaching the obligation of *non-refoulement*. The problem of the mutual recognition can be discovered in the case *T.I v. U.K*[10]*,* in which ECtHR made an important ruling relating to the third country practice and the state responsibility in regards to the Dublin system.

T.I was a Sri Lankan asylum seeker whose asylum application was refused in Germany on the basis that his claim was not considered credible and the fear of persecution was caused by the non-state agents. The applicant was thus returned first to UK and from there to Sri Lanka. The ECtHR found that the State responsibility arose also in cases where the State sent back the asylum seeker to a third "safe" countries according to the Dublin system if there was a risk that the person might face treatment contrary to article

1 Ibid, p 28
2 Ibid., p 28
3 ECRE Report: Dublin II Regulation - Lives on hold, p 53
4 ECRE Report: Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered, Executive Summary, May 2008
5 ECRE Report: Dublin II Regulation - Lives on hold, p 74
6 Battjes, H. 2006, Immigration and asylum law and Policy in Europe, European Asylum Law And International Law, Martinus Nijhoff Publishers, p. 411
7 Amuur v. France, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996
8 N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform , C-411/10 and C-493/10
9Costello, C-„ p 316
10 T.I. v. The United Kingdom, Appl. No. 43844/98, Council of Europe: European Court of Human Rights,7 March 2000

3 ECHR, meaning that the states should not disregard the asylum application by resorting to the safe third country practice. It stated that the assigning the risk of torture to another Member State, did not take away the responsibility from the first Member State, but rather just increased it in the receiving state. [1] The Court did not, however, condemn the Dublin Convention per se.[2] Therefore, even if the Dublin system is a tool to make an end to the phenomenon of "refugee in orbit" inside the borders of Europe, the Article 3(3) enables the externalization of the asylum seekers making the phenomenon aggravated elsewhere in the world.[3] Also the CJEU has ruled in the joined cases *NS/ME*,[4] that the EU human rights law does sometimes require Member States to refuse to transfer the asylum seeker according to the Dublin system. The CJEU held that this obligation is triggered if the authorities in the transferring Member State have substantial grounds for believing that there is a real risk of treatment contrary to Article 4 EU Charter of Fundamental Rights (Article 3 ECHR).[5]

In January 2011 the ECtHR gave a fundamental judgment in ***M.S.S v Belgium and Greece***[6] ***which changed the direction of the responsibility of states in regards to the asylum application examinations. The case concerned an Afghani refugee who entered Europe through Greece where he was fingerprinted. From Greece he continued to Belgium where he applied for asylum where according to*** the Dublin II Regulation it was allocated that Greece was the country responsible for determining his asylum application and he was sent back there. In Greece he was first shut in a detention in degrading conditions in a center which was overcrowded and insalubrious and left to live in Athens without food or any protection or rights what so ever. Finally he was transferred to the Turkish border by the Greek authorities in order to be irregularly pushed across the border without any procedures but which was prevented only because of the Turkish border guards challenged the attempt of the Greek. Complicated question in the case was whether the Belgium was culpable breaching its human rights obligations as it had relied on the Dublin II Regulation. The ECtHR ruled that Belgium did breach its obligation under the article 3 ECHR (prohibition of inhuman or degrading treatment or punishment)[7] because of the applicant's detention conditions and living conditions in Greece and it had thus not fulfilled its obligations to protect *M.S.S* from torture, inhuman and degrading treatment because at the time of the applicant's expulsion the Belgian authorities knew or ought to have known as confirmed by the given Rule 39 that M.S.S had no guarantee that his asylum application would be seriously examined by the Greek authorities and they would have had the means to refuse the transfer.[8] The two countries were given fines of some €6,000 and €30,000[9] and thus, despite the fact that Greece had ratified the common European asylum directives the Court ruled that it did not comply with international and European human rights standards and thus condemned the transfers to Greece. As a result, the contracting states of the Dublin system suspended transfers of asylum seekers to Greece. These actions thus showed that the Dublin II Regulation remained far away from its goal to harmonize of asylum policies in Europe.[10]

1 Ibid.,

2 Guild, E., The European geography of refugee protection - exclusions, limitations and exceptions from the 1967 Protocol to the present, European Human Rights Law Review E.H.R.L.R. 2012, 4, 413-426,

3 Da Lomba, S., p 133

4 Joined cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform, Judgment of 21 December 2011

5 Costello, C., p 314-315

6 Case M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011

7 European Court on Human Rights Press Release, Forthcoming Grand Chamber Judgment in case M.S.S v. Belgium and Greece, issued by the Registrar of the Court, no. 25, 17.01.2011

8 Ibid.

9 EU Observer.com: Human Rights Court Deals Blow to EU Asylum System, 21.01.11

10 Vink, M. (2012). Dublin System. In I. Ness, ed. (2012). Encyclopedia of Global Human Migration. ,Wiley Blackwell Publishing. p. 3

CONCLUSION

There are conflicting ideas of how to resolve the problem. UNHCR and NGO-s promote the change. Majority of the EU Member States would like to maintain the present principles of the Dublin Regulation. The EU Commission has made a proposal in 2008 to create a more effective system that would also take into account the rights of asylum seekers.[1] The new Dublin regulation draft is still under consideration and under discussion at the EU level.

The statistics have also revealed that Member States have not applied the Dublin II Regulation in a manner that would be in accordance with the spirit of the Dublin Convention. The consideration of the best interest of the persons have been abandoned and the Dublin system has become just a tool for „getting off the problem from ones shoulders". It is mainly used to transport the asylum seekers back to the first country of entry or who might be held responsible of letting the person in to the European Union. The hierarchy criteria has been forgotten and is mostly theoretical. [2]

The lack of harmonization and inconsistent interpretation of Regulation provisions and refugee concepts might also lead to direct and indirect refoulment.[3]

It can be concluded that applying Dublin criteria in a mechanical and technocratic way might lead to the violation of the principle of non-refoulement, lack of respect of family unity. These practices have been condemned by the supranational courts and in the European Court also in the Hirsi Jamaa v. Italy[4] the ECtHR respectively ruled that the legal obligations of the states did not limit to their territorial borders but human rights protection should extend even beyond.[5]

The example of Greece shows that the Dublin System doesn't grand to the individual refugee the protection and treatment that he or she deserves. Although all EU member states are signatories to the ECHR, and have thus recognized the principle of non-refoulement as an absolute right, most EU states don't respect this principle, either directly or indirectly by blindly following the Dublin Regulation. However a serious body of recent information is provided about the problems of refoulement in Greece, a lot of EU countries keep returning people to the country when it is responsible for the asylum request according to the Dublin Regulation.

In case of a possible violation of art. 3 ECHR, the ECtHR can take up the role of the member states by taking interim measures to suspend the Dublin transfer.

The ECtHR interpreted art. 3 very broadly and is in its jurisdiction clear about the responsibilities of the contracting states in transfer cases. Still it is, in the casus of Dublin transfers to Greece, very difficult to give proof that in an individual case there is a violation of art. 3 ECHR. The Dublin system impedes integration by delaying the substantive examination of asylum claims, by creating incentives for refugees to avoid the asylum system and live 'underground,' and by uprooting refugees and forcing them to have their claims determined in member states with which they may have no particular connection. In 2013 the new regulation[6] was agreed upon and hopefully the application of this regulation will resolve major of the abovementioned problems.

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[1] Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person (Recast), COM (2008) 820 final, 2008/0243(COD)

[2] See also the Commission proposal for recast, p2-3

[3] UN Hight Commissioner for Refugees, The Dublin II Regulation. A UNHCR Discussion Paper, April 2006

[4] *Hirsi Jamaa and Others v. Italy* , Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012

[5] Vandvik, B., p 135-138

[6] REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31, 29.6.2013

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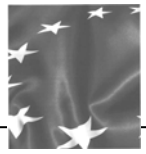

The EU efforts in combating internal fraud and corruption

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Abstract: This article focuses on some of the EU experiences with combating internal fraud and corruption before and since the Lisbon Treaty. The latter Treaty creates new opportunities and provides new instruments to establish an effective area of freedom, security and justice at European level. The article also comments upon the reports on the way the Commission is handling internal fraud, as well as the performance of some Commissioners. Finally, the role of OLAF (European Anti-Fraud Office), Europol and Eurojust and the potential EU Public Prosecutor are discussed.
Keywords: Europol, Eurojust, EU Public Prosecutor, Justice and Home Affairs, Common Foreign and Security Policy.

1. INTRODUCTION

This paper discusses some of the EU experiences with combating internal fraud and corruption before and since the Lisbon Treaty. The latter Treaty creates new opportunities and provides new instruments to establish an effective area of freedom, security and justice at European level. The paper also comments upon the reports on the way the Commission is handling internal fraud, as well as the performance of some Commissioners. Finally, the role of OLAF (European Anti-Fraud Office), Europol and Eurojust and the potential EU Public Prosecutor are discussed.

2. THE FIGHT AGAINST INTERNAL FRAUD AND CORRUPTION BEFORE LISBON

European Parliament has consistently pushed for an EU anti-fraud policy. Such a policy was needed for the EU institutions themselves in the first place. On 14 January 1999, it adopted a resolution on improving the financial management of the Commission[1] that called *inter alia* for a "Committee of Independent Experts" to report on the way the Commission was dealing with internal fraud, maladministration and nepotism.

Already on 15 March 1999, the Committee submitted its *first* report entitled *Allegations regarding Fraud, Mismanagement and Nepotism in the European Commission.*[2] Fraud was defined as "intentional acts or omissions tending to harm the financial interests of the Communities." Mismanagement forms a broader concept and was defined as "serious or persistent infringements of the principles of sound administration and, in particular, to acts or omissions allowing or encouraging fraud or irregularities to occur or persist. Such infringements may be committed intentionally but will consist, more frequently, in negligent behaviour, or lack of care, in the exercise of public management functions." The non-legal concept of nepotism "refers to favouritism shown to relatives or friends, especially in appointments to desirable positions which are not based on merit or justice". As the Committee's report found various examples of reprehensible conduct, notably from the side of French Commissioner Cresson, within one day of the presentation of the report the College of Commissioners resigned.

A *second* Committee report was issued on 10 September 1999 and was entitled *Reform of the Commission. Analysis of current practice and proposals for tackling mismanagement, irregularities and fraud.*[3] It contains a long list of recommendations dealing notably with prevention[1], detection and investigation[2], prosecution and sanction.[3]

[1] B-0065,0109 and 0110/99.
[2] http://www.europarl.europa.eu/experts/pdf/reporten.pdf .
[3] http://www.europarl.europa.eu/experts/default_en.htm .

The Committee reports referred to the Convention on the Protection of the EC's (European Community's) financial interests,[4] adopted in 1995, followed by two protocols in 1996 and 1997. This convention and the protocols had the aim to create a common legal basis for the criminal law protection of the European Communities financial interests. Fraud affecting the expenditure and fraud regarding revenue was defined as "any act or deliberate omission involving the use or presentation of false, incorrect or incomplete statements or documents." Such fraud must be punishable by effective, proportionate and dissuasive criminal penalties in every EU country. The Member States also agreed to adopt measures that would allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable.

At the start of the European Communities, no competence regarding cooperation on criminal law was foreseen. Through the Treaty of Maastricht that entered into force on 1 November 1993, the Justice and Home Affairs (JHA) provisions were introduced as the third pillar of the EU. The first (EC) pillar encompassed the supranational area, the second pillar was the one entitled Common Foreign and Security Policy (CFSP). The second and third pillar were essentially more of an intergovernmental nature. Before the Lisbon Treaty cooperation in criminal matters thus had its legal basis in the third pillar.

3. LISBON TREATY PROVISIONS ON THE FIGHT AGAINST FRAUD AND CORRUPTION

Essential for the fight against fraud and corruption are in the Treaty on the Functioning of the European Union (TFEU), the new Chapter 4 on judicial cooperation in criminal matters (Artt 82 – 86 TFEU) and Chapter 5 on Police Cooperation (artt. 87 – 89 TFEU). In order to constitute an area of freedom, security and justice, the Lisbon Treaty creates new opportunities and provides new instruments at European level, for example the establishment of a European Public Prosecutor (EPP) (Art. 86 (1) TFEU) and the idea to reinforce Eurojust (Art. 85 (1) TFEU).

For the development of EU criminal law, Article 83 TFEU is a starting point and it includes the EU 's competence to enact measures concerning criminal law:

" 1. The European Parliament and Council may by means of directives, adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. (…)

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure effective implementation of a Union policy in an area which has been subject to harmonisation measures , directives may establish minimum rules with regard to th definition of criminal offences and sanctions in the area concerned."

The TFEU also provides a legal basis for the fight against fraud against the European Union's financial interests with article 325 TFEU. Fraud is defined there as acts or omisions which have as effect the missapplication, wrongful detention or illegal diminution of EU funds. It includes tax evasion, VAT fraud and fraud in relation to Agricultural and other subsidies.

According to the second paragraph of Article 325 TFEU *"Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests*." Anti- Fraud activities are therefore a joint responsibility of the Commission and of the EU Member States.

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[1] Encompassing a. quality of well drafted legal documentation, b.transparent and efficiëntly managed tender procedure, c. effective control and monitoring procedures, d. effective internal audit in the Commission, e. a tight administrative culture.

[2] Encompassing a. effective, competent and qualified law-enforcement in Member States, b. an effective investigative capacity at European level, c. good coordination and information exchange between anti-fraud-services, d. good internal cooperation between Commission services, e. adequate legal basis for investigations, f. anti-fraud culture – guarantee for whistle blowers.

[3] Encompassing a. willingness and ability of national juficial authorities to prosecute EU fraud cases, b. good cooperation between Member States judicial authorities, c. adequate Legal framework for the prosecution of EU fraud, including of EU officials, d. effective coordination of administrative, disciplinary and judicial procedures, e. speedy resolution of fraud litigation in Member States criminal courts

[4] OJ 1995, C 316.

Effective cooperation is a key factor in the investigation and prosecution of related offences as mentioned in the third paragraph of Article 325 TFEU: *"Without prejudice to other provisions of the Treaties ,the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organize , together with the Commission, close and regular cooperation between the competent authorities.*"

The Union needs to defend taxpayer's money in the most efficiënt way, making use of all possibilities offered by the Treaty on European Union.The damage to the EU budget calls for action to ensure equivalent and effective protection of the Union's financial interests, including criminal law as far as this proves necessary. Despite the development of an EU acquis in this area which includes fraud and corruption, Member States have adopted diverging rules and levels of protection within their national legal systems. The Communication "Towards a European criminal policy"of September 2011 sets out a proposed general framework for the contents and structure of EU criminal law, as well as general principles of EU criminal law legislation, namely the need that EU criminal law does not go further than what is necessary and proportionate in relation to its objectives. As there are several different criminal laws in the Member States of the EU these differences do not help to ensure consistency in the fight against frauds. An obstacle for the fight against fraud is that the operations are being made transnationally since the European integration has opened national borders, making it easier to move from one country to another without border controls.

4. AN INDEPENDENT EUROPEAN AGENCY TO FIGHT FRAUD AND CORRUPTION (OLAF)

In addition to the herefore mentioned acts and conventions , in order to render the fight against fraud more effective, the EU also created a specialized anti-fraud office (OLAF) which has the task to conduct anti-fraud investigations. OLAF was created in 1999 by Regulation (EC) No 1073/1999[1] as an administrative independent body whose aim is to protect the financial interests of the Union, fighting fraud, corruption, professional misconducts and irregularities. Its main task is to conduct in full independence, transparent internal and external investigations. OLAF has a special status, in fact as part of the Commission, it is responsible for developing and monitoring the implementation of the EU's anti-fraud policies, but is has some of budgetary and administrative autonomy, which guarantees the total independence with which OLAF conducts investigations.

According to the last OLAF annual report over the period 2007 – 2013 the European Union budget destined to cohesion policy and aimed to cover a great number of programs and projects in the 27 member states, amounts to 347 billion Euros. Such an amount of money is often the subject of attack by fraud and irregularities! In order to render the fight against fraud more effective OLAF officials'power of investigation has been broadened and they can now carry out on-the-spot-checks in EU Member States. In addition OLAF has close links with Europol and Eurojust, the agencies set up to improve coordination of the fight against serious crime, especially when it is organized. OLAF works in close collaboration with national judicial and administrative authorities.

In order to render the fight against transnational fraud or corruption more effective OLAF had established collaboration with EUROJUST and EUROPOL. This collaboration has been regulated in TFEU Chapter 4 Articles 82 -86 Judicial cooperation in criminal matters and TFEU Chapter 5, Articles 87 – 89 – Police Cooperation. The aim of EUROJUST and EUROPOL is to facilitate traditional judicial and police cooperation. While EUROPOL has been processing Member States data on crimes, including crimes against the EU budget, like fraud and corruption, EUROJUST has been coordinating Member States judicial authorities in the investigation and prosecution of similar crimes.

The Lisbon Treaty gives to EUROJUST a more active role which includes the prosecution on a common base of serious crimes, a more specific role in relation to EU fraud, even if committed just in one member state.

A novelty is the possibility to establish a European Public Prosecutor (EPP) Office according Article 86 TFEU. Paragraph 2: " The European Public Prosecutor's Office shall be responsible for

[1] Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (1999) OJ L 136.

investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in, offences against the Union's financial interests, as determined by the regulation provided in paragraph 1 . It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.".

In fact in Article 86 TFEU the functions of the European Public Prosecutors are described in general terms and the details will be left to secondary legislation to improve the cooperation in the fight against frauds against the EU.

5. OBLIGATIONS FOR EU COMMISSIONERS

The resignation of the European Commission in 1999 emerged notably because of the allegations regarding the French Commissioner Edith Cresson.

A Judgment of the European Court of Justice in Case C-432/04 of 11 July 2006 confirmed that she had acted in breach of the obligations as Commissioner, notably Article 213 (2) EC (now Article 245TFEU). Since the entry into force of the Lisbon Treaty, the responsibilities of the Members of the European Commission are regulated in Articles 17 of the Treaty on European Union (TEU) and Article 245 TFEU. Article 17 TEU obliges the Commission to promote the general interest of the Union and take appropriate initaitives to that end, and demands that the Members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt, and shall refrain from any action incompatible with their duties or the performance of their tasks. Article 245 TFEU stipulates that "the Members of the Commission may not during their term of office, engage in any other occupation, whether gainful or not. When entering upon their duties they shall give a solemn undertaking that both during and after their term of office, they will respect the obligations arising therefrom and in particular their duty to behave with integrity and discretion as regards the acceptance after they have ceased to hold office, of certain appointments or benefits. In the event of any breach of these obligations, the Court of Justice may rule that the Member concerned be, compulsorily retired or deprived of his right to a pension."

Remarkable is that in Case 432/04 , the Advocate General Geelhoed advised to reduce Mrs *Cresson* pensionrights as a sanction for breach of obligations, by appointing a close acquaintance as a visiting scientist, although he was not actually engaged in the activities he was being paid for. The European Court of Justice did not follow the opinion of the Advocate General, but judged that the statement of the finding of the breach already constituted an appropriate penalty.

As the provisions quoted above show, Commissioners also have duties regarding their position after they ceased to hold office. An example in this respect is the *Bangemann* case. He was a Member of the European Commission since 1992 in charge of the information and telecommunications technology. Dutch parliament raised questions concerning his acceptance of a job at Telefonica with a salary of approximately 1 million Euros. He had informed by a letter his intentions to the German Chancellor Mr *Schroder*, who in 1999 was also chairman of the European Council and did not have objections. However, other Member States like the Netherlands had objections and declared that Mr *Bangemann* should have refused to accept the function at Telefonica. It was further considered to start the procedure of Article 213 (2) EC (now Article 245 TFEU). *Mr Prodi*, President of the Commission, proposed to draft additional provisions to clarify the application of that Article:

Acting with integrity and discretion in accordance with the principles of accountability and openness to the public, which implies that, when decisions are taken, the reasons for them are made known, the processes by which they are taken are transparent and any personal conflicting interests are honestly and publicly acknowledged.

The Council of Ministers finally were satisfied with this clarification by Prodi and decided not to prosecute Bangemann according Article 213 EC and bring the case before the Court of Justice. In the mean time Bangemann decided to refuse the job at Telefopnica.

These general principles apply only to Members of the Commission, and not to Members of the Council like mr Schröder, for which according to the subsidiarity principle national administrative law applies. Otherwise he could could not have accepted a job at Gazprom.

A recent example of apparently not complying with the principles of the Treaty obligations for Commissioners concerns Commissioner *John Dalli*. He resigned on 16 October 2012, after an OLAF report shed light on the allegation that a Maltese entrepreneur had used his contacts with Mr Dalli to try to gain financial advantages in return for seeking to influence a possible future legislative proposal on tobacco products, in particular on the EU export ban on snus.

6. LEGISLATIVE COMMISSION PROPOSALS ON CRIMINAL LAW IN 2012

The following legislative Commission proposals of 2012 are currently being considered by EU institutions and national governments.

A. On protecting EU financial interests through criminal law – Directive proposed by the Commission on 11 July 2012 aimed at establishing minimum penalties and common definitions for crimes against the EU budget in all EU countries. (COM 2012 /363 final)

Context: Member States have included definitions of this crime in many different forms of legislation, ranging from general criminal law, which may include specific or generic offences, to criminal tax codes. A similar divergence can be noted with respect to the level of sanctions, which are applicable to these forms of crime in the different Member States. Such divergences have a negative impact on the effectiveness of the Union's policies to protect its financial interests. Common offences in all Member States would reduce the risks of a divergent practice, as they would ensure uniform interpretation. They would also strengthen the deterrent effect and enforcement and reduce the incentive for potential perpetrators to move to more lenient jurisdictions within the Union to exercise illegal activities.In Article 16 of the proposal of the Directive the repeal of the Convention on the protection of the European Communities financial interests of 26 July 1995, including the Protocols thereto of 27 September 1996 and of 19 July 1997, is mentioned….

B. On freezing & confiscation of crime proceeds in the EU – Directive proposed by the Commission on 12 March 2012 (COM (2012) 85 final) aimed at facilitating it for Member States to confiscate and recover the profits derived from serious and organized cross-border crime.The current EU Legal framework on the freezing and confiscation of proceeds of crime consists of four Council Framework Decisions (FD) and one Council Decision. The most relevant is Council Framework Decision 2005/212/JHA of 24 February 2005 on harmonisation of confiscation laws of Crime – Related Proceeds, Instrumentalities and Property, which Decision the Commission proposed to replace by the above mentioned Directive.

An additional reason for proposing these new legal instruments is the need to adopt concrete measures to implement the Commission's overall strategic approach to combating fraud. The Commission will moreover continue to strengthen by these proposals the mutual recognition of freezing and confiscation orders.

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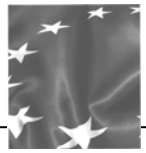

The Institutionalization process of Alternative Dispute Resolution mechanisms in the European Union; The Estonian legal developments experience

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Abstract: Formal institutionalization efforts in the European Union are proven insufficient to benefit commerce, improve the accessibility to justice and/or enhance the collaborative human interaction that the adequate use of Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) methodologies could bring about. Among the fundamental challenges for a more responsible involvement of mediators and other ADR professionals in their practice is the integration of preventive lawyering and dispute resolution principles that in addition could match the demands of an interconnected, multicultural global society. This text proposes a revision of common institutional shortcomings, recommending a shift of focus from the procedural and formal towards the substantial aspects of the ADR methodologies and the competences that practitioners should develop. It comments on transferable skills for more effective negotiation processes and also reflects about the opportunities that the current techno-economic paradigm offers to facilitate association and exchange. In the internet society context, human transactions are influenced by transforming technical, social and economic factors that must inform the formulation of dispute resolution strategies; especially relevant to conduct further studies are the catalyzing effects on development, of mediatization and artificial intelligence applications for conflict management, in countries like Estonia where no ADR tradition preceeded statutory regulation.
Keywords: Alternative Dispute Resolution (ADR), Mediation in Estonia, Conflict Management, Online Dispute Resolution (ODR), Information Society.

INTRODUCTION AND DELIMITATION

Mediation is an Alternative Dispute Resolution method (ADR); a term that comprises all voluntary, collaborative processes facilitated by a third neutral party (Kovach, 2010, Riskin 1982, 1996) with no adjudicatory powers. Recently, mediation has also become a legal category.[1] The European Union (EU) has led an impetus for its institutionalization, first concerned with the quality and access to justice, and then in connection to the need for multilateral cooperation in the administration of disputes by member states. Improving these aspects must ultimately assist the single market growth and economic development by facilitating transactions and promoting efficient redress mechanisms. Effectivizing the solution of cross borders disputes is also expected to improve the climate for electronic trade within the union and trust in a more harmonious and secure consumer protection system. To begin to promote ADR methodologies, a Mediation Directive on civil and commercial matters was issued in 2008.[2] A number of the well documented advantages of mediation over litigation are mentioned on it, including that its voluntariness should lead to compliance of the parts with the resulting agreements, which could in turn, reduce the registration of disputes to the traditional court system. As a whole, mediation when conducted properly, is known to be an efficient option for preventing and solving disputes; it provides with opportunities to resolve differences that are unavailable in adjudicatory processes. Country specific features of cultural, social and legal signifficance affect the implementation of EU regulations, hence, any conflict management institutionalization strategy should be comprehensive and reach as close as possible to people and the enhancing of their personal competences. In trying to avoid the risk of reducing the explanatory and descriptive value of "culture," this paper uses a concise dimension, with no intention to expand on its

[1] A legal category is a term used by positive laws and strictly bound to the definition it provides or suggests.
[2] Directive 2008/52/EC was to be implemented by all member states except from Denmark, by May 2011. More on this, including the legal text can be found at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:NOT

sociological meaning.[1] It fits to the understanding that conflict management styles as well as laws are or derive from cultural manifestations. Professionals in the field need to belong to a creative cultural context where socio economic development is based on collaborative and integrative values, equipped for globalized, cross border and digital participation. Expertise on ADR is thus, compatible with the knowledge economy in as long as it can invoke its institutional constructs. Some of the most important competence requirements for the negotiators and mediators of the information society are flexibility, creativity, proficiency in the use of new interactive environments, cross cultural training and expertise, enthusiasm for association, and at the core of their practice: innovation capacity for the constructive prevention and management of disputes.

In Estonia, formal implementation of these supranational rules has been opportune, but with limited effect in practice due to the country's lack of familiarity with ADR and the apparent prevalence of competitive and distributive conflict management styles, combined with a low awareness levels about non-adjudicatory processes of dispute resolution. A detailed assessement of these factors should be supported by academics and public institutions if quantitative and qualitative research on them could be better promoted to cope with the effect of more specific EU requirements in the same field. In 2013, a Directive on consumer ADR and a Regulation on Consumer Online Dispute Resolution (ODR) followed. In complying with its goals, states will be able to develop operational and integrative conflict management strategies applicable and complementary to their domestic systems. The conflict management formal institutional structure is soon to be delimited in the region, assigning special relevance to mediation and its transformative capacity. The technological capacity of the region and the information society demands could be argued to become two of the most important catalyzers of this complex institutionalization process.

The paper focuses first on the institutionalization of ADR methodologies of interest in Europe and the requirements of their practice and then on commenting the Estonian legal developments on Mediation and the challenges and oportunities that may arise.

GENERAL SECTION. BASIC ADR CONCEPTS AND THEORETHICAL BACKGROUND

Negotiation, mediation and other ADR methodologies have been classified according to their attributes, in hierarchical models, attending most commonly to the process they follow, parties involved, the standards applied for decision-making and the enforceability of their outcomes. These issues belong to the study and theory of conflict, where most of the most reputable and well known scholarly work can trace its origins to (Menkel-Meadow, 2000). Negotiation and mediation belong to the collaborative sort. In its least restrictive way, the term mediation could refer to any assisted negotiation. Every person negotiates on everyday basis. It is done regardless of how aware, experienced of effective we are, or on whose behalf we are acting (Nierenberg, 1968, 1986; Raiffa, 1982). In academics, it seems preferable to adopt Gerhard Nierenberg's expanded view on negotiation as any exchange aiming to transform relationships or situations. The simpler it is defined, the less intimidating it is to evaluate, train, and practice. The skills that effective negotiators possess are transferable social abilities applicable to interpersonal/private relationships as much as to transnational conflict analysis and management. These competences are understood to be deeply rooted on personal development and thus, require critical efforts at modifying/improving people's communication models, attitudes, and beliefs systems (Thompson, 1990; Gelfand et al. 2011). Therefore, it is unlikely that the more we use ADR methodology the better we are at it, unless a conscious adoption of principles inspires this practice.

Negotiations do not need to be complex, or related to extraordinary events, because any social interaction involves them. While all transactions require some exchange for the adjustment of certain relationships (a contract, for instance, creates rights and duties for the parties), the lack of an agreement could also be considered a negotiation outcome. Negotiation, and assisted negotiation designate processes

[1] As Adamson Hoebel described in Antropology, The Study of Man, 4th ed. New York, McGraw-Hill, Inc,1972, p.6. „Culture is the integrated system of learned behavior patterns which are characteristic of the members of a society and which are not the result of biological inheritance."

regardless of any potential result.[1] Bargaining, denotes an entirely different concept, but is a term often used interchangeably with negotiation. The scope of a bargaining process is much more reduced. It also involves intent to cooperate but just to the extent it could produce "valuable" concessions, mostly leading to distributive compromises. The example of the market discussion over the price of an item illustrates it well.[2] Every party wants to gain as much as possible, yielding as little as they can. The incentives these situations generate are very competitive, even if the short lived relationship between the merchant and buyer is friendly and no communication obstacles arise.

Assisted negotiations generally favour incentives that are based on associative tactics, in support of relationships that need to be preserved. In the most transformative, enduring, professional and constructive way, these ADR methods should focus primarily on reaching a common understanding. This promotes the validation of each party's interests and facilitates reparation when necessary; or prevents the development of grievances into disputes, when these are not yet configured as such. The formulation of durable, friendly and efficient agreements should be one by-product of this approach.[3] In contrast, bargaining for an agreement alone, does not safeguard parties from misunderstanding and/or breach. The worth of a deal resides in the process and how committed the parties are made to protect what they can gain from it on what hand, and how much the relationships linked to the transaction continue to matter, on the other. When mediation is used after disputes have emerged, the focus remains the same but the purpose is to help resolve, not merely settle conflicts that have been professionally identified during proceedings. At the core of this approach are the fundamental characteristic of these activities: they are universal (they surround our everyday life), procedural (do not revolve around agreements but methodologies/styles), and highly enriching (informing relationships and expanding the possibilities for an agreeable result, be it an agreement or not). This field is rich for the multidisciplinarity of its sources, insights and attention to the interaction between different types of social institutions. At the same time, In countries where theory of Conflict has been studied the longest, such as Canada, the United States, and Holland, its application has contributed to the social sciences, most noticeably to sociology (Hollenbeck and Zinkhan, 2010; Carter, 2012; Törnblom & Vermunt, 2013), management (Mnookin et al., 2000; Marsnik, 2013), law (Menkel-Meadow, 1993; Macfarlane, 2004; McDermott, 2012; Martinez et al., 2013), and lately even computer sciences and information technologies (Luo et al. 2013). Developments on artificial intelligence and about human-computer interaction and design are ideal grounds for cross-disciplinary innovation relevant to conflict management and ADR/ODR techniques. Integrative and principled styles of negotiation have been identified in theory and practice, with ample and recognized applicability in any field concerning human associations, at any level, from the interpersonal to the international sphere.

ODR has been presented as yet one more ADR methodology, but more acurately, it is the technological applications use in conflict management (Katsh et al.,2001), that eventually could also be serving adjudicatory procedures or at least some of their stages. In other words, ODR can incorporate existing methodologies from the ADR espectrum or none; in the most reductionist manner it could be merely the use of an electronic medium in human and organizational interactions.[4]

DISCUSSION ON RECENT FORMAL INSTITUTIONAL DEVELOPMENTS

The ADR movement does not represent an emerging or innovative initiative to experts on conflict management.[5] Neither does the preventive law style of lawyering theorized by Louis M. Brown decades ago,

[1] The Harvard Negotiation Project of the Harvard Law School, has been studying and educating on these methodologies, adopting interest or principled based negotiation models. Consult: http://www.pon.harvard.edu/category/research_projects/harvard-negotiation-project/

[2] In the text "Getting to Yes," published by Fisher, Ury in 1981 and later credited also to Patton in a later edition of 1991, the topic is explained in detail. This has been a reference text on the fundamentals of interest based negotiations and principled conflict management from the time of its release, three decades ago.

[3] The main lessons drawn from Fisher´s academic work, and intellectual capital include this assumption.

[4] The term is explained by the author of the first book published on the matter. Consult: Katsh, E. E., Katsh, M. E., & Rifkin, J. (2001). Online dispute resolution: Resolving conflicts in cyberspace. John Wiley & Sons, Inc..

[5] ADR has been a field largely unregulated, and hence its popularity, its main differenciating feature from adjudicatory processes and its continuous, undisturbed development.

that reflects on the use of ADR methodologies.[1] However, the attempt to institutionalize the former, as strictly as possible, can be perceived as a new trend for the diffusion of a certain favoured social order within the EU. The most recent rules on ADR -and ODR- aim to support and are linked to a wider range of supranational concerns, for instance the consumer policy strategy 2007-2013,[2] and the Digital Agenda for Europe,[3] both derived from a larger 2020 European Growth 10 year strategy.[4] With ADR put this way "in fashion," opportunities to reinvigorate the spread of preventive law principles in the global scale arise. They are –ADR and the preventive law philosophy- not only compatible, but complementary elements of a healthy conflict management system. But in essence, and for legitimacy, their adoption should have a demonstrated cultural meaning or appeal, at least in as much as it conveys a required legal upgrade and sound harmonization strategy. Like in every legal field, regulations are the most effective when valued by society because of their consistency with other cultural standards. In the last years, various separate structures were forming in the EU at the expense of cohesion, which was in fact one of the intended purposes of the supranational policy on access to justice and judicial cooperation. Specialized consumer ADR bodies and networks proliferated, fractioned according to sectors, transactional fields, and country specific factors, for instance, their cultural embedded approach to conflict management and dispute resolution.[5] This last, naturally corresponds to each country´s deep social biases and structures. Studying consumer habits and attitudes on domestic and cross border transactions should confirm that to a higher trade indicators, correspond better structured transactional and dispute resolution system, so this could be an issue of trade refinement. In some member states, compliance with sophisticated and well formulated ADR standards is made explicit, revealing a solid institutionalization of principles that do not come about by the mere enactment of new legislation, issuing of other binding regulations, or the development of EU public policy pushing the matter forward.[6] To illustrate with electronic commerce records, the proportion of consumers who order goods or services over the Internet are among the highest in the Netherlands and the UK, 58% and 55% respectively, during 2010, according to the analytical report of the Eurobarometer on Consumer attitudes towards cross-border trade and consumer protection in the EU.[7] These are also countries where a wide range of dispute resolution methodologies are available, well known and appreciated by the population, even prior to the EU initiatives on ADR. In the same study countries such as Bulgaria and Italy show the lowest indicators for both domestic and cross-border e-commerce; coinciding with systems with little or no tradition of resorting to non-adjudicatory resolution methods. Italian ADR laws, with few exceptions, have originated on European Community (EC) regulatory formulations (Colombo, 2012). The ADR culture differs greatly in the EU, with many countries lagging behind in terms of penetration, awareness and commitment to the purposes for which these methodologies are conceived. In the case of the Mediation Directive, the implementation formalities are fulfilled, having had a direct impact on structural and regulatory aspects, but much less influence on the prevailing dispute resolution cultures. An important barrier on the consumer side, is lack of awareness, a clear prerequisite to obtain redress and justice with the use of alternative methods. Still, the European

[1] Preventive law is a creative problem solving style of lawyering where the legal expertise is used to identify risks and plan strategies to the efficient conduction of transactions. Lawyers therefore are expected to become more actively and much earlier involved in business affairs. Its theory promotes non-adversarial legal processes. Consult: Brown, L. M. (1956). The Law Office. A Preventive Law Laboratory. University of Pennsylvania Law Review, 104(7), 940-953.

[2] Available with its background documents at: http://ec.europa.eu/consumers/strategy/index_en.htm#intro

[3] Read more at: http://ec.europa.eu/digital-agenda/digital-agenda-europe

[4] Consult the Europe 2020 Strategy in a Nutshell Online at:
http://ec.europa.eu/europe2020/europe-2020-in-a-nutshell/index_en.htm

[5] The European Commission states that in the EU by now, more than 750 institutionalized ADR schemes are currently into place. See: http://ec.europa.eu/consumers/redress_cons/adr_odr_eu_en.htm and the source report:
http://ec.europa.eu/consumers/redress_cons/adr_study.pdf

[6] The Directorate General for Health and Consumers reports that in Estonia ADR is limited to two consumer redress institutions one on goods and services (trade) and the other being the insurance court of arbitration, with no track records available to analyze, whereas in the United Kingdom, 43 ADR schemes are identified combining public and private ones. They are mainly sector-specific such as in the fields of transport, or energy. To further illustrate the contrasting situation, only the Financial Ombudsman Service of the United Kingdom administered +160,000 cases in the year 2009. Compare:
http://ec.europa.eu/consumers/redress_cons/docs/MS_fiches_Estonia.pdf , and
http://ec.europa.eu/consumers/redress_cons/ecc_united_kingdom_en.htm

[7] Available online at: http://ec.europa.eu/consumers/strategy/docs/consumer_eurobarometer_2011_en.pdf

Parliament noted in an implementation report from 2011, that some states went further than the terms of the Directive when passing their mediation laws.[1] This could be a sign of the growing interest of these legislatures, most probably supported by the academia, to set the foundations of a proper conflict management system.[2] The expected and much desired growth of electronic commerce in the EU cannot reach its full potential while consumers have no confidence or information on the way their disputes can be resolved, or if they are not guaranteed access to effective redress, and firmly institutionalized dispute resolution schemes.[3] On this regard, the Directorate General on Health and Consumer affairs concluded that a unified regime had to be incorporated in the region, to assure a more functional system. New rules on ADR and Online Dispute Resolution (ODR) have come into effect this year: the Directive 2013/11/EU on Consumer ADR and the Regulation (EU) No 524/2013 on Consumer ODR. They followed preparatory works as required, including a complete impact assessment study that explains their reach and importance.[4] With these regulatory tools, the EU expects to achieve full ADR coverage, a raise in the quality of the services provided by ADR entities, easy access to these instances, and a single European ODR platform where to submit and resolve disputes electronically. The directive does not distinguish between online or offline, domestic or cross border commerce; and for starters, it seeks to benefit consumer and traders. The regulation describes the network to-be as a set up connecting national ADR entities operating in all EU languages. The implementation period of the ADR/ODR rules is two years, with the ODR platform required to be operational in the end of 2015. An integrated and more comprehensive structure is to grow out of these rules, which will force states to fund projects for education, training and consumer awareness, the other fundamental pillar of this legislative development. Information about ADR and ODR has to be made available to consumers, but before it reaches this level, institutions need to get ready, prepare personnel, adopt procedures and, in a very short period of time, learn the fundamentals of a discipline of greater significance and applicability than all the formalities these highly regulated ADR methodologies will create; principled conflict management.

Public policies and legislative developments in both the international and supranational levels, focus on formal capacity building, promoting the establishment of institutional guidelines for mediation in civil and commercial matters as well as minimum standards on ADR and ODR. [5] The negotiation programs created for education and diffusion of these principles, offer very basic methodology training on procedural action alone, but this can be attributed to the lack of expertise of organizations and their members. [6] Conflict management theory in general is hardly ever introduced and seldom presented as a background information to enhance conflict administration and dispute prevention skills in countries with no ADR tradition.[7] For those states that transposition rules merely pushed by other integration initiatives,

[1] See: 'Report on the Implementation of the Directive on Mediation in the Member States, its Impact on Mediation and its Take-Up by the Courts' by Arlene McCarthy. (Report, No 2011/2026 (INI), EC Committee on Legal Affairs, 15 July 2011).

[2] The German Ministry of Justice commissioned a scientific study from the Max Planck Institute of Comparative and International Private Law, to assist the legislative process of the first Mediation Act and its accompanying legislation.

[3] This institutionalization could be formal or informal as explained in Solarte-Vasquez, M. C. (2013). Regulatory Patterns of the Internet Development: Expanding the Role of Private Stakeholders through Mediatized "Self-regulation". Baltic Journal of European Studies, 3(1), 84-120.

[4] The policy work can be consulted online at: http://ec.europa.eu/consumers/redress_cons/docs/adr_citizen_summary_en.pdf

[5] Surprinsingly, the legal acts passed in EU member countries, following the Mediation Directive (Dir. 2008/52/EC), despite the many forces at play –*oportunities*- , mostly conform with the aim of affecting trade and civil dispute resolution processes. On other fields, despite the political climate favouring the practice of ADR methods, a very poor substantial discussion and theorethical debate has taken place.

[6] The European Code of Conduct for Mediators from the year 2004, together with the green paper on ADR from 2002 were the basis for the mediation directive. The former is available here: http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf and refers to specific competences stating that mediators must know the process, receive proper training and continuous updating of their education
and practice in mediation skills; so to that end, states should promote accreditation schemes, and information programmes.

[7] Higher education courses on ADR were absent from the curriculum of the universities in countries transitioning from socialist systems in the nineties, until the year 2002 when the first course on ADR and conflict management was offere, for instance in Estonia, at the former International Concordia University. More recently intensive courses, training workshops and conferences have proliferated in the eastern European region with the increase interest in upgrading the quality of the ADR practice and raising public awareness on these options. The course was discontinued until the year 2004 when re-introduced in the curriculum

mediation and conciliation acts were enacted for compliance, adding legal certainty on the subject but very little guidance if drafted according to the basic requirements stated on the directive. Soft laws of the EU, and reports collected during consultations from member states, reveal what committed ADR practitioners have perceived and denounced during their practice: that formal engagement is important, but it alone does not benefit the system with the tremendous advantages that these alternative processes could bring about, if their substantive worth was truly appreciated. In addition, with the economic activity in active migration towards the digital markets, ADR applications and Online Dispute Resolution (ODR) models could constitute a remarkable refinement of the traditional dispute resolution system, not a replacement of healthy judicial contentious procedures.[1] It seems plausible that the jurisdictional function is being preserved by freeing it from cases that could better be served by non-adjudicatory principles and tools. At the same time, some issues should continue be of exclusive competence of courts and tribunals, based on subject matter considerations, such as large collective claims, disputes of constitutional relevance and affecting the public order.

THE INFLUENCE OF CONFLICT MANAGEMENT STYLES AND THE INFORMATION SOCIETY ON THE EFFECTIVENESS OF ADR METHODOLOGIES

Although all ADR methods are procedural solutions, it has been established that negotiation and mediation do not designate just a sequence of neutral events. They can be activities replete with content apart from their legal relevance (Wall and Dunne, 2012). The two most contrasting and common dispute resolution approaches influencing these processes are the competitive and the collaborative styles, also named distributive and integrative, respectively.[2] Countries with a long standing tradition on ADR have developed conflict management ethics that embrace the organizational models that adopt principled based styles of negotiation. People negotiate better, are more skilled and experienced at transformative conflict management, and their results most satisfactory when trained on the practicalities of collaboration. An statement that has become a truism for conflict management experts and people working on the field of negotiation and peace studies is that negotiating on the basis of collaboration produces more stable, friendly and efficient results. This is also a very practical condition for compliance in effective ADR models. In the absence of a conscious posture on this respect, negotiations could easily become competitive or rituals of little intrinsic significance. In this light, the activity of ADR practitioners, negotiators/mediators in particular, should be deliberate, aimed at improving communication, mutual understanding, and association for the satisfaction of all needs of the parties, and the achievement of most of their legitimate interests (Sato, 1986).

Much of this debate could also be linked to the dynamics of the information society that is described as a highly creative community primordially based on exchange (Castells and Himanen, 2002), via networked social arrangements, affected by the current technological paradigm while at the same time creating a global society (Castells, 2005). The changes of behavioural models that would coherently follow technology advancement are pushed by innovation and/or attributed to its diffusion (Utterback, 1996). So, as much as the internal and culture specific factors determine social interaction, external influences shape the way in which communities relate and communicate with one another. Information and Communication Technologies (ICTs) continue to concern researchers with their impact on people´s

of the Concordia-Audentes University. Later it became part of the curriculum of the master program on international and comparative law of the law institute of Tallinn Technical University and instructed simultaneously with a course about arbitration in the United States until 2011. Tartu University also offers an arbitration and alternatives to the judicial procedure scheme course from 2009, and one on international commercial arbitration. People working on the feld know the shortcomings of a remedial approach, but lack the academic background, expertise and institutional support to promote integral ADR models at universities and other educational institutions.

[1] The text of the green paper seeks not to devaluate adjudication but to balance the existence of flexible methodologies for dispute resolution with the consistency and assurances that the judicial procedures do offer. See:
http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=COMfinal&an_doc=2002&nu_doc=196

[2] In the conflict management literature from the Harvard negotiation project and on, the terms , adversarial and associative, positional and principled and destructive and constructive are also of common use.

behaviour and therefore their conflict management styles and attitudes. The information Society have helped expanded human capacity and equipped people with access to numerous technological tools. While these offer realistic opportunities to improve people´s wellbeing, they have no capacity to operate and discern on their own. Technologies are "neutral instruments," in as long as administered, programmed and used by humans, thus education, competences building and training should continue to be a priority for public policy. Our level of reflection on technologies applied to social dynamics must be deepened and contrasted with variables like culture, education, age, and others that might affect their usability. Advancement, growth, productivity and sustainability are all expectations placed on the networks, in their technical and social levels. Information is the fuel that helps advancing in the path of the digital economy with knowledge, vested already into even newer technologies, being its main product.[1] It is the combination of techniques and certain social behaviour what needs to be tackled. The mind-set, the culture in its invisible layers could be affected in ways that could positively influence assertive association. Sharing, data, exchange, knowledge, information and multistakeholderism of the information society require unprecedented levels of mass-collaboration that also favour integrative views. It is the scenery to a remarkable -*global*- social transformation (Fuchs, 2009) that no longer relies in the traditional distributive principles of exclusion. Technology and information are correlated with social transformation in both views, the techno-deterministic and the social-constructivism. They coincide in that human cognition, communication, and cooperation are positively affected by the information society technologies, thus a critical reflection on the way in which society moves from competitive and exclusion patterns towards a collaborative and all inclusive global society is welcome in all disciplines. In fact, the argument on that cooperation is at the very essence of society is developed long ago, and present, for example in early works by Karl Marx, and Herbert Marcuse. This paper claims that a conflict management system can be considered complete only when it includes institutionalized ADR methodologies that incorporate integrative and collaborative strategies for dispute prevention and resolution, supported by a matching public policy.

As explained above, according to an interest based negotiation methodology, the model this texts subscribes to, the foremost priority of professional negotiators should be to turn agreement centred approaches to negotiation, into discovery and engagement experiences where the goal could shift towards reaching a common understanding. Experience has demonstrated that outcomes based on these type of processes will likely be satisfactory to everyone involved (Schneider, 2002), regardless of how they are fashioned: a contract, a pre-contractual pact, or partial/preliminary agreement, etc. This may be achieved in a non-intrusive manner, using technical and interactive tools in as much as possible and admitting that mediatizing technology cannot be expected to transform conflicts *per se* but humans are responsible for this; on their own or assisted by "transactional brokers" –mediators- committed to the process, and willing to put their competence to its service.[2] Innovative technical solutions may have a positive impact on relationships, in as much as they could be proven to temper positional attitudes and distract from resentment, distrust and other disturbing obstacles. This reinforces the main claim of this section on that at education on improving the personal and technical skills of mediators is where the state resources are mostly needed. Information about the formalities of a process is not enough, and does not make practitioners any more competent at conflict resolution. Insufficient attention to these aspects of the implementation of EU ADR regulations can disillusion for its lack of consistency with a holistic ADR philosophy.

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[1] Mobile technologies, nanotechnology and the internet of things. See: Solarte-Vasquez, M. C. (2013). Regulatory Patterns of the Internet Development: Expanding the Role of Private Stakeholders through Mediatized "Self-regulation". Baltic Journal of European Studies, 3(1), 84-120.

[2] For integrative processes, professional negotiators should be competent to influence people´s perceptions, bridge communication gaps and create a negotiation atmosphere of cooperation. Being persuasive on how important is an ethical and collaborative attitude channels the energy of participants into the procedures, liberating the parties from the burden of decicion making on the basis of emotions alone. This process is useful to distance people from conflicts allowing more objective discussions. Technology can be both distracting or supportive, but advanced computer technologies explore very actively the field of conflict resolution and artificial intelligence beyond the mere replication of traditional ADR Online.

Some of the professional mediation schemes that have been designed for the past forty years to foster and support consensual solutions to disputes conducive to compliance have also been replicated by global service providers online but with unresolved information asymmetries diminishing the potential for optimal outcomes.[1] Also at the global level, 1. Professional mediation schemes could be made part of any strategic model for organizational management and dispute prevention. The type of participant that commonly seeks to transform positional bargaining and difficult communication into a principled exchange could become a professional evaluator of contractual and managerial risks, before any grievance shapes or disputes begin to arise. 2. The professional practice by organizations and independent mediators, with recognized expertise and with encouraging success rates, could be assessed on its actual commitment to a holistic approach of administration of disputes and their understanding of the technical possibilities that can support ADR processes.

ASSISTED NEGOTIATION IN PRACTICE

Although mediation/assisted negotiation is the least formal of all the schemes where a neutral third party facilitates the exchange between two or more others, its conduction involves concrete responsibilities. Quality mediation needs proficient strategic planning and project management skills. In addition, according to the explanations above, effective negotiations take place when the tactics can be planned in consideration to principled postulates such as those that Fisher and Ury introduced in their studies: 1. Separate the two levels of every negotiation: relationship and issues, creating a cognitive dissonance: being soft on the people and strong against the problem; 2. Work on improving perceptions, controlling emotions and bridging communication gaps to be able to formulate the discussion in terms of interest, not positions; 3. Stress the need of being creative when developing options on a possible outcome that would benefit all parties, and; 4. Insist upon the convenience of legitimate decision making, based on justifiable, objective and acceptable criteria.

The ADR literature on mediation has classified a number of tasks that could better help the parties finding a solution to their disagreements. They could be summarized on coaching association and creative administration of the disputes. In respect to concrete proceedings, since until very recently, this has been a field greatly advantaged by its flexibility, there were no rules except from recommendations and best practice advice on how the processes had to be sequenced. This aspect is relevant in terms of logistics but other than this, as long as feedback based iterative tactics are into place during sessions, no special process is preferred. A mediator should be ready to adapt proceedings to the requirements of each case. Generally, mediation consists of a progression of meetings arranged by the facilitator, beginning with an information exchange stage (were the parties are instructed on guidelines and the process in effect), followed by dialog meetings and ending with a concluding session. Advancements are registered throughout, to reinforce the commonalities, increasing the capacity of the parties to integrate, and also to divide the disagreement areas into deconstructed, simpler, more manageable parts. The results should represent consent on legally enforceable agreements for mutual gain, partial agreements, or their absence, that in times is the most reasonable and mutually beneficial resolution available.

Resorting to Mediation should not preclude the parties from accessing to other redress sources when deemed needed. Online Dispute Resolution (ODR) systems could be integrated to artificial intelligence actors in the future, in support of the interest of the parties. Scholars such as Arno Lodder and John Zeleznikow argue that ODR could even serve "justice" by contrasting exchanges with legal provisions and precedents. Their ongoing research is increasingly concerned with these possibilities.[2] So far, they successfully replicate ADR procedures, although progressing in terms of information visualization and analysis. For example, online applications can prepare accurate overviews about recorded data and support different mapping options on the same information with graphics. Software programs and

[1] Smartsettle, assetdivider, negotiationpro, Adjustedwinner, etc.

[2] See: Lodder, A. R., & Zelznikow, J. (2005). Developing an online dispute resolution environment: Dialogue tools and negotiation support systems in a three-step model. Harv. Negot. L. Rev., 10, 287. And, Lodder, A. R., & Zeleznikow, J. (2010). Enhanced dispute resolution through the use of information technology. Cambridge University Press.

applications can be developed with the assistance of proficient negotiators so the design of new interactive environments can suit the needs and requirements of the information society beyond usability. First with prevention in mind, proposing exchange and transactions in simple and understandable ways, and second, facilitating the execution of agreements. ADR processes have been incorporated to judicial procedures and administrative practices as well.[1] However the patterns of governance have shifted the trend from the centralized regulatory authorities of the state to people and this requires increased and varied competences from all to perform in a renewed self-regulatory and highly technical capacity, in all fields. The continued involvement of the state could become more intrusive than ever, while requiring substantial monitoring, control, and adjudication at high costs and towards unsatisfactory settlements.

ADDITIONAL REMARKS

In regard to concrete action to achieve the recommended style of practice, education plays a fundamental role. Legal instruction for lawyers and non-lawyers should be complemented with a preventive philosophy. Although the interest for less adversarial methods has been a concern of many committed legal scholars and law professors, it remains out of law programs and marginal to conventional legal training proposals in all levels. Preventive law as a subject of academic inquiry was first established by Brown, whose writings allowed the formulation of the more contemporary preventive law methods.[2] The purpose of this approach continues to be that interaction with legal significance, if planned strategically, can minimize the risk of disputes while the proactive law movement, of very recent origin, combines it with the design of innovative methods to deliver legal services. [3] Brown´s work, inspired a set of legal negotiation principles that regain relevance today, more persuasively than ever before, but they need to reach curriculums.

To summarize, in Europe, public policies are consistent and respond to the political and techno-economic requirements of the time. They support regional integration and knowledge-based growth but have no capacity to transform via institutional prescriptions the great diversity of existing cultural barriers to their efficient implementation. In practice, professional negotiators will realize the need to be prepared to empower their clients at the individual level in the management of their affairs. The prevalence of cross-border transactions will inevitably increase expectations on them, consumers, traders, and private and public organizations. Not only ADR professionals are in charge of administering a growing number of a variety of disputes, but also their activity is affected by technology in that unique transactions/conflicts take place electronically, and innovative platforms are available for human interaction/negotiation. The Internet and other telecommunication developments have added another transactional layer for conflict management and resolution schemes. Electronic commerce, intense global interaction, and the current governance patterns require from their stakeholders cooperation, cohesion and self-regulatory confidence. A successful negotiator must be able to communicate with responsible involvement this commitment, and lead on values of mutual understanding for cooperation. As a result, mediated transactions, including those mediatized by technologically advanced artefacts, will naturally result in cooperative and mutually satisfactory solutions.

This section has intentionally avoided discussing negotiation applied to other than civil cases. Experiments of restorative justice programs, even though very relevant for conflict management are advanced topics discussed in specific literature. Several jurisdictions in the EU attempt to reconcile offenders and victims of criminal cases, after a judicial procedure has established legal responsibilities.

[1] Conciliation in divorce proceedings and custody cases, facilitation services in municipalities to handle claims and complaints, the institution of the ombudsman, community based and family mediation programs such as counseling to address interpersonal conflict, etc.

[2] Supra note, 6

[3] Legal Audits and contract management, for instance.

Mediation in criminal cases has been strictly regulated in the countries where it is practiced, and requires a study on its own.[1]

EVOLVING MARKETS FOR ALTERNATIVE DISPUTE RESOLUTION. ESTONIA WITHIN THE EU AND THE BEGINNING OF A CHALLENGING ADR INSTITUTIONALIZATION PROCESS

Subscribing to the doctrinal understanding that any institutionalization of ADR processes could put at risk the very spirit of these methodologies (Nolan-Haley, 2012), does not imply complete disregard for the EU ADR policy and legal formulations, their integrity or validity. Effectiveness is the issue this text questions. Formal rules on ADR can easily contradict the essence of what they try to institutionalize: flexible, dynamic, expedite, inexpensive and accessible dispute resolution schemes, and forums for equitable redress. It was discussed how the global governance reality clearly challenges adversarial and competitive interaction. Recent worldwide social, legal, political and even economic developments demonstrate the convenience of cooperation in processes both public and private such as entrepreneurship, innovation management, research, international trade, domestic policy making and other political dynamics, regional integration, e-government, and private affairs. However, the EU action seems irresolute in what refers to the dimension ADR requires in the conflict management context, and the ways towards its institutionalization. The most recent regulations at the supranational level on ADR and ODR are of a much further reach than the older Mediation Directive, the most valuable to the EU consumer acquis: ADR redress will be available in every sector, minimum standards will be adjusted uniformly to raise trust on the system and add procedural fairness and, an single ODR platform will be handling the filing of all complaints of its competence across the Union. The enunciation of those advantages seems too optimistic when considering the records after implementation processes of the Mediation Directive in countries with no ADR tradition like Estonia. Also, the EU approach is consumer protection centered and minimalistic if to compare it with other models, like the UNCITRAL;[2] after all the European ambit will be reduced to the so called high volume, low-cost cross-border cases. In many ways, this pragmatism is understandable, but could continue to distract from the fundamental features of cooperative, principled ADR.

The increasing use of ADR, conciliation and mediation in particular, across Europe, has not necessarily been prompted by a perceived need to overcome the shortcomings of the more adversarial traditional system. The public policy of the EU has been careful/respectful enough not to urge cultural revolutions, remaining discreet and within its competences. It prescribes for the convenience of the common market, trade and e-trade capacity, and customer protection, so it is up to the member states to distinguish from the bulk, the laws that could also support important opportunities for social development. ADR has played a role in Commission´s consumer policies for many years; the first recommendation that advised the establishment of these schemes in member states was issued in 1998, a second followed in the year 2000. Sectorial EU regulations also contain provisions of the same kind.[3] Compliance with supranational policies and regulations, and legal transplantation practices has been satisfactory and resulted in a modest statistical raise of the number of disputes administered out of the

[1] Finland for example. On this See: Brunila, T., & Judge, F. C. (2010). Restorative practices in Finland. LIFELONG LEARNING, 27.

[2] The UNCITRAL model Law on International Commercial Conciliations is available online, at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf On the records of the UNCITRAL commission on Internatonal trade law about ODR consult: http://www.uncitral.org/uncitral/commission/working_groups/3Online_Dispute_Resolution.html

[3] Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of court settlement of consumer disputes, and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR
Available online at
http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31998H0257&model=guichett and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001H0310:EN:HTML, respectively.

courts.[1] But the available data cannot persuade on the consolidation of these systems. The influence of the EU in domestic legal development has been very powerful, but frequently leading to imitation and adoption rather than to creation and adaptation (integration). International and supranational model rules or standards enacted this way, fail to engage the state or its population; so they could be considered flawed at their origin, this types of rules lack effectiveness. A truly transformative approach to resolving disputes is hard to induce through formal institutional means, this intrinsic incapacity of some EU initiatives can in part be attributed to the enormity of the EU regulatory system, or its cautious governance approach, but not only. As suggested, countries are responsible for their own domestic policies and could exploit the advantages that the institutional endorsements at the European level bring forth to all.

IMPACT ASSESSMENT OF THE MEDIATION DIRECTIVE AND OTHER ADR REGULATIONS IN ESTONIA

Culturally accepted conflict resolution methods, compatible with the expectations of most of the Estonian population have little in common with the ADR philosophy. It is likely that ADR and ODR rules will also be passed regardless of the cultural readiness for their effective implementation. While in the world the issue of the convenience of collaborative ADR is long settled, and the field rapidly advances along with technological developments as described in the past section, Estonia confines it too to the consumer protection sphere, assigning to it a marginal value. No outreaching or educative campaigns have followed the enactment of The Conciliation Act that was passed of November 2009 and entered into force on the 1st of January 2010.[2]

It is because ADR processes are flexible, that they can be adjusted to meet and integrate the needs and expectations of the parties to a negotiation or dispute. This is the least controversial of its most valued characteristics. Passing laws on mediation can help in nothing this feature, given that a legal act is the most rigorous expression in the institutionalization scale, and any procedures it may involve must be safeguarded with the limitations imposed by the rule of law doctrine. Due process requirements applied to ADR impose disproportionate constraints. Statutory institutionalization has been the preferred way to introduce changes in the Estonian regulatory system. No scholarly or political debate about conflict management and ADR in the country has given relevance to these concerns so far.

The Estonian law on mediation, has been a legislative investment with very limited reach as it resulted from the urgency to comply with supranational legislation. It missed to propose a comprehensive approach beyond the formal description of a practice that could have developed in the absence of statutes (it fills no legal vacuums). This legal act holds the appearance of novelty, but supplies adjective and formalistic mandates. Meaningful procedural provisions indicate that resorting to ADR does not disturb the rights of the parties to a legal procedure, and that commencement of mediation proceedings suspends the prescription term of action for the parties. The conciliation act, validated ADR methodologies as serious alternatives to adjudicatory processes even if a comprehensive policy is yet to be conceived. Considering the admitted strength of the country in terms of technology development, could not ODR applications and other advanced technologies set a way to disseminate and implant the comprising logic of ADR?

The wording of the act and the preparatory works officially recorded, put some problems manifest.[3] The term chosen to name the law and the process was "conciliation" and it is justified on the basis of a mistaken understanding on it being a more ample and encompassing notion than mediation. In some

[1] Numerous reports have been published between 2009 and now, including raw data and anaysis on dispute resolution methodologies in the EU. An example related to the internal market and consumer protection by the European parliament is available online at: http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf , and a more extensive analysis on the use of Adr across Europe by the Civic Consulting of Consumer Policy Evaluation Consortium, from October 2009 at:
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/imco/dv/adr_study_/adr_study_en.pdf

[2] State Gazette RT I 2009, 59, 385, 1 January 2001.

[3] Supra note, 25.

European countries scholars use the two words interchangeably, but knowingly, when the two systems have been unified.[1] Mediation occurs with the participation of a neutral third-party that intervenes to facilitate communication and understanding of the parties, their interests and the possible outcomes available. Mediators also help to identify areas of concern, reformulate perspectives, and create a cooperative environment for reaching what could be seen as mutually acceptable solutions. This very clear and widely accepted description of the methodology reflects its fundamental differences with conciliation processes, and the extent of its applicability. Conciliation, in contrast, is an authoritative scheme of conflict resolution in that it utilizes mainly legal standards; the exchange occurring during conciliation processes is transactional as its object can only be a thing with patrimonial value, that can be subject to transfer or/and transmission. The purpose of appointing a conciliator is to have an expert on laws counsel on shaping the content of a binding agreement that would settle a dispute in licit terms. Thus, it necessarily imposes limits because the most important decision making criteria is the law, the third party is not neutral but also plays an advisory role, and the whole process is agreement centred. They are similar in that both refer to expedite and out of court methodologies that could spare the parts time and other quantifiable costs. Whether this regulation based on a directive on cross border disputes exclusively, will influence the Estonian conflict resolution structures is yet to be seen. The conciliation act includes the uniform provisions on the scope of its application, the quality of the mediation process, its relationship with legal procedures, enforceability of resulting agreements, the principle of confidentiality, the effects of initiating proceeding in respect to limitation and prescription terms, and information/promotion of mediation opportunities. No official data in Estonia is available that could be evaluated in regard to its use. The absence of records on its rate of use or success is due to the fact that formal mediation/conciliation settlements according to this law have not been registered so far. Considering how bewildered people are at the prospect of negotiating solutions when enabled/entitled to impose the recognition of a right, then it is predictable that the society development lag continues, behind the Estonian regulatory capacity. Documented evidence of the economic and social advantages of ADR has not been enough to provoke enthusiasm among Estonian practitioners. The use of these methods by lawyers and disputants continues lacking authenticity and it is seldom systematic. These are methodologies that do not match people´s mentality, so supplying the population with laws and formal institutions allows a very weak hope for change as long as societal demand for transformation does not exist. Overcoming the cultural constrains is a long term task that may be expedited with the help of telecommunication technologies, informatics and artificial intelligent agents. Dealing with the complicated issue of causation between state action and social transformations will soon decrease in relevance as these rapidly evolving technologies impose themselves onto all kinds of human interaction anyway. It is expected that the use of ADR methodologies, Mediation and Conciliation mainly, increases steadily in the years to come, but it might be that the objective statistical standards used to analyse this trend fail to confirm a raise in the number of disputes *effectively solved* and/or to demonstrate the competence of the participants of these processes on the skills required to administer more amicable and cooperative dispute resolution schemes. This increase will be more likely to happen after the newer regulations on consumer ADR and ODR are developed.

In Economic and technologic development studies it has been explained that to leapfrog, a country needs to focus on consistent and coherent reforms at many levels, based on a shared vision, coordinated by a committed political leadership, and with institutional instruments suited to cope with the difficulties arising from social reactions to change. This scenery demands the participation of all stakeholders that need to be informed and/or interested in the process. If to use an analogous set of preconditions for testing the fast tracking of cultural and legal evolution in Estonia, an empirical feasibility assessment could be disappointing. Statutes alone are unable to foster awareness and appreciation for ADR, conflict resolution beyond settlement and legitimacy outside the procedural justice standards that the court system guarantees. On the other hand, the Estonian society is tech-savvy, with a proven capacity to develop and absorb innovation. This could be a strength in social development and education strategies on collaborative ADR as it has been in other fields. The government agreed on preparing a development plan

[1] It is the case for instance of Sweden. See a useful comparative report in: De Palo, G., & Trevor, M. B. (Eds.). (2012). EU Mediation Law and Practice. Oxford University Press

for the internet society to put the internet and other communication technologies at the service of the population and its wellbeing, increase the country´s economic competitiveness and improve the efficiency of the public sector.[1] This could be an initiative to encompass, at least, the implementation of the ODR platform according to the recent EU regulation, and the context to discuss its potential outside of this particular context.

It could be argued that the public sector engagement has been weak so far, given that no integrated policy exist on these matters. Currently, only the drafters of the conciliation act and the few lawyers involved in the task on reporting on it, besides the members of the Estonian mediation Association (MTÜ Eesti Lepitajate Ühing) can offer reliable information on what mediation really is or the extent of its applicability.[2] The preparatory works preceding the debate at the parliament comment on what could be summarized in three main features of this law:[3] it was passed attending to the state responsibilities on the basis of the directive that required it, and in support of its stated aim[4] as well as on the international guidelines on ADR of the United Nations;[5] it sought to strengthen the capacity of organisms and agents administrating non-judicial forms of settlement of disputes with a unified legal framework;[6] and it aims to promote the use of alternative dispute resolution methods to unburden the judiciary while still providing effective access to justice.

While preparing for this submission, 16 local lawyers from 5 law firms, 6 academics with current tenure and 10 business professionals working on international companies in Tallinn were informally requested to comment on resorting to assisted negotiations to prevent or resolve disputes. Only one lecturer of the 32 people asked showed proficient use of the relevant terminology, conceptual understanding and precision in the answer. This person received training on ADR during the past year to prepare and instruct a course, and admits that prior to it she had no interest or need to study this field. Six of the practicing lawyers have information on the law but experience or clear understanding of international arbitration, one of them has a degree on this procedure from a foreign university and lectures at a higher education facility on arbitration and ADR from 2009. 12 have been acquainted with contractual clauses on out of court settlement preferences, but only 2 of them have read the text of the conciliation act and have led mediated settlements or participated in formal mediated proceedings resulting on satisfactory outcomes. In general all of them assist in the negotiation of agreements that would better satisfy the expectations of the clients they represent. None of them feels that ADR schemes are any more useful than traditional adjudicatory methods in the local level, and all believe that in Estonia mediation will not be popular outside of family and labour affairs because experience with their clients suggests, and their own opinion is that non-authoritative dispute resolution processes are weak, and offer little assurances of compliance so they would constitute a "waste of everyone´s time." In addition, they are sceptical about the collaborative negotiation styles in the country, and notice that individualism, and highly competitive attitudes prevail among parties of disputes and transactions they have counselled. This was not a rigorous study, but the first attempt at exploring the possibility of forming sample groups in preparing for one in the near future. Nevertheless, it confirmed the anticipated responses, and that the country would benefit

[1] More on the plan at the microsite maintainedby the incumbents of the Ministry of Economic Affairs and Communications at: http://263654.edicypages.com/eesti-infouhiskonna-arengukava-2020/infouhikonna-arengukava-2020-loppversioon The document with the development plan, in Estonian is available online at :
http://263654.edicypages.com/files/Infoyhiskonna_arengukava_2020_f.pdf

[2] Consult, for instance carri Ginter´ s contribution on Estonia for this book: De Palo, G., & Trevor, M. B. (Eds.). (2012). EU Mediation Law and Practice. Oxford University Press.

[3] Explanatory memorandum for the draft legislation of the Conciliation Act, 2-3, available online at:
http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=624582&u=20131025125435 in Estonian.

[4] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, available online at:
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:en:NOT

[5] 2002 UNCITRAL Model Law on International Commercial Conciliation available online at:
http://www.uncitral.org/pdf/english/texts/arbitration/ml-conc/03-90953_Ebook.pdf

[6] The Estonian Asociation of mediators registers family mediators and concentrates in family counseling. This organization cooperates only with 3 partners but they count with cross border expertise and are of respectable standing. See:
https://sites.google.com/a/lepitus.ee/ely/home

from formulating a deliberate institutional conflict management system in support of the basic normative text that has been issued so far.

It seems reasonable to think that a dual system of ADR will develop in the region and the country: the one prescribed by the EU, and another that could emerge in parallel; an alternative to the alternative methodologies that will evoke their original qualities.

PROPOSALS FOR EFFECTIVE ADR AND COLLABORATIVE CONFLICT MANAGEMENT DEVELOPMENTS.

For the most practical of purposes, a well design outreaching strategy should be planned with no delay in the country: It would contribute to the EU efforts to meet the needs of its single market; entitle the state to support for investing in the dissemination of a consistent and understandable ADR culture; help overcoming the gaps between technological, social and legal institutions and; assure readiness for an expanded commercial exchange within the region and internationally.

The strategy should actively engage on education and awareness initiatives, training law specialists, entrepreneurs, social scientists and also educators on a mixture of conflict theory, negotiation/mediation competences. It is equally important to detect constructive individual, and culture-specific qualities that need to be preserved and channelled to implement more effective ADR processes in this and other countries with adversarial and adjudicative preferences in conflict management and low rates of ADR success.

Programs are the most beneficial and popular when exposing trainees to early –coached- practice, for perspective. Later or coinciding theoretical instruction, must include at least:

-Introduction to the dynamics of conflict and conflict management styles;

-Dispute resolution schemes;

-Case studies presentations to learn identification of the conflicts and the choice of methodology applicable;

-Numerous self-assessment exercises to evaluate progress;

-Simulation exercises to facilitate constructive interaction;

-Strategic planning and implementation, lessons on negotiation models;

-Exposure to competitive and distributive bargaining styles;

-Information on a variety of negotiation tactics; application at different levels of practice: from the interpersonal to the international sphere.

-Development of personal qualities for an effective and dispassionate negotiation practice;

-Cross-cultural training;

-Considerations on legal and ethical aspects of ADR methodologies;

-Demonstration of the importance of feedback and responsive involvement.

CONCLUDING REMARKS

With the prevalence of cross-border transactions, the need for truly competent ADR professionals increases, as well as the volume and complexity of their responsibilities. Their activity can be highly affected by technology in that unique transactions/conflicts take place electronically, and innovative platforms are available for human and integrated automated interaction/negotiation. The Internet and other telecommunication developments added another transactional layer to all conflict management and dispute resolution paradigms. Electronic commerce, intense global trade and exchange, and the current international and supranational governance patterns require from all stakeholders effective cooperation, cohesion and self-regulatory confidence. A successful negotiator must be able to communicate with responsible involvement this commitment, transmitting the values of mutual understanding and cooperation. As a result, mediated transactions, mediatized by technologically advanced artefacts, will naturally develop integrative, mutually satisfactory solutions. In the international level, relevant developments also occur, the United Nations is specially active and interested in encouraging the adoption

of electronic trade supporting regulation. ODR, low-cost, cross-border e-commerce transactions related projects are assured to produce positive results in the near future if their target groups are receptive to recommendations: Internet and telecommunication intermediates (Amazon, eBay, payment channels), their mobile phone applications, and governments. A working group is designated (WG III of UNCITRAL) with the mandate to formulate ODR guidelines and legal standards that will be influencing the European legal system as well. The development of electronic mechanisms to handle small and medium disputes online, expediting Business to Business (B2B) and Business to Customer (B2C) relationships implies that a significant amount of conflicts could be administered fast and inexpensively, facilitating the smooth development of electronic trade models, across borders. Those international initiatives need to be considered and well understood by all EU states. Examples are available around the world, there is no need to subscribe only to the European vision when all the boundaries have disappeared on account of the telecommunication technologies. An additional and relatively unexplored field of research is the indigenous conflict resolution profile of each country´s population, and how it could be categorized. Autochthonous decision-making mechanisms to manage and resolve conflicts should be less threatening, and much less intrusive that those coordinated by states or engineered by far removed organizations.

Impact assessments of the instruments that the EU countries used to implement the mediation directive have been made on the basis of quantitative research. Hence, they can only report on compliance and frequency. Two aspects could be added to the evaluation of this legislative policy, to begin with:

1. Revision of derivative regulations and normative institutions developing local ADR systems, as well as the educational supporting strategies and training opportunities available in each country;

2. Analysis on substance, quality and consistency of the pedagogies used to test to which extent they conform to the requirements of a collaborative, integrative problem solving approximation to disputes and conflict management in general.

The Estonian public policy is mainstream in that it responds adequately to supranational requirements. It could be more proactive on techno-socio-economic aspects to effectively support regional integration and knowledge-based growth. Prospects for success will remain uncertain if fundamental changes in the cultural approach to conflict management are not promoted. Although labelling does not entirely explain the skills that work for dispute resolution, Consistent evidence in the practice of legal negotiators demonstrate that an assertive but principled problem solving attitude is needed, one that that should (loosely) match with the main postulates of the Harvard Negotiation Project, described earlier. Knowledge of contrasting styles such as the competitive models that apply the game theory and other zero sum game representations are as important in field work. Mediation of all the ADR options is on focus; Its regional consolidation path invites research because all that has been written on its best practices, tactics and logistics, needs to be evaluated in the transforming context of the times; especially in connection to the mediatisation and automation of human processes and the ways in which technology can support old models with newer tools. Its importance extends to the fields of trade policy, conflict management and the law, dynamic capabilities managerial theory, information technology and interaction design, just to mention a few. This paper intends to precede and induce a plan for designing a research study on the readiness of local average customers, to engage on ADR methodologies, and how effective their intuitive understanding of these could be. Further, based on convenience samples, it could be possible to inquire on the effects that technology and mediatisation might have on people´s attitudes when exposed to conflict. Another promising field of inquiry is the effect that mediatized interaction could have in the conduction of the negotiations and their outcome from the perspective of its ubiquity, exposure, and the human computer interaction and design.[1] This places the issue into the context of the information society one more time.

[1] Mediatization in this context referes to interactive artefacts or mediums supporting human relationships and transactions. As a result of this technical intermediation, data collection occurs and could lead to a much less private type of communication. This aspect acquires special signifficance, considering that confidenciality is one of the fundamental principles of Mediation, extensive to other formal and informal ADR systems.

This contribution has presented a view on what should be the emphasis of training and educational proposals for mediators and other conflict management practitioners; what makes mediation more effective; and how in a defined context this and other alternative methodologies can be influenced by transforming technical, social, legal and economic factors. It does not explain specific proceedings but suggests the need for both descriptive and inferential research in Estonia and the region for a more conscious assessment of the capacity of countries to implement regulatory tools so closely linked to their cultural identities.

SUMMARY

Supranational and national legislative policy on civil and commercial Mediation, and consumer oriented ADR and ODR have formally initiated an ambitious regional institutionalization process. This has clearly exposed the need for more comprehensive action in the field of conflict management in Europe, where countries are constrained by cultural factors and unevenly prepared for change. The most attention has been given to mediation and conciliation schemes for being also the first regulated and in effect. The main task of professional mediators continues being the empowerment of individuals for the management of their own affairs and the production of self-regulatory solutions to their disagreements. Any normative development affecting this and other ADR methodologies should be accompanied by strategies that could reinforce the effectiveness of processes and the legitimacy of outcomes. National public policies could contribute to this much more efficiently than supranational initiatives. Countries of the EU with no ADR tradition or collaborative ADR experience would benefit from deepening their commitment to the values behind the institutions that the Union seeks to harmonize. Formal compliance with regulations and directives alone adds no credibility to domestic legislation. Technology could assist social awareness and transformation processes, and help to overcome of the difficulties that arise from the adoption of ADR supranational rules. Because conflict management structures are rooted in culture, interdisciplinary research is essential to identify the most important areas of concern. Country specific features require identification because they can be determining in the successful application of Mediation, ADR and ODR customer protection legislation.

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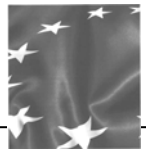

C. EU Energy Policy, Environment and Climate Action

Current problems related to Energy Policy and Law in European Union

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Abstract: Energy belongs to the area of "shared competence" between the EU and its member states. The basic objectives of EU energy policy are: competitiveness, sustainability and security of supply. There are also concerns regarding pollution of the environment and the need for developing more cost-effective energy technologies. Renewable Energy Sources are an area of keen interest in the EU. The target is to have single energy market by 2014 with the hope Europeans will benefit from the growth and development of the internal market also in energy sector. However, the energy area is also legally problematic as it falls under the category of "general economic interest" that means exceptions from general competition legal framework and State Aid rules. Russia is one of the largest energy suppliers of the EU and disputes about transit of exported products have caused in recent years, serious imbalances in supply. That is why, the priority in EU energy sector is based on encouraging the renewable sources and exploring new technologies like the US has done, for example, related with shale gas. The main problem of effectively achieving the common EU goal is related to the fact that energy supply is a matter of every country's national security.
Keywords: Energy, Fuel Poverty, Renewable Energy Sources, climate, greenhouse gases, pollution, pipelines, emissions, security, shale.

1. EU INITIATIVES OF LAST DECADE

Energy belongs to the area of "shared competence" between the EU and its member states. The latest legal basis of primary legislation is Lisbon Treaty, title XXI, Art 194 that provides certain legal basis for the EU to take action despite of different national energy policies.[1] In comparison with other areas of common market (telecommunications), the liberalization of the energy sector has been slower. Today, the European energy policy, approved by the European Council in March 2007, establishes the basic objectives of EU energy policy: competitiveness, sustainability and security of supply.[2]

As the pollution of environment and the more cost-effective energy technologies fighting against so-called "fuel poverty" become serious issues in the EU agenda that relates to over 500 million citizens, first, the EU adopted the Directive 2001/77/EC with the aims to increase the share of electricity produced from Renewable Energy Sources (RES) to 22% of gross electricity consumption by 2010. The next step was a goal of 20% as its contribution of RES in relation to the total European energetic

[1] For example, the European Parliament can establish the measures to achieve the objectives of the European Union's external energy policy
[2] Mert Bilgin. Energy security and Russia's gas strategy: The symbiotic relationship between the state and firms. Communist and Post-Communist Studies vol. 44, Issue 2. (2011) p. 119–127

production in 2020 and European Directive 2009/28/EC.[1] The package is also aimed to meet Kyoto protocol criteria.

Of course, the realization of the Directive depends very much on the willingness and proactiveness of the member states in promoting and investing in alternative technologies. So, the Directive states that every EU member must increase the production of RES of 5.5% from their 2005 levels. As to the rest, differentiation has been allowed - the gross domestic product (GDP) per capita is a determinator. The ambitious plan, so called "Climate Action and Renewable Energy Package" includes cutting EU greenhouse-gas emissions by 20 percent, reducing energy use by 20 percent and boosting renewable energy to 20 percent of the EU's overall energy consumption.[2]

Each member state should present a National Renewable Action Plan with:

a) planning and

b) regular progress reports.

In case the state fails, the Commission may start infringement proceedings that would lead to financial fines. Most popular RES-based technologies are hydro potential energy, wind power, photovoltaic and solar resources, although offshore wind, solar, bioenergy, geothermal energy, carbon dioxide capture, transport and storage, smart electricity grids and nuclear fission are considered as future alternatives.[3]

For example, as stated by "*Der Spiegel*" few years ago, "Germany's renewable energy companies are a tremendous success story. Roughly 15 percent of the country's electricity comes from solar, wind or biomass facilities, almost 250,000 jobs have been created and the net worth of the business is €35 billion per year."[4] There are also political tensions related to the agreements with Russia. So, the most debated pipeline Nord Stream has been political debate in many European countries. Nord Stream is an international joint venture. Russian Gazprom holds only 51 percent of the company's shares, with the remaining shares being held by the German companies Wintershall and E.on, as well as the Dutch company Gasunie. Of course, the Russians are in charge, although a German, former Chancellor Gerhard Schröder, is the chairman of the board (chart taken from *Der Spiegel*).[5]

However, the European countries are doing more cooperation to save the common market. One of the promising perspectives is related to Norway (not the EU member though): "with the €1.4-billion project „NorGer," the Norwegian company Statnett is planning an almost 600-kilometer-long high-voltage power line on the seabed. The direct current cable should, starting in 2018, transport 1,400 megawatts between Norway's southern coast and the Netherlands."[6] Also, another example of the regional development would be the cooperation schemes of Nordic and Baltic markets.[7] However, in ideal, regionalism should not prevail or become rival over the idea to achieve EU energy market but rather be supporting pillars of it.

The main goal is still EU strong and legally regulated energy market. In the centre of supranational planning is a Strategic Energy Technology Plan (SET-Plan, including information system SETIS) which is implemented by the European Energy Research Alliance (ERA) - a roof organization for national

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[1] See: Luigi Dusonchet, Enrico Telaretti. Economic analysis of different supporting policies for the production of electrical energy by solar photovoltaics in eastern European Union countries. Energy Policy vol. 38, Issue 8 (2010) p. 4011–4020

[2] Andris Piebalgs Renewable Energies, Pillar of European Energy Policy, European Commission. Electric Light & Power Journal, May/June 2009., Vol.87, Issue 3, p.36-38

[3] About the development of RES technology per member states see: Konstantinos Patlitzianas , Konstantinos Karagounis. The progress of RES environment in the most recent member states of the EU. Renewable Energy Vo. 36 (2011) p.429-436.

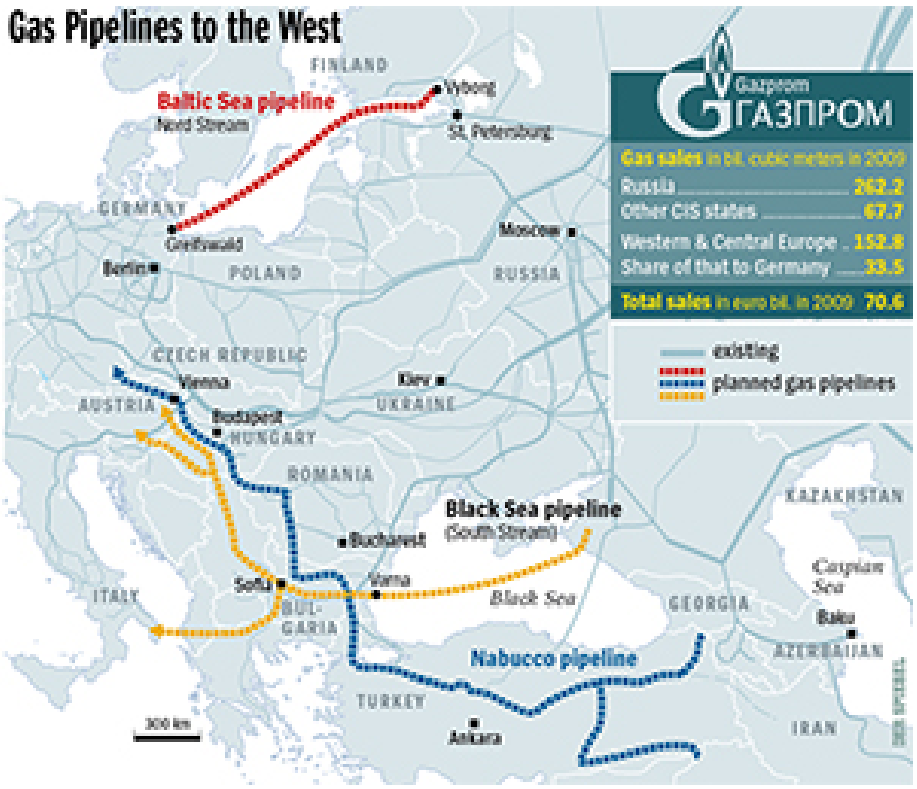
[4] Anselm Waldermann. Climate Change Paradox. Wind Turbines in Europe Do Nothing for Emissions-Reduction Goals. Der Spiegel 02/10/2009 See:
http://www.spiegel.de/international/business/climate-change-paradox-wind-turbines-in-europe-do-nothing-for-emissions-reduction-goals-a-606763.html

[5] Dohmen, Frank et al. The Battle for Gas. Europe's Pipeline War. Der Spiegel 01/27/2009
(http://www.spiegel.de/international/world/the-battle-for-gas-europe-s-pipeline-war-a-603803.html)

[6] *Christoph Seidler. Renewable Energy AmbitionsNorway Wants to Become Europe's Battery.* Der Spiegel *05/24/2012 see: (http://www.spiegel.de/international/europe/norway-wants-to-offer-hydroelectric-resources-to-europe-a-835037.html)*

[7] See, for example: Oliver Pearce, Hans-Arild Bredesen. Nordic and Baltic Power Markets: Challenges in Market Integration. Workshop presentation 2012

institutes. The prognosis of the European Commission called "EU Energy trends 2030" indicates of how much Europe hopes to achieve with investing to renewable energy.[1]



(source: *Der Spiegel*)

2. EFFECTIVENESS OF THE EU STRATEGIES

By some authors, "knowledge about energy poverty in continental Europe is at a nascent stage, despite the recent completion of a pan-European research project which emphasised that 'retired people, those out of work or in poorly paid jobs, and those dependent on social security benefits', as well as 'elderly, disabled or single parent families' are at the highest risk of falling into fuel poverty ((EPEE) European Fuel Poverty and Energy Efficiency, 2009)."[2] The basis of any efficient regulation are realistic aims and commonly understood definitions. The lack of a consensus between the member states and the EU institutions on the constituent elements of energy poverty is not the case today but it slowed down the process. Also, the first strategies did not include direct actions but just mapping the problems and possible activities. The main reasons were conflicting results of scientific world and the resistance of some member states to allocate the competence to the EU institutions. Today, both the economic and social reasons for further initiatives are identified.

By Michalena and Hills: "the EU Energy Directive 2009/28/EC, which is responsible for implementation of the overarching policy for MS to reach renewable energy targets, does not provide the structure or content by which MS can implement REP (Renewable Energy Plan) and reach the imposed targets. In particular, the analytical review of the example NREAPs has suggested that reality is far from stereotypical policies in terms of the architecture of the sectors involved in renewable energy process and the complexity of the REP development itself." [3] The authors point out that one of the main reasons for

[1]EU Energy Trends 2030, available:
http://ec.europa.eu/energy/observatory/trends_2030/doc/trends_to_2030_update_2009.pdf
[2] Stefan Bouzarovski, Saska Petrova, Robert Sarlamanov Energy poverty policies in the EU: A critical perspective. Energy Policy 49 (2012) p. 76–82.
[3]Evanthie Michalena , Jeremy M.Hills. Energy Policy Vo. 45 (2012) p. 201–216

relative failure is that the REP issues are partial artefacts of methodology and geographical scope and there are geographical differences across the EU in relation to issue perception. Another important obstacle is that the REP implementation is complex issue because:

a) local specificity and governance,
b) complexity and multiplicity of factors,
c) technological challenges,
d) environmental concerns and
e) economic opportunities and competitiveness[1].

However, these aspects are not always taken into account. There is a tension between supranational aim and local political willingness and capacities. It must be mentioned that the Directive is a normative regulation that sets the goals but leaves the methods of implementations to the Member States where the energy issues and the legal culture can still be differentiated. Legal sources of renewable energy by EU member states is available from the EU Commission website http://www.res-legal.eu/, called RES LEGAL Europe database. One can alo compare the policies and grid issues through this online tool and search specific information related to a EU member state.

By Marketwatch, "the question arises as to whether the European Commission has enough power to influence national energy policies across the EU"[2]. As explained by Bohne: "Conflicts between national regulatory systems and EU energy Regulations given these characteristics and differences of national regulatory systems, the question is whether and to what extent these systems are compatible with EU energy regulations."[3] EU energy legislation follows the British model that conflicts with French and German regulatory systems. By Prosser, the liberalization of energy sector has been slower than expected "because of strong opposition of some member states (notably France) which are still wedded to the concept of a monopoly, or dominant, unified utility serving as producer, transporter, and supplier."[4]A key to success is a collaborative governance perspective on EU energy regulation. There is an aspect related to RES technologies where the interests of member states are more unanimous - climate change legislation to reduce CO2 emissions by gradually capping emissions. There is a very pragmatic and realistic area of business regulated by the EU which allows companies that achieve emission reductions to sell or trade credits with companies that meet the emissions cap.[5] Another motivation to increase production of "green energy" is analysed by group of the Spanish scholars who find that "proliferation of RES in the power sector is primarily a political decision which can be implemented by using a large range of instruments, such as tax exemptions, rebates of taxes, tax refunds and by applying lower tax rates."[6]

Target is to have single energy market by 2014 with the hope Europeans will benefit from the growth and development of the internal market also in energy sector. The so-called third package seeks to break up the monopolies of vertically integrated energy suppliers by unbundling their networks, increasing public service obligations and consumer protection, and by giving national regulators more power and independence.[7]

The energy area is also legally problematic as it falls under the category of "general economic interest" that means exceptions from general competition legal framework and State Aid rules (ECJ still emphasised that there must be "superior public interest" involved).[8] The ECJ had to recognize that the stable European energy market legal norms are not sufficient and the "imposition of free market

[1] Michalena, Hills, Ibid.
[2] MarketWatch: Energy. August, 2011, Vol.11, Issue 8, p.8-9
[3] Eberhard Bohne. Conflicts between national regulatory cultures and EU energy regulations. Utilities Policy 19 (2011) 255-269
[4] Tony Prosser. The Limits of Competition Law. Markets and Public Services. Oxford University Press 2005, p 188
[5] Andris Piebalgs. Renewable Energies, Pillar of European Energy Policy Electric Light & Power Journal, May/June 2009., Vol.87, Issue 3, p.36-38
[6] José M. Cansino, Mańa del P. Pablo-Romero, Roćio Román, Rocío Yńiquez. Tax incentives to promote green electricity. An overview of EU-27 countries. Energy Policy. Elsevier. 2010, p. 6006
[7] MarketWatch: Energy. August, 2011, Vol.11, Issue 8, p.8-9. There is, of course progress in a number of other areas, such as convergence of prices
[8] Case 503/99 Com v Belgium 2002

restrictions based on energy supply is limited to national energy regulations."[1] By the approach, taken by the EU, "energy policy considerations could become relevant in granting an exemption to an otherwise restrictive agreement only insofar as they can be subsumed under efficiency consideration."[2]

The State Aid questions are constantly discussed. In one of the latest cases (178/2010), the European Commission noted[3] that "the wide discretion enjoyed by member states when defining what they consider as services of general economic interest has long been recognized….In the specific context of the electricity market, it is important that the public service requirements can be interpreted on a national basis, taking account national circumstances and subject to the respect of EU law….However, the Commission took a position analogous with several cases from other areas of law – as the margin of appreciation of member states and the line between the competences are always marked down by the EU – the principle of proportionality (any exception cannot unproportionally harm the common market) is a final ace to play".

3. EU ENERGY SECURITY ISSUES

One can also make difference of EU energy policy and EU foreign energy policy, although very much interdependent dimensions of the one area. Why the international aspect is a key factor when to talk about needs (and obstacles) of common EU energy market? By Nowak: "Although the Community has legislated in the area of energy policy for many years, and evolved out the founding Treaties, the concept of introducing a comprehensive European energy policy for all member states is fairly new, especially with regard to the external dimension."[4] Several other authors and specialists are reporting about growing dependence of EU. By Bahrin: "Over 50% of Europe's energy comes from countries outside the European Union – and the dependence is growing.

Russia is one of the largest energy suppliers and disputes about transit of exported products have caused in recent years, serious imbalances in supply. This warning indicates the need for the EU to closely monitor oil and gas reserves and be prepared in case of emergency energy. Among the priorities in the area include the development of the southern corridor, which could carry gas from the Caspian Sea region via Turkey. Its construction started in 2011. Through Communication no. 677 of 17 November 2010, the EU Commission proposed a series of energy corridors to link the EU's priority cross-border flow of electricity, gas and oil.[5] Russia today holds more than 25% of the world's natural gas resources.

By Bilgin, "the way how Russia ignores the EU's quest for liberalization and sustains a control over markets and supplies is directly related to her use of gas as leverage. Russia's strategy affects many European and non-European countries during all stages: demand, supply and transit. It is not, however, possible to generalize a common statement that the EU's position is based on a policy of market liberalization while Russia pursues an opposing strategy of increased state control. Russian energy strategy leads markets in Europe; sets tone for energy supplies at homeland and abroad, benefiting from a variety of means."[6]

That is why, the priority in EU energy sector is based on encouraging the renewable sources. Important number is 20: Integral energy market, in 2020 should contain 20% of renewable sources, also emissions of greenhouse gases must decline by 20% and energy efficiency needs to determine a 20% reduction in energy consumption. New technologies and intelligent use of energy is not a fashion but a vital necessity.

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[1] Padrós, Cocciolo, Ibid.

[2] See: G. Monti, EC Competition Law. Cambridge University Press 2007

[3] See the analysis of the particular case at: Leigh Hancher, Francesco Maria Salerno. Energy Policy after Lisbon, in: EU Law after Lisbon, eds. Andrea Biondi et al. Oxford University Press 2012, pp. 391-392

[4] Bartholomiej Nowak. Forging the External Dimension of the Energy Policy of the European Union. The Electricity Journal. 1040-619, Elsevier. 2010, p. 1

[5] Dorel Bahrin. European Union Energy Policy and Good Administration. Hypersion International Journal of Econophysics & New economy; 2011, Vol.4, Issue 2, P.329-338

[6] Mert Bilgin, Energy security and Russia's gas strategy: The symbiotic relationship 2between the state and firms. Communist and Post-Communist Studies vol. 44, Issue 2. (2011) p. 119–127

The energy crises are not utopia but reality – one example from past would be Russian-Ukrainian gas conflict in 2006 that also affected EU member states. As concluded by Frank Umbach, the paradigm after the Ukraine incident in mentality is noticeable and the assumptions of the EU member states policy that "oil and gas are exclusively economic goods, not strategic ones" can be questioned.[1] By Bilgin – "doubts and risks in Europe remain, and will affect Russia's position, so far as the latter keeps on refusing a liberal framework of energy relations with the EU, and follows a geopolitical approach over alternative supplies where *Gazprom* has already launched a corporate expansion strategy."[2] European–Russian gas relations are related political risks and "trying to network contacts with Moscow can involve key European leaders and other European actors into different morally and legally questionable actions."[3]

The investment to the RES technology is not maybe the alternative to eliminate all the risks today but should be constantly progressing as a parallel process. As rightly pointed out by Fouquet, "renewable energy producers and producers of RES technology have the same investment needs as all industry participants: a reasonable investment security."[4] The EU failed to convince Member States to vote for a total unbundling of energy production and distribution, and the legislation does not change the power structure of oligopolies in the energy sector as such.[5]

4. INDIGENOUS UNCONVENTIONAL GAS AS AN ALTERNATIVE

Another emerging issue of keen interest in this field is the potential effect of unconventional fossil fuels, particularly shale gas, on energy markets in the EU.

Currently, shale gas is the most discussed and contentious. There is relatively less experience in the EU regarding shale formations as new sources of natural gas, when compared to tight gas and coal bed methane sources. Further, till date no commercial scale shale gas exploitation has occurred in the EU as yet, although countries such as Sweden, Poland, France and Germany have been active in this field.[6]

The Commission has published several studies on shale gas in recent times, in an effort to appreciate how these can impact energy markets, and what will be the environmental and health related risks associated with shale gas development and associated hydraulic fracturing (fracking).[7]

In February, 2011, the European Council called for the assessment of shale gas and oil shale extraction and use in the EU, from the view of enhancement of security of energy supply. Although conventional gas accounts for 85 percent of worldwide natural gas production, the focus has recently shifted towards "unconventionals" due to concern that energy demand could soon outstrip supply, and the dramatic increase (upto almost 50 percent of doemstic production) in unconventional gas production in North America. What is of interest to the European Commission is the possibility of unconventional gas production resulting in security of supply, lowering of gas prices, increased availability of gas in the common market, relieving of pressure on global energy markets, and the addition of diversity to the gas supplies portfolio.[8]

Liquefied Natural Gas (LNG) liquefaction capacity has grown significantly in the last 10 years worldwide, giving rise to the possibility of the concept of a "world gas market" and its associated focus on interregional gas price competition. The boom in unconventional gas production in USA coupled with the effect of the economic recession on the ensuing glut in global gas supply has allowed unconventional gas

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[1] Frank Umbach. Global energy security and the implications for the EU. Energy Policy, Mar. 2010, Vol.38., Issue 3., P.1229-1240
[2] Mert Bilgin, Ibid.
[3] Andrey Kazantsev. Policy networks in European–Russian gas relations: Functionand dysfunction from a perspective of EU energy security. Communist and Post-Communist Studies (2012) p.1–9
[4] Dörte Fouquet. Renewable Energy Vol. 49 (2013) p.15-18
[5] Fouquet, Ibid
[6] Commission, Final Report on Unconventional Gas in Europe, 2011 at 5, available: http://ec.europa.eu/energy/studies/doc/2012_unconventional_gas_in_europe.pdf
[7] Commission, New Studies on Unconventional Gas, 2012 available: http://ec.europa.eu/energy/studies/energy_en.htm
[8] Commission, Study on Unconventional Gas: Potential Energy Market Impacts in the European Union, 2012 at iii, available: http://ec.europa.eu/dgs/jrc/downloads/jrc_report_2012_09_unconventional_gas.pdf

to have a significant impact on European energy markets. On top of it, all this has occured when there is still no prospect of indigenous production of unconventional gas within Europe itself.[1]

It is estimated that in the EU regasification capacity will increase by approximately 25 percent during the period 2010 to 2013. This is while there has been slow progress in other major natural gas infrastructure projects in the EU. Thus LNG regasification terminals are making more progress than interregional pipeline projects, of which only two, namely Medgaz and Nord Stream, are coming online in the same period. Already the increased accessibility of low priced LNG imports is putting pressure on gas buyers to renegotiate the terms of their existing oil – indexed gas purchase contracts.[2] Consequently customers in the EU have been recently offered concessions by suppliers such as GasTerra, Statoil and Gazprom.[3]

In the future, the competitiveness and cost effectiveness of high capacity / long distance lines such as South Stream, Nabucco and Nord Stream II will eventually be assured only in a situation where shale gas reserves in the EU are under-developed due to cost considerations. Failing this, both shale gas and pipeline imports will compete for a share of the European gas market.[4]

It is estimated that shale gas reserves in the EU can potentially have a deep impact on the EU's import dependence of gas, both by allowing for indigenous production and by keeping pace with rising gas demand. In case there is significant shale gas production in the EU, then by 2040 import dependence of the EU can decrease from 79 percent to almost 57 percent.[5]

However, shale gas extraction requires extensive drilling and extraction processes. These are associated with risks to the environment and public health. The general public attitude in several EU countries towards shale gas projects is dominated by environmental concerns.[6] This is different from the situation in countries like China, Argentina, Algeria, USA and Canada (the top five countries with the most shale gas reserves) where there is less controversy because their reserves are either in sparsely populated areas or the local opposition is not effective.[7] One area of interest is the potential contribution of shale gas production to greenhouse gas (GHG) emissions.[8] In the EU, there already exists legislation controlling GHG emissions from shale gas production.[9] Some of these are as follows:

a) The Environment Impact Assessment Directive (85/337/EEC; 2011/92/EU (codified)) which provides for a mechanism to assess the effects of a project on the environment and includes air, emissions and climatic factors. Competent authorities are also obliged to address the issue of significant adverse side effects and the means to avoid, reduce and remedy them.

b) Directive 92/91/EEC concerning minimum requirements for improving the health and safety of workers in the mineral-extracting industries through drilling. It deals, interalia, with the protection of workers from harmful substances or substances that are explosive in nature.

c) The Industrial Emissions Directive (2010/75/EU) provides for minimising pollution from industrial sources.

d) The EU Emissions Trading System Directive (2003/87/EC) which could be extended to regulate emission of shale gasses.

Other EU and national laws and regulations on this subject are:[10]

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[1] Ibid at 164
[2] Ibid at 180
[3] Ibid at 184
[4] Ibid at 219
[5] Ibid at 221
[6] Commission, Final Report on Unconventional Gas in Europe, 2011 at 95.
[7] John Aglionby, Europe Split on Benefits of Drilling for Shale Gas, *Financial Times* 06/27/2013, available http://www.ft.com/intl/cms/s/3319fd84-df1d-11e2-881f-00144feab7de,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F3319fd84-df1d-11e2-881f-00144feab7de.html%3Fsiteedition%3Duk&siteedition=uk&_i_referer=%20-%20axzz2dp6ZmT3J
[8] Commission, Final Report, Climate impact of potential shale gas production in the EU, 2012 at iii, available: http://ec.europa.eu/clima/policies/eccp/docs/120815_final_report_en.pdf
[9] Ibid at V
[10] Commission, Final Report on Unconventional Gas in Europe, 2011 at 101

a) The Hydrocarbons Directive (94/22/EC) deals with prospection, exploration and production of hydrocarbons.

b) The Water Framework Directive (2000/60/EC) aims at maintaining and improving the aquatic environment in the EU. The Groundwater Directive (2006/118/EC) deals with the protection of groundwater against pollution and deterioration. The Mining Waste Directive (2006/21/EC) deals with the management of waste from the extractive industries, especially those such as fracking which could be a potential source of water contamination.

c) The Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (Regulation (EC) No 1907/2006) deals with the use of chemicals.

d) Biodiversity within the EU is safeguarded and regulated by two directives specially designed to oversee wildlife and nature conservation. These are the Habitats Directive (92/43/EEC) and the Birds Directive (2009/147/EC).

e) Liability may also arise for damages under the Environmental Liability Directive (2004/35/EC) which deals with prevention of environmental damage and remedying thereof, and the Mining Waste Directive (2006/21/EC) which deals with the management of waste from extractive industries.

It remains to be seen how the EU deals with this situation in the near future. The European Commission is expected to finalise a fracking risk management strategy by 2014 which will make for interesting reading in this matter.[1] Thus we can see that the impact of unconventional gas (particularly shale gas) as an alternative on energy markets in the EU will be significant in the years to come.

5. *Per aspera ad astra*?

The European Energy market is currently developing. The main problem of effectively achieving the common EU goal is related to the fact that energy supply is a matter of every country's national security. We could make a comparison to transport (aviation) or some other area of common market – European Court of Justice (ECJ) has issued several judgments by which national (protectionist) policies are seen as a breach of EU principles of free movement of capital and freedom of establishment.[2]

We are still living in the age of crisis[3], and the solutions that are proposed to alleviate the consequenses of it are not always acceptable for everyone or do not meet the criteria of what we call legitimate expectations. The controversial age of Prince Metternich (the Concert of Europe) is still bygone and the consensus to be achieved between European nations before introducing radical changes in the European political architecture is an inevitable prerequisite. In history, there have been several strategies that were emerging from the ideas of founding fathers of the European Union, such as Altiero Spinelli and his followers. The question whether the EU, a core institutional framework for Europe should be more centralized is, today, the "hot button" again. "Ever closer union" can be possible only in the case Europe shares the common vision.

By the European Commission[4]: The EU aims to get 20% of its energy from renewable sources by 2020. Renewables include wind, solar, hydro-electric and tidal power as well as geothermal energy and biomass. More renewable energy will enable the EU to cut greenhouse emissions and make it less dependent on imported energy. And boosting the renewables industry will encourage technological innovation and employment in Europe. EU commissioner for energy, Günther Oettinger[5] recently stated three relevant layers:

a) to create the European energy market by 2014 which means to move from monopolies with centralised grids and power production to competitive markets;

b) better infrastructure policy: interconnectivity and full advantage of a European market;

c) increasing energy efficiency and the share of renewable energy.

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[1] John Aglionby, *Financial Times*

[2] See: Carlos Padrós, Endrius E. Cocciolo. Energy Law Journal vol 31, especially Case C-196/07 Com v Spain 2008

[3] The current section is modified version of editorial of the author for academic journal L'Europe 2012

[4] See: http://ec.europa.eu/energy/renewables/index_en.htm

[5] Günther Oettinger. Sustainable and Secure: How to tackle flexibility challenges in an integrated EU power market? Centre for European Studies. Brussels 2012

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Gouvernance de l'eau et des changements climatiques. Quelques repères concernant la nouvelle législation roumaine dans le domaine de l'eau

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Abstract: The concept of governance is seen since the beginning in the European context as being able to take different meanings or major forms, to develop into a particular vision, applicable, for example, to the management of water resources in the current reform context, given the limited effect of specific conventions and of the other instruments of international law, including the implementation of regional organizations (BSEC) or of the states of the Central-East region. It is thus increasingly clearer that the current management of water resources in the Union as a whole, but especially at the sub regional level (Central and Eastern Europe, with chronic delays in several areas)- with all the problems from the recent or nearest past and subjected to current challenges requires an integrated approach - inter-and multidisciplinary, involving, beyond the purely legal issue or the one related to the current reform of governance – certain technical and institutional aspects and taking into consideration the possible complications that may arise in the integrated water systems under the pressure of climate changes, our attention must focus again on the EU's sustainable development strategy and its constructive application. In the Central-East region of the Union (Romania, Bulgaria, etc..) it is required a deep reform, the solution that should be implemented is connected to the realization and intensification of local and regional cooperation, understanding that at a local level the problems are well known and will likely be better managed (principle of subsidiary), so it is necessary to put on its feet some units of inter-county collaboration that can integrate - for Romania - in the current structure of the 11 river basins. In this new context, the concept itself of governance involves widening the tight circle of the traditional actors - participants in the various decision-making processes, and looking, if possible, some solutions by consensus.
Keywords: European Governance, international treaty, environment protection, water resources, regional, sub-regional, local, reform, subsidiary, inter-communal collaboration, hydrographic basin, consensus.

CONVENTIONS DE DROIT INTERNATIONAL ET ACTES NORMATIFS SECONDAIRES. EXPOSE THEORIQUE ET PROPOSITIONS DE REFORME EN PLAN REGIONAL

I. LA GOUVERNANCE EMERGENTE DANS LE DOMAINE DE L'EAU ET DES CHANGEMENTS CLIMATIQUES

Dans la littérature actuelle de la gouvernance, au-delà des préoccupations pour la gouvernance globale, la nouvelle gouvernance européenne se dégage comme une approche particulière[1], en reprenant des éléments définitoires de la doctrine des organisations internationales ; d'ailleurs, à l'origine, les Communautés européennes suivaient un parcours d'organisation classique, de droit international public, par la suite l'Union étant une organisation atypique, d'intégration, situation due à une évolution sinueuse, marquée par les crises et les défis de chaque étape d'intégration – et définie en profondeur par les caractères du nouvel ordre juridique de l'Union, dégagés de la jurisprudence de la Cour de Luxembourg.

Le concept de « gouvernance européenne » incorpore bien sur les aspects protéiformes de la gouvernance en général, ainsi selon R. A. W. Rhodes (1996), elle prend plusieurs formes, on peut avoir

[1]Chez nous les ouvrages sur la gouvernance européenne sont malheureusement assez rares, tout de même Petre Prisecaru avait publié jadis « La gouvernance européenne » chez Economica, à Bucarest, en 2005, et plus récemment – Oana-Andreea Ion, « La gouvernance de l'Union Européenne. Des approches actuelles », Editions Polirom, Iassy, 2013.

au moins six sens majeurs différents, concernant la gouvernance corporative, la bonne gouvernance au sens de la Banque Mondiale, laquelle a consacré d'ailleurs le concept, l'Etat minimal (d'inspiration néo-libérale), le management public actuel, les réseaux d'auto-organisation et les complexes socio-cybernétiques. Plus récemment les études sur la gouvernance ont conquiert aussi le domaine de la gestion des eaux et des changements climatiques. L'évolution récente dans ce domaine montre le bienfondé de l'intention initiale et de la typologie présentée ci-dessus. Mais au-delà des aspects historiques ou conceptuels invoqués brièvement ici, nous devons partir du fait tant invoqué par les spécialistes occidentaux que dans le moment actuel on traverse une période de crise – non seulement financière ou économique, et plus largement de civilisation, mais une crise qui porte atteinte aux valeurs sociales en général, et par la remise en question et l'analyse détaillée des limites du concept de développement durable (anticipée par Shamsul HAQUE, 2006, James ROBERTSON, 1999), repousse sur un terrain « fragile », de plus en plus « glissant », le contenu classique du développement durable – et illustre – au-delà des différentes nuances culturelles ou plus particulièrement sémantiques et – la recherche impérieuse d'une transition vers une possible conciliation entre le progrès de facture économique – un avatar de l'idée de progrès linéaire, toujours ascendant, dynamique – et le progrès humain – rattaché à l'idée de « soutenable » ou de « durable », circonstances qui génèrent des problèmes majeurs d'ordre sociétal, en disharmonie parfois avec l'ensemble des acquis de l'Union.

Ayant en vue ces défis, nous devons conclure cette section avec la conviction que le management actuel des ressources d'eau au niveau de l'Union, mais aussi au niveausous-régional (l'Europe Centrale et Orientale, tout spécialement, avec des retards chroniques dans certains pays, en dépit des efforts considérables d'harmonisation législative et institutionnelle) exige une approche intégrée, pluridisciplinaire, qui implique au-delà de la problématique purement légale ou attachée à la réforme actuelle de la gouvernance – des aspects techniques (biophysiques, chimiques, économiques), et aussi institutionnels, et rencontre bien sûr les nouveaux défis qui imposent une harmonisation législative soutenue qui devrait favoriser l'émergence accélérée des nouvelles politiques publiques impérieusement nécessaires ; et pour espérer d'être quasi-complets dans cette énumération – nous invoquons aussi les aspects liés à la planification. Il est besoin ainsi d'étudier en profondeur, pour l'améliorer, le management de l'eau dans l'UE – on ne le dit jamais assez – dans une perspective multidisciplinaire – et d'essayer de trouver des solutions intégrées, par l'intermédiaire des méthodes de recherche et d'apprentissage innovantes, incluant les recherches documentaires nécessaires – dans le sens d'une approche plus large – amplement culturelle (l'eau vue comme bien proprement dit *culturel*), adaptée aux besoins actuels et l'amélioration et l'usage de certaines procédés et procédures de laboratoire au top de la technique actuelle, complétés par des travaux spécialisés dans les bassins hydrographiques eux-mêmes (ou, par exemple, dans les usines de distribution), à l'aide ou à travers des études de cas (tout en utilisant la méthodologie adéquate), pour réaliser la synthèse nécessaire de toutes les connaissances accessibles, tous ces éléments ensemble – se complétant les uns les autres – et cumulés – constitueront les éléments d'une avancée possible concernant la théorie et la pratique du management de l'eau, permettant – pour l'avenir – une réforme de la gouvernance, une amélioration et une démocratisation des processus décisionnels, une juste réglementation et une harmonieuse mise en œuvre dans le domaine général de l'eau – comprenant la gestion et la protection des sources, ainsi que la distribution et la consommation, ici intervenant, au-delà du droit de l'eau, des éléments nouveaux liés au droit à l'eau, ou l'accès à l'eau (non clarifié encore complètement même pas au niveau onusien, pour ne pas parler de sa mise en œuvre effective) promu par les Nations Unies depuis 2010 comme *droit fondamental de l'homme*.

Dans ce contexte, le concept de gouvernance implique un élargissement du cercle étroit des acteurs participants dans les différents processus décisionnels et la recherche pour déceler systématiquement des solutions par consensus. En résumant ces aspects nous devons mettre en parallèle, dans le contexte actuel – lorsque la protection de l'environnement et la problématique toujours plus « agitée » de l'eau et – par extension – les défis des changements climatiques – sont considérés comme en étant majeurs – en constituant l'axe second, selon l'importance – du Traité de Lisbonne, la source fondamentale du droit de l'Union, la gouvernance publique et la gouvernance corporative (de l'entreprise) et d'évaluer, de peser les

implications et les conséquences sur notre propre vie – alors même que la protection de l'environnement – sous ses aspects d'ensemble (y compris les domaines de l'eau et climatique) est remise en discussion.

Dans son ouvrage *"L'eau. Pour une culture de la responsabilité"*[1], Antoine Frérot écrit : « Le concept de gouvernance a acquis une célébrité planétaire. On lui prête la solution de tous nos maux. Il ne se passe pas une journée sans qu'on en appelle à lui dans un secteur d'activité ou un autre. Il n'en a pas toujours été ainsi pour cette notion à la fois si ancienne et si nouvelle. A l'origine, la gouvernance désigne une méthode ou un système de gouvernement. Le mot gouvernance vient de gouverner »[2].

1. LE ROLE DES NATIONS UNIES ET DE L'UNION EUROPEENNE, AINSI QUE DES ORGANISMES RAPPORTES A LA PROTECTION DE L'ENVIRONNEMENT DANS LA GOUVERNANCE REGIONALE ET LOCALE DURANT LES DERNIERES DEUX DECENNIES

Dans la gestion des aspect régionaux et universels de la protection de l'environnement il a fallu mettre sur pied des organismes capables d'une prise de décision rapide et qualifiée en vue de limiter les dégâts provoqués par les divers accidents écologiques survenus dans les divers parties du monde. Ainsi, selon une typologie consacrée - on parle, en général, des organisations *à vocation universelle*, qui vise le système onusien - et des organismes *régionaux* ou *sous-régionaux*, liés à la protection de l'environnement contre les pollutions de tout sorte et à la gouvernance émergente des changements climatiques.

Pour illustrer les évolutions dans l'Europe centrale, on passe au phénomène dit de la *régionalisation*, pour signaler ainsi les évolutions récentes et la mise sur pied des organismes régionaux, capables de mettre en œuvre des programmes de dépollution de l'environnement naturel suite aux flux de produits pétroliers déversés accidentellement dans les rivières, les canaux ou les lacs, par imprudence ou ignorance des règles établies.

Dans une approche diachronique on peut voir, de façon très concise, qu'au niveau global, à partir de la Conférence de Rio un arrangement institutionnel d'une portée considérable a été réalisé par la mise sur pied de la Commission du développement durable, sa constitution étant prévue dans le chapitre 38 de l'Agenda 21, et pour appuyer son activité ont été créées deux structures principales : une pour la coordination des agences, organismes et programmes des Nations Unies et une autre « comme organe consultatif de haut niveau ». Cette Conférence de Rio, ainsi que les travaux de Rio+10, Montréal, Rio+20, etc., ont contribué, comme le témoignent les grands documents internationaux[3] – de manière fondamentale au développement du droit international de l'environnement et à l'évolution de la gouvernance spécifique concernant l'eau et les changements climatiques, consolidée depuis suite aux autres travaux spécialisés des instances internationales[4]. L'actualité dans le domaine du droit international de l'environnement en plan global et régional a été ainsi assez riche depuis 1990 et jusqu'à ce jour, avec la tenue d'un nombre important de Conférences d'Etats - parties à plusieurs instruments internationaux et régionaux. Une suite des Conventions internationales ont quadrillé le terrain autour du monde, les grandes Conférences internationales et les Sommets de la Terre ont donné du sens à la recherche d'un développement durable, soutenable, d'un développement harmonieux joint à la protection de l'environnement naturel et aux études sur les changements climatiques.

Au niveau européen on doit signaler les travaux de toutes les organisations mises sur pied à partir des années quatre-vingts jusqu'à aujourd'hui, dont « l'Alpes – Adriatique » - l'actuelle Initiative Centrale Européenne, le Groupe de Visegrad – suivi par la CEFTA – ou le Marché Commun de l'Europe Centrale – selon une approche médiatique, la Zone de Coopération Economique de la Mer Noire – devenue l'OCEMN, en juin 1998, la Coopération de la Mer Baltique (ou la nouvelle « Hanse nordique), l'Espace Economique Européen dans son évolution discrète – et sur son modèle – du moins sur le papier – toutes les organisations pan-slaves animées par la Russie et ses partenaires de la Communauté d'Etat Indépendants (l'Union Economique Eurasiatique, l'Espace Economique Unique, l'Union

[1] Antoine FREROT, *L'eau. Pour une culture de la responsabilité*, Editura Autrement, coll. Frontières, Paris, 2009.
[2] Ibid., p. 174.
[3] Report of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20–22 June 2012.
[4] Voir en ce sens le Programme de Nations Unies pour l'Environnement, tout spécialement la politique et stratégie de l'eau du PNUE.

Douanière Russie – Kazakhstan – Biélorussie – Ukraine, et même l'organisation de courte vie - GUAM, censée a favoriser le transport des hydrocarbures de la Mer Caspienne vers l'Europe par des routes en dehors de la Russie, pour éviter « le robinet russe ».

Dans cette mouvance générale des nouvelles organisations ou des nouveaux organismes créés après la chute du communisme en Europe, se distingue en particulier l'Union Européenne, qui a mis sur pied une véritable politique dédiée à l'environnement, et plus particulièrement aux eaux et aux changements climatiques.

Ainsi, à travers le prisme de la stratégie de développement durable, lancée il y a quelques années, pour ce qui est de la politique de l'eau de l'Union Européenne on doit dire très brièvement que la Directive cadre[1] accorde un place essentielle à la protéction des écosystèmes, elle implique une logique de résultats – arriver au « bon état » au plus tard en 2015, exige de stimuler la participation de tous à l'implémentation de la politique de l'eau et de procéder à la consultation du public, d'assurer la transparence des coûts des services de distribution liés à l'eau et l'estimation correcte des dommages causés par le non-respect des règles de la protection de l'environnement. Pour conclure sur cet aspect nous devons dire que la Directive cadre est née de la volonté expresse des Etats-membres de l'Union de tacher d'harmoniser leurs politiques en matière de gestion des ressources en eau, l'objectif fondamental étant celui d'atteindre le bon état écologique des milieux aquatiques (rivières, lacs, eaux littorales, eaux souterraines, nappes phréatiques, etc.) au plus tard en 2015.

2. BREF REGARD SUR L'IMPACT DES CONVENTIONS DE DROIT INTERNATIONAL DE L'ENVIRONNEMENT EN EUROPE CENTRALE ET ORIENTALE. CAUSES DES ACCIDENTS ECOLOGIQUES RELATIVEMENT RECENTS ET DEFIS REGIONAUX ET LOCAUX

a) *Quelques exemples de pollution dans le bassin de la Mer Noire et du Danube durant la dernière décennie*

Dans la seconde moitié du XX-ème siècle le bassin de la Mer Noire et du Danube a subi des dommages importants, à cause de l'érosion côtière quasi continuelle, de l'absence ou l'insuffisance chronique du traitement des eaux usées , et de manière plus générale - la mauvaise gestion des eaux. Mais durant la dernière décennie, des accidents écologiques provoqués par des transporteurs pétroliers ont pollué les eaux du Danube et de la Mer Noire avec des hydrocarbures déversées de manière accidentelle par les tanks pétroliers. Quelques exemples d'accidents arrivés il y a quelques années s'imposent :

- Pollution des eaux du canal Danube - Mer Noire (due à un résidu pétrolier déversé accidentellement sur la rive droite du canal, à la hauteur du km 24,29, par le navire roumain « Rovinari », accident survenu le 4 juin 2004), selon le Ministère de la Protection de l'Environnement et des Changements Climatiques ;
- Pollution de l'aquarium de Constantza, le 20 juillet 2004, confirmée par un communiqué de presse du même ministère, par une nappe de pétrole déversée accidentellement par le transporteur roumain « Dana 84 », suite à une fissure de la magistrale de transport de SC OIL Terminal ;
- Pollution massive du Canal Poarta – Alba – Midia – Navodari constatée le 23 novembre 2006 en raison du déversement accidentel d'une certaine quantité de hydrocarbures par un transporteur roumain (selon un communiqué de presse du Ministère de la Protection l'Environnement et des Changements Climatiques).

b) *Les causes recensées*

Les causes concrètes de tous ces problèmes rencontrés dans le bassin Danube – Mer Noire ont été recensés à l'occasion de la mise en œuvre du Plan stratégique pour la protection de la Mer Noire contre les pollutions: a) l'insuffisance des législations nationales et des réglementations spécifiques au niveau régional, ainsi que des mesures concrètes au niveau local ; b) mauvaise implémentation des politiques législatives établies, uneplanification stratégique inadéquate a tous les niveaux, absence de stratégies et visions réalistes ; c) attitude inadéquate des divers acteurs et insuffisance de l'information et de la participation du

[1]La DCE a été adoptée par le législatif européen, par la procédure dite de co-décision, le 23 octobre 2000 (actuellement, suite au Traité de Lisbonne la procédure est appellée « procédure législative ordinaire ».

public (manque d'une prise de conscience aigue par rapport à la protection de l'environnement,l'exercice des droits publics,le manque de transparence des processus décisionnels, etc.**)**.

Ces expériences dramatiques ont poussé les autorités à s'engager à des politiques visant la protection de l'environnement et une meilleure gestion des eaux, et à des prises de position fermes à l'occasion des sommets régionaux et transcontinentaux.

c) *Conventions et Déclarations d'intention visant la dépollution des eaux en Europe Centrale et Orientale*

En plan régional central et est-européen compte aussi la Convention sur l'usage du Danube, convention qui a été signée en 1994 et ratifiée par la Loi roumaine n° 14 du 24 février 1995. Les suites des guerres yougoslaves ont menée également à la pollution... « durable » du fleuve, le manque d'investissements dans la région faisant pratiquement impossible même le trafic fluvial. Il semble que la situation évolue d'une manière plus satisfaisante ces dernières années suite aux efforts des différents groupes de travail de l'Organisation pour la Coopération Economique de la Mer Noire, mise sur pied par les douze pays riverains ou voisins proches depuis 1992, suite aux *Déclarations* d'intention de 1992[1] du Sommet d'Istanbul, qui ont réussi à déclencher un processus de coopération multilatérale dans la région, qui a atteint son apogée en juin 1998 à Yalta, en Crimée, avec la création de l'Organisation pour la Coopération Economique de la Mer Noire[2].

L'utilisation excessive des ressources de la Mer Noire ou du Danube, pendant la période communiste - mais également pendant la transition (les privatisations accélérées, le capitalisme sauvage dans certains pays, effets des « thérapies de choc ») - sans faire attention aux facteurs qui touchent à l'environnement nous ont mené à une situation presque sans issue. La réaction des organismes internationaux ne s'est laissée pas attendue. De nombreuse prises de position de l'Union Européenne, plusieurs résolutions et recommandations de l'Assemblée parlementaire du Conseil de l'Europe, sur la base de cette « matrice conceptuelle », en font la preuve : Résolution 1149 (1998) : Développement durable des bassins de la Mer Méditerranée et de la Mer Noire, Recommandation 1359 de 1998 - Développement durable des bassins de la Mer Méditerranée et de la Mer Noire, Recommandation 1502 (2001) sur la Coopération interparlementaire dans ces bassins, Résolution 1242 (2001) sur le même genre de coopération, etc.

La Convention de Bucarest du 21 avril 1992 sur la protection de la Mer Noire contre les pollutions, inspirée des textes des Conventions sur les mers régionales du PNUE, signée par les pays riverains de la Mer Noire, a été ratifiée par tous les six partenaires au début 1994. Cette Convention comprend un accord cadre et trois protocoles spécifiques : a) le contrôle des pollutions d'origine tellurique ; b) l'immersion des déchets ; et c) les actions concertées en cas d'accident, cas des marées noires ou autres. La mise en œuvre de la Convention pour la protection de l'environnement en Mer Noire est gérée par une Commission internationale, avec un Secrétariat permanent siégeant à Istanbul, Turquie.

Cet accord régional est suivi à deux années d'intervalle par l'Accord sur la conservation des Cétacés de la Mer Baltique et de la Mer du Nord, entré en vigueur le 29 mars 1994, comme troisième accord régional dans le cadre de la Convention de Bonn, une première session de travail - de la réunion des Parties contractantes ayant lieu à Stockholm, en Suède, les 26 - 28 septembre 1994.

d) *Champs d'action et caractères du Plan stratégique d'action en Mer Noire*

Voyons de façon très concise les exigences des principales conventions régionales au regard des plans concrets d'action dans la Mer Noire. Les champs d'action fondamentaux établis par le Plan stratégique sont les suivants : gestion intégrée des zones côtières, des zones urbaines et industrielles ; assurer le développement durable dans le domaine du tourisme, favoriser l'aquaculture ; stimuler la

[1]Il s'agit des deux Déclarations du 25 juin 1992, du Sommet d'Istanbul, lors de la création de la Zone de Coopération Economique de la Mer Noire, la première – la Déclaration du Bosphore étant une déclaration politique et la seconde – celle d'Istanbul – étant celle qui mettait sur pied les deux volets principaux de la nouvelle coopération – le volet intergouvernemental et le volet « non étatique » de la coopération « sans l'Etat ».

[2]Les 5 – 6 juin 1998 à Yalta a été signée la Charte de Yalta, l'acte constitutif de l'OCEMN.

participation du public aux processus décisionnels visant la protection de l'environnement ; attirer les ONG dans les programmes pour faciliter la mise en oeuvre des stratégies. Pour assurer une gestion adéquate de la zone côtière de la Mer Noire, doivent être élaborées des stratégies de management intégrées. Les stratégies régionales doivent être élaborées sur la base des principes fondamentaux requis et à l'aide des méthodologies modernes de planification, pour mieux utiliser l'eau et le sol. La promotion du tourisme et de l'aquaculture durable est un pas important en vue d'assurer la croissance économique dans la région de la Mer Noire et du Danube. Ainsi, pour éviter toute dégradation de l'environnement et toute pollution des eaux, les principes fondamentaux du tourisme et de l'aquaculture doivent être respectés par chacun de six Etats impliqués.

Il faut développer l'écotourisme par l'intermédiaire des projets – pilot innovants - dans le bassin de la Mer Noire. Vont être élaborés des codes de conduite écologique et des cours d'initiation au tourisme durable, en coopération avec les autres secteurs de l'industrie du tourisme. La participation des tous les segments de la société est l'exigence première pour élaborer une stratégie fiable de développement durable dans la région **(«** conformément au Plan Stratégique d'Action pour la protection de la Mer Noire contre la pollution», Istanbul, octobre 1996).

En ce qui concerne cette région du Centre – Est, la période de transition s'est montrée d'une difficulté croissante pour tous les pays riverains ou voisins proches de la Mer Noire ou du Danube. Une longue période d'austérité, lourd héritage de l'époque antérieure, a poussé à une exploitation irrationnelle des ressources avec des conséquences néfastes sur l'environnement et sur le facteur humain. Le manque d'investissements dans ce domaine a empiré la situation, menant à une crise accentuée. Cela a poussé les pays intéressés à s'associer en vue de la protection de leur patrimoine commun. Des nouvelles législations, harmonisées avec les normes européennes, ont été mises en places dans les pays de la région, la Roumanie étant parmi les premiers pays candidats à l'adhésion qui ont implémenté ces mesures avec un certain succès.

II. LES DEFIS ACTUELS DE LA GESTION DES RESSOURCES EN EAU. QUELQUES BREVES PROPOSITIONS DE REFORME EN GUISE D'UNE MEILLEURE HARMONISATION AVEC LA LEGISLATION EUROPEENNE

Selon les spécialistes, l'adhésion de la Roumanie à l'Union Européenne[1] a représenté un défi considérable pour les milieux scientifiques roumains, y compris dans le domaine de la protection de l'environnement et la gestion des ressources en eau. Même si notre pays ne s'est pas confronté avec des degrés de pollution similaires à ceux de quelques pays les plus développés de l'Europe occidentale, les conséquences de l'industrialisation forcée durant la période de l'ancien régime - qui n'était pas assortie de politiques adéquates concernant la protection de l'environnement, ont mené à la dégradation quasi-générale du milieu naturel et des sources d'eau. Donc l'un des domaines les plus touchés est celui de l'eau, lequel a subi des pollutions majeures durant des décennies, causés tout spécialement par :

- des accidents industriels (pollution chimique de l'eau sur la rivière de Tisza en 2000, suite à un déversement de cyanure par une société commerciale à capital australien, de la région de Baia-Mare) et des accidents écologiques sur les canaux, les lacs et la mer elle-même (déversements accidentels des hydrocarbures dans les eaux respectives) ;
- l'entassement des déchets et des ordures sur le bord des rivières ou même le déversement direct dans la rivière ou les lacs d'accumulation;
- l'absence d'un système cohérent de canalisation ou salubrité (surtout dans les campagnes);
- le manque chronique d'installations modernes ou d'usines performantes pour le traitement des eaux usées (faute de ressources et de technologie).

[1]La première vague d'élargissement de l'Union, après la chute du communisme en Europe de l'Est , a permis l'adhésion de la Roumanie et de la Bulgarie, dans sa deuxième « tranche », en 2007 (la première s'est produit au 1er mai 2004), et de la Croatie au 1er juillet 2013, dans sa troisième « tranche ».

Selon les chercheurs avisés, la pollution ne représente pas le seul défi majeur pour la Roumanie, dans le moment actuel les inondations représentent encore un problème aigu. Ces vagues répétées des catastrophes durant ces dernières années ont été souvent déterminées par l'application déficitaire des politiques publiques, le manque d'intérêt des agents économiques, l'absence d'autres leviers importants, l'inexistence d'une organisation administrative efficace : notre pays garde encore système fortement centralisé[1], ce qui mène souvent à un double emploi au niveau local et à un enchevêtrement d'attributions et de taches qui permet de mettre souvent sur le compte d'autrui des responsabilités accrues. La régionalisation en cours va, très probablement, régler tous ces problèmes, sinon tout de suite, du moins dans la durée.

Au niveau des structures spécialisées, nous avons en Roumanie trois institutions centrales (le Ministère de l'Environnement et des Changements Climatiques, l'Administration Nationale « Les Eaux Roumaines » et l'Institut National d'Hydrologie et de la Gestion des Eaux)[2], notre pays étant quadrillé en 11 bassins hydrographiques, chacun d'entre eux étant doté d'un Comité de bassin. Mais ces comités n'arrivent pas à couvrir le réseau hydrographique en son entier à cause de sa grande étendue et ils risquent ainsi de perdre de vue les particularités locales. On se préoccupe trop des grandes rivières du pays, les politiques publiques négligeant ainsi les petites rivières, mais ce sont justement ces dernières qui risquent de provoquer des catastrophes inattendues (Târlisua, 2006, Humor, 2006 ; deux tempêtes d'une rare violence ont tout détruit en moins d'une heure).

On constate également l'inexistence de certains départements spécialisés à l'intérieur même du Ministère de l'Environnement et des Changements Climatiques. Ainsi les politiques concernant la protection de l'environnement proposées par ce ministère ont fait preuve d' inefficacité, en ayant généralement un impact assez réduit sur les citoyens, en l'absence d'un vrai débat et d'une collaboration accrue entre le centre et sa périphérie, ou vice-versa. Un tel exemple pourrait être représenté par le Programme « Crisurilecurate » (les Crisuri propres), qui a été mis en œuvre il y a quelques années – mais sur une trop courte période de temps pour pouvoir prétendre avoir un impact significatif.

Quant au domaine législatif concernant les eaux roumaines – celui-là contient à peu près une centaine d'actes normatifs[3] promulgués dans un laps de temps assez court (lois, décrets, ordres et arêtés du Gouverenement, ordonnnances d'urgence ou simples, certains d'entre ces acts législatifs étant modifiés ou complétés ultérieurement), dont le plus important est celui de 1996, la Loi des Eaux n° 107, publiée dans le Moniteur Officiel n° 244 du 8 octobre 1996. Comme la Roumanie s'est engagé, dans le cadre de la stratégie de pré-adhésion[4], d'harmoniser sa législation avec celle de l'Union – et donc d'implémenter la Directive Cadre sur l'Eau (2000/06/EC), adoptée par la procédure de codécision le 23 octobre 2000, la sus-dite loi 107 de 1996 a été modifiée en profondeur et complétée par la Loi n° 310 de 2004, qui transpose donc cette directive dans la législation nationale roumaine, ces deux actes normatifs cités *supra* en constituant ainsi le cadre législatif général dans le domaine des eaux dans notre pays, d'autres aspects particuliers concernant les eaux étant réglementés par l'intermédiaire des ordonnances d'urgences, des ordonnances simples, des ordres et des arrêtés du Gouvernement. Nous allons donc présenter de manière concise les principales modalités d'organisation du réseau hydrologique roumain, pour conclure, en quelques lignes, sur une proposition de réforme, nécessaire si on veut aboutir „au bon état écologique" des eaux attendu pour l'année 2015.

[1]On nous promet une régionalisation rapide, pour l'année 2014, mais sachant qu'on va avoir une longue année électorale – cela va rester du domaine des promesses… électorales…

[2]Ces diverses institutions changent de nom à chaque alternance politique, ainsi il est difficile à les identifier sur un plus long laps de temps, des mises à jour, des ajustements et des corrections étant nécessaires tous les quatre ou cinq ans…

[3]Une analyse quasi complète ou du moins plus détaillée de ces actes normatifs devrait être réalisée dans la seconde partie de notre travail et en d'autres contributions dans les volumes collectifs publiés par notre Centre de recherches sur les politiques publiques dans le domaine de l'eau dans notre pays, actuellement en cours de préparation.

[4]En 2004 la Roumanie était en train à ce moment-là de finaliser les négociations d'adhésion à l'Union Européenne, parcours achevé, du point de vue technique, au mois d'octobre 2004, le Conseil Européen des 16 – 17 décembre 2004 donnant le feu vert à la rédaction et la signature du Traité d'adhésion pour le premier semestre de 2005, la Roumanie intégrant l'Union Européenne au 1er janvier 2007.

La Loi n° 107 de 1996, complétée par les dispositions des articles 11 et 12 de la Loi n° 310 de 2004, établit, dans son nouvel article 6, le *bassin hydrographique* comme entité de base dans la gestion des eaux, les bassins hydrographiques nationaux étant à la charge des directions régionales de l'Administration Nationale des Eaux Roumaines.

Le législateur roumain avait opté, dans la nouvelle loi, en guise d'harmonisation avec la directive cadre européenne (l'article 3 de la DCE), pour une organisation régionale dans le cadre des districtes de bassins suivants: *Someş-Tisa, Crişuri, Mureş, Banat, Jiu, Olt, Argeş-Vedea, Buzău-Ialomiţa, Siret, Prut-Bârlad et Dobrogea-Litoral.*

Il était ainsi établit que dans le cadre de chaque direction régionale de l'Administration Nationale des Eaux Roumaines soit organisé un comité de bassin, qui devait être composé par de nombreuses catégories de membres, ce qui nous mène ainsi vers une organsation extrêmement compliquée, difficilement applicable, qui nécessite à notre avis une réforme en profondeur. Nous avons essayé ainsi de préparer une brève proposition de réforme dans le cadre d'IRENES, projet développé en Interreg III C, aux côtés de nos partenaires roumains et étrangers, donc par la suite on va reprendre quelques passages, pour bien illustrer notre propos.

Suite à l'identification de ces problèmes spécifiques, à notre avis la seule solution viable sera la réalisation et l'intensification des relations de collaboration au niveau local et régional[1]. Un argument de taille en faveur de cette idée consiste dans le fait qu'au niveau communal les problèmes sont mieux connus, et implicitement seront mieux gérés (cela nous rappelle le principe de la subsidiarité). Par conséquent, nous avons besoin d'une meilleure organisation régionale par la mise sur pied des unités de collaboration intercommunale. Ces unités seront créées sous la forme de Comités, organisés au niveau des affluents importants des principales rivières – des 11 grands bassins hydrographiques existants.

Dans un essai d'harmonisation complète avec les normes de l'Union Européenne, ces Comités – calqués un peu sur ceux prévus par la loi française, devront être composés de plusieurs membres, dont :

a) un représentant du Conseil Départemental ou Régional; b) un représentant des Conseils locaux de chaque commune impliquée dans le comité ; c) un représentant de l'Administration Nationale « Les Eaux Roumaines » au niveau du bassin ; d) un représentant de Romsilva (Administration nationale des forêts) au niveau d'organisation de la zone respective ; un représentant de l'Institut National d'Hydrologie et de la Gestion des Eaux ; e) un représentant des ONG qui travaillent sur l'environnement de la région ou du département ; f) des agents économiques – PME ou autres structures – qui ont un impact sur la gestion de l'eau (usines d'eau, sociétés commerciales, autres structures de distribution, etc.).

Selon la méthodologie que devrait être adoptée (vu l'expérience française récente) les membres des Comités vont se réunir une fois par mois, mais aussi chaque fois qu'il sera nécessaire. Leurs responsables vont rédiger des rapports trimestriels et annuels, dans lesquels ils vont présenter :

a) le degré d'implémentation des politiques publiques au niveau des communes ;
b) les problèmes courants ;
c) les modalités de règlement des crises et de résolution des problèmes rencontrés ;
d) les propositions nouvelles ;
e) l'audit financier (justification des dépenses et autres).

Les Comités vont représenter des instruments utiles de liaison entre les communes, entre les communes et les autres structures habilitées vont tacher de faciliter et d'harmoniser la communication entre elles, pour aboutir à une meilleure collaboration au niveau local et régional. Les problèmes communs rencontrés par ces localités, surtout durant les situations de crise, pourront ainsi trouver une solution globale par l'intermédiaire de ces structures.

En dehors ou en plus de ces activités, les Comités décris ci-dessus devront réaliser des taches conjointes :

a) missions d'information dans les écoles (universités, lycées, écoles primaires);

[1]Comme le processus de « régionalisation » effective en Roumanie se laisse attendre, cela reste encore une figure de style lorsqu'on parle de la… « régionalisation ». Le gouvernement actuel semble décidé de clore ce processus dans quelques mois, mais vu qu'on sera en année électorale, ses promesses risquent de ne pas être respectées.

b) activités organisées dans d'autres institutions d'enseignement (écoles professionnelles, confessionnelles, etc.) pour sensibiliser les élèves à la protection de l'environnement ;

c) missions d'information et de consultation du public (campagnes d'information, dissémination de dépliants, conférences, séminaires, etc.) ;

d) prévention de la déforestation massive et le reboisement en coopération avec Romsilva;

e) promotion de l'éco-tourisme (ou tourisme écologique) en coopération avec les structures professionnelles du tourisme de la région;

f) établissement des modèles d'implémentation des politiques écologiques en agriculture ;

g) vérification périodique de la qualité et de la pureté de l'eau ;

h) implémentation des réglementations nationales au niveau local (le contrôle de la pêche, superviser l'aquaculture…,la salmoniculture, etc.) ;

i) mise en œuvre des politiques publiques pour la prévention des inondations, des glissements de terrain du aux tempêtes, correction des torrents, etc.

Hormis ces brèves propositions (la plupart étant déjà discutées à l'occasion de nos réunions de travail dans le cadre d'IRENES – comme nous l'avons précisé *supra*, par la force des choses incomplètes ou même un peu sommaires, étant donné le cadre restreint de cette analyse préliminaire, il nous reste à investiguer, dans une éventuelle seconde partie de ce travail, un champs de recherche assez large et d'une technicité particulière, par rapport, en principal, aux modalités dans lesquelles les Etats-Membres arriveront à respecter leurs obligations visant la mise en œuvre de la Directive Cadre dans le domaine de l'eau - 2000/60/UE – (WFD), ainsi que des autres directives tangentes et associées, pour pouvoir dégager un ensemble de mesures qui vont contribuer à une plus efficace et plus harmonieuse finalisation du premier Plan de Management National (RBMP) et des Plans de Mesures Associées (JPM), lesquels ont comme délai, selon l'article 8 de la Directive Cadre sur l'eau, l'année 2015, dans un contexte tout à fait particulier pour la Roumanie – le constat d'un retard dans certaines domaines – qui peut nous amener dans une situation semblable à celle dont nous nous confrontons maintenant par rapport à la CEDO (retard chronique visant quelques problèmes législatifs spécifiques et les restitutions des bien confisqués pendant l'ancien régime), d'être amenés à demander des changements de calendrier pour pouvoir réaliser nos obligations visant l'objectif fondamental spécifique – celui d'atteindre le bon état écologique des milieux aquatiques en 2015.

Notre intention est de réaliser, entre autres – dans notre deuxième partie de ce travail préliminaire – qui va être publiée prochainement, espérons-le dans le numéro suivant de cette même revue – au-delà de la démarche purement théorique, une brève proposition de réforme visant les modalités de planification en Roumanie des Plans approuvés (RBMP) entre 2009 et 2010, par l'analyse approfondie des impacts créés dans les bassins hydrographiques de prédilection – sélectionnés – ici étant bien le cas de la région Nord-Ouest de la Roumanie – le bassin Somes-Tisza, ainsi que des stades de réalisation des objectifs établis, de la prise de mesures incluses dans les Plans de mesures concernant le premier cycle de la mise en œuvre de la Directive Cadre et qui ont – comme nous l'avons vu – comme délai de rigueur pour leur finalisation l'année 2015. Assurément, comme nous ne pouvons pas analyser tous ces aspects dans le cadre de ce bref article, les principaux éléments vont faire l'objet d'une recherche approfondie, tant documentaire, législative, que scientifique en général – avec la prise en considération des nouvelles complications qui peuvent intervenir dans les systèmes intégrés de l'eau sous la pression des changements climatiques, lesquels constituent depuis l'entrée en vigueur du Traité de Lisbonne – l'axe second selon l'importance pour l'Union Européenne, dans le contexte particulier où tout est vu à travers le prisme de la stratégie de développement durable, lancée il y a quelques années par l'Union Européenne.

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D. European Identity, Languages and Education

European Identity and English as official language of Europe

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Abstract: This article explores European Integration, focusing on identity issues of the people of Europe. It talks about the problems of European integration and lack of feeling of belonging to common Europe by the people of Europe. There are different levels of identity, also within the citizens of the European Union, the authors try to explain what are the identity problems in the integration process, how important is the role of language in it and what could be a future useful solutions and developments.
Keywords: European Union, European identity, European Integration.

INTRODUCTION

There are different theories about European integration, different ways to build a common Europe as a common peace system where the parts, the member states, can solve their disputes by peaceful means. As the integration has been growing, the benefits for the European people increase and there is a big necessity for increasing the integration, and hence protecting the benefits of the already done integration plus achieving new profits via deeper integration.

The main theories are Federalism, Functionalism, Cooperation and Neofunctionalism. Basically the first of them supports the idea of a European Parliament as the central institution of a political framework in Europe, because the new political structure can be built only by the people of Europe, and should be done at once with a federal constitutions and federal institutions. Hence, the European Parliament should be elected by the European people in democratic elections to rule over the European affairs. It means that the citizens of the member states, and hence European people, should vote in the European elections according to the European interest, and not according to their national interests. In order to achieve this, the Europeans should have issues which are felt as European. It raises several problematic questions:

- How to identify a European issue when you do not identify yourself as European? Why the European elections show low participation comparing with the elections in the member States?
- Why is there so much indifference about the European Parliament in Europe?
- Why cannot a great majority of European citizens name even a single member of the Parliament?
- Why there is not any proper European political party?
- Why domestic issues are still much more important in all the countries of the EU in the political campaign for the European elections than European problems?

The answer could be the lack of identification between the European citizens and the European Union since their national identity is much stronger that the European identity.

According to the main federal idea, subsidiarity, the problems should be solved on the best level of decision making. There are many different levels of decision making influencing the life of the European citizens:

1- Local level and city halls
2- Regional level and regional institutions
3- National level and States

4- European level.

Hence, for example, if a problem can be solved better on a local level, such as rubbish recollection, the City Hall should deal with it rather than other institution less effective. Having a problem that can be solved better on the European level, like for example protection of environment – a problem widespread in Europe because environment does not know about political borders and it influences all the members of the Union- the European Parliament should rule over it in order to benefit the society. Henceforth, if the decision making would happen on the European level providing benefits for the society, the European citizens would look to the European Parliament for solutions. Once the EP could rule and solve the problems of the people, the loyalty of the citizens will be transferred from the national level to the European level because the institution that solves our problems is European, our loyalty gradually would change from the national level (before the last institution in order to solve our problems) to the European level.

Why has it not happened in Europe? Mainly is because of confusion about the role of European Institutions, and especially confusion between the powers of the European Council and the European Parliament, and secondly because of lack of a strong European identity.

Another theory, Functionalism, is based on a technocratic work, out of the political spectrum, does not need any European identity to work. The same as Transnationalism: the member states are the center of the decision making, so no transfer of loyalty from the national to the European level is required, and hence no European identity is needed.

In the case of Neofunctionalism, and its approach to the integration in Europe based on the spill-over effect, the transfer of loyalty from the national level to the European level is basic in the system.

Neofunctionalism speaks about integration in areas of low politics which are important in other fields as side effect. Economy for example, has a high potential for further integration that will lead to bigger integration that will create new necessities which can be solved just by more integration, being the end of the process the creation of a European State. The idea is clear, integration in a common trade area lead us to a common market. In order to have a common market, we could not have national barriers, so the European institutions dealt with this problem creating European standards. So, Europe moved towards a Single Market. To get a real single market Europe should have had the same rights and duties, the same opportunities, and finish with the distortion created in the market by different national currencies. So, the EU created a common currency, the Euro. The creation of the European currency will lead Europe towards a free movement of capital in the euro zone, but there is a problem with the banking system and different taxes paid in each member state. So this field too will be integrated in the European level as the only possible way to increase the effectiveness of the system. If the EU follows this progression, it will have a European State as a result.[1]

But Neofunctionalism has a multi-approach to integration. The spill-over effect is its central point, but not the only one. The creation of institutions to deal with common issues and to push for further integration, leading the process in the right direction is another important approach. These institutions should be independent from any member state of the organization, and its workers should forget the interest of their own national states for the common European interest. In case of the European Union this institution is clearly the European Commission. As a consequence of the spill-over effect, more and more policies were, are, and will be included in the area of influence of the European Union, and hence, in the area of influence of the European Commission, that becomes a center of decision making in terms of European issues. The loyalty of the economical agents, according to Neofunctionalism, will change from the previous level of decision making, the national governments, to the European level, transferring loyalty from the states to the European Union.

It is clear that if in any economical field the decisions are taken on the European level, for good and for bad, providing the economical agents rules, benefits and losses, the eyes of these agents will be focused on the European level. Whenever they have a problem, they will try to solve it in Brussels, or whenever they have a proposal, they will lobby in Brussels. According to Neofunctionalism this will create a European identity in economic terms, helping to create the European identity in cultural terms.

[1] European Integration: Building Europe (Nova Publishers) David Ramiro Troitino. 2013

The problem of this theory is the multifunctional approach to the European Building process and the creation of other institutions, such as the European Council, where the member states are represented, where the national interest of the member states is protected. The European Union has four main institutions, the High Court of Justice which protects the respect to the common law, the European Commission as the executive branch, the European Parliament as a representative of the European people, and the European Council as a representative of the member states.[1] The process of legislation is started by the European Commission, but the Council and the European Parliament have the last saying, and they can change the original proposal substantially. In this game of power the Council almost always has the upper hand, becoming the central institution of the European Union and blocking the transfer of loyalty from the national level to the European level, delaying the creation of the European identity. As an example, one of the most successful lobby agencies dedicated to the car industry has declared in the Financial Times via his chief executive that their success resides in the lobby done in the capitals of the member states before the meetings of the European Council, and not in Brussels.[2]

THE CURRENT SITUATION OF THE EUROPEAN IDENTITY

After more than 50 years of the European Building process, common institutions, and more representation of the people of Europe via the European Parliament, has resulted in a process were the European identity is growing but is still far to unseat the national identities as the main source of identification for the European people. The European Union does not want to destroy the national identities; the European Union is just adding another level in the decision making in order to benefit the whole society.

The first level of identification of any human being could be the family, the second location or homeland, where it can be included friends and work. Regional identification can be important mainly if the state is supranational or the extinction of the state is big. Finally there is a national level, with its capital as the common space of all the citizens of the State. European identity will be over the national identities. It already exists, but is weak in comparison with national identity, the strongest in Europe in the public affairs. All the agents working in the European Union field try to achieve the same primary goal, the end of confrontations and wars in Europe, most of them consequence of nationalistic confrontations, via integration. So, the creation of a European identity above the national identities will integrate people; make them closer, avoiding conflicts between them because of nationalistic feelings, fears or ignorance.[3]

Another important fact is the creation of the European State. It was the main target of the so called fathers of Europe, as they asserted in the Schumann declaration, the founding paper of the European Union.[4] The European integration cannot work in the long term without the support and identification of the citizens with the new State.

How a European state could last if there is no European identity?

A state is just the organization of the public and common affairs. At the moment there are many reasons for the lack of European identity and measures working to achieve it, but one of the main obstacles is the fear that increasing the European identity would attack the national identities. Europe is a place with a great diversity, with more than 750 million inhabitants, and nearly 500 million in the EU, more than 200 languages, more than 2000 dialects, different ethnical groups, many different national groups, and different climates from the extreme cold of the north to the warm south, different cultures, etc.

Europe, small in territory, is big in diversity, making it more difficult to create this European identity.[5] For years the actions of the European Commission in the field of European identity have been very cautious. Trying to avoid problems and upset faces the Commission has been acting according to the idea that pushing for a Unitarian identity would have meant the same that the fascist approach, not respecting the

[1] The Institutions of the European Union (New European Union). John Peterson and Michael Shackleton, 2006

[2] Theories of European Integration, Ben Rosamond, Series: The European Union Series, Palgrave Macmillan, 2000.

[3] European Identity (Contemporary European Politics),Jeffrey T. Checkel and Peter J. Katzenstein, 2009.

[4] http://www.eppgroup.eu/Activities/docs/divers/schuman-en.pdf

[5] http://ec.europa.eu/public_opinion/archives/ebs/ebs_237.en.pdf

European diversity. The position of the Commission is wrong, because the European identity is not something that destroys or dismantles the national identities; it is something to be added to them, above the national identity. The process is similar to the one followed by the national states in Europe where there were different cultural groups – a national consciousness was created over them without destroying them. For example, the regional identity of Bavaria in Germany is still very strong, but is not confronted with its German identity. The same can be said about Spain, where many regions, such as Andalusia, have a strong identity complemented by the national identity. A problem could be the new nationalism in many regions of Europe, like Catalonia in Spain, Corsica in France, or Scotland in United Kingdom. Even though all these regions have a strong regional nationalism growing, they also feel very European. Their main nationalist political parties want to be part of the European Union, and hence of the European identity, outlining that their main target is just to eliminate one level of integration: the state. They support the European identity as the last level of identification of their citizens as the most effective way to eliminate their main enemy, the identity of the State. So, a Basque person supporting the creation of an independent Basque state would like to have his local and regional identity, understanding the last as national identity, eliminating the Spanish identity, and making the European identity stronger. It means that it is a problem, but more for the member states of the European Union than for the European identity. Nationalism on a state level presents a bigger problem, centuries of building the national identity between many different people in the same state, as the case of France, made the state a nationalist agent, against pressures from below, local nationalism, and from above, European Union. Their support for the creation of a strong European identity is indispensable, because they are the main recipient of the loyalty of the people, because their power in terms of education, economy or politics. They should understand that a strong European Identity is good also for them, because with a stronger Union, with stronger integration the possibilities of a conflict would be minimal, and the benefits in many fields great, with minimal losses for the national identity.[1]

The European identity is principally based on weak symbols, as copying the process initiated by the states in the process of creating the national states. The European Union has its own flag and it's supposed to be the flag of all the Europeans, something to identify with. Also there is a European anthem, that as can be read in the web of the European Union is not just the anthem of the EU, but the anthem of Europe. The melody comes from the Ninth symphony composed in 1823 by Beethoven. These are two of the most visible symbols of the European Union, but there are others, a bit weaker, less popular symbols among the citizens of the EU, such as the European Day. It is a copy of the national days, important festivities in the member states, but on a European level: it is the 9th of May, the day of the Schumann declaration and the real beginning of the European building process. A huge part of the Europeans do not know anything about Schumann, the Schumann declaration, or even when the day of the European Union is. So, this symbol is still empty.[2]

The economical field has provided much stronger links of identification for the Europeans, mainly two facts, the creation of the Euro, the common currency, and the Schengen agreement. The first means that 16 member states share a common currency, more than 320 million Europeans with a common symbol in the everyday life. The level of identification with the currency is important in order to achieve a strong common identity, as we can see with the British and the Pound, still an important symbol for British citizens. But, the currency should work well, be strong, and give security to the citizens. Until now the Euro is being one of the strongest vehicles to create de European Identity because despite a general rise of the prices with its adoption, the Euro is lasting well during the current financial crisis, at least until now. The current crisis and the austerity mean in the countries more affected is having the opposite effect, as many citizens blame the common currency and the loss of financial independence for their situation.

The main problem of the Euro is the possibility of an asymmetrical crisis in some part of the common area, with an important impact in some areas of the Union and the lack of respectability of the currency and its common institutions, specially the European Central Bank. The best solution to an asymmetrical crisis could be the creation of a Treasure office in the European level, again the so called spill-over effect and deeper integration, deeper common identity.

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[1] Nationalism in Europe 1789 1945 (Cambridge Perspectives in History), Timothy Baycroft , 1998.

[2] http://europa.eu/abc/symbols/index_en.htm

The feelings of the people related to the Euro, the common currency, are also important. The former idea in Europe of one state, one currency, makes the people get used to associate a country with a currency. The effect of having the same currency whenever the Europeans move to another country of the Euro zone, makes them feel more at home, with a currency that they know, without changing in the border, understanding the prices of the things, and so on.[1]

The Schengen agreement, primary a bilateral agreement between France and Germany is also an important point in the creation of European identity. The free movement of people between the member states of the EU, with some temporal restrictions for new members, security restrictions for crisis, and exceptions for some countries as United Kingdom, has practically abolished the concept of borders. Travelling from Spain to Finland without crossing any border, or showing any passport, makes people feel that they are still in the same area, on a common territory.[2]

Finally, the European citizenship is also helping to shape the European identity, especially for the Europeans who live in other states within the EU. The main benefits of the European citizenship are the rights to participate in the local elections wherever you live, despite of your nationality, and also in the European elections. It means that if any citizen does not live in another member state, the benefits are not felt, so its integration effect is residual because most of the Europeans born live and die in the same state.

On the other hand there are other symbols in order to create the European identity, as the Eurovision song context in Europe, the TV channel Euro News, the Ryder Cup, a golf competition between USA and Europe, or the football competitions in the European level, specially the last one for its great popularity among Europeans. The sentence Bosman, related with the freedom of movement of the European Union workers, allows the creation of real European teams where previously were national.

The future of the European identity faces many problems as we have seen; huge work is still to be done in order to increase the identification of the European citizens with the European Union to achieve a minimal loyalty that will allow creating the European State. Currently the European actions should be focus on:

1- The ignorance of the citizens about the EU and its institutions should be eradicated via education. Secondary school and high school should teach all over the territory of the EU a topic related with the Union. It is clear that education is a policy in the hands of the member states, but the European Council, where the states are represented, could include this topic all over Europe, with the same contents, the same structure and the same target. It will help to close the big gap between the people and the European Institutions, and decrease the high turnout of the European Elections. Currently the European Commission is working in this field promoting via subsidies teaching in schools. But still there is much to do until the European studies are generally included in all the member states.

2- In political terms, the European institutions should work faster in order to be felt easier by the European citizens, increasing the loyalty of them towards the EU. At the moment there is a balance system of power between the member states, where unanimity is required in delicate issues, and between the member states and the European Parliament, with the co- decision system. It makes it inefficient and slow. A reform to increase the capacity of reaction and reduce the timing in the decision making will have a positive influence in the identification of the citizens as Europeans.

3- In International relations, a single voice is needed, because still nowadays, most of the member states look after their own interest unilaterally, instead to reach a common and stronger position for the benefit of all of them. So, a foreign affairs minister is needed to increase the influence of the EU in the external world, and make it stronger inside the community. As an example, we can see the energy policy of different states negotiating with Russia, like Germany, avoiding a common position that could bring to the whole community better deal conditions.

4- In the defense field, many European countries, especially in Central and East Europe, feel safe from external aggressions thanks to their membership in the NATO, a military organization lead by USA. It

[1] The Euro: The Battle for the New Global Currency, David Marsh, 2011.

[2] Schengen Area: Schengen Agreement, Schengen, Luxembourg, European Union, Immigration Policy, Amsterdam Treaty, Visa, Council of the European Union, Opt-Outs in the European Union by Lambert M. Surhone, Miriam T. Timpledon and Susan F. Marseken , 2010.

means that they do not feel safe because of the EU, and the citizens identify themselves less with a common Europe. So, the European Union should develop its own defense policy in order to protect its members from external aggressions, even if they are hypothetical. This would without any doubt increase the European identity of the European people protected by the EU. The project already exists via the Western European Union, but is developing slowly, and lately has suffered some reverse. Related with the international relations and a common position with the rest of the world, this idea is also the key to understand the division of Europe in the war of Iraq.[1]

As a conclusion, the creation of a European identity as the last level of identification of the citizens, above the national level is needed in order to achieve a European state. It seems that many agents are not interested in it because of nationalistic approaches. The EU should analyze what they want to be, and after, push for it, giving up its ambiguous current approach. It is clear that there are other identities, like the Western civilization, with democracy or human rights are shared, but for geographical distances make a future cohesion impossible.

THE ENGLISH LANGUAGE AND THE EUROPEAN INTEGRATION

The language is an important vehicle in terms of integration and a problem in terms of European identity, originated at the beginning of the European Communities where France was clearly the leader of the process and French language still pretended to be a worldwide vehicle of expression. Also UK was outside of the Union promoting the European Free Trade Association, an alternative to the EC and USA was not still the cultural power that became afterwards. The members of the first European Community were France, West Germany, Netherland, Belgium, Luxembourg and Italy. The center of the Community was France, a country willing to use the Community for the promotion of an independent third way in the context of the Cold War, between USA and its close ally UK and Soviet Union. The duality of the world was also expressed in linguistic terms, with English and Russian becoming the leader languages of the planet in terms of international influence. The will of France to build an independent block was also link with the loss of influence of the French language, predominant at the beginning of the integration in the European institutions and world cultural language until the beginning of the XX century. The inclusion of the ex-colonies of France in the Communities with the Lomé agreements, mostly in Africa, and mostly French speakers, helped to strength the position of the French language in the Community.

The claims of France were also supported by the leadership of the country and the language in cultural terms in the period before the Second World War, where France was the cultural center of the world, and Paris was the cultural capital of the world. West Germany, was willing to accept the leadership of France in the new Community because the country was willing to show solidarity and generosity after the catastrophic IIWW in a way to integrate the country in the international world, and hence it did not oppose the dominance of the French language in the European institutions, although German is the first language in Europe as mother tongue. Luxembourg and Belgium had French also as official language in their states; there were other languages as Flemish or German, but the predominant language was French. Netherland had a language more similar to German, but the cultural and economic influence of France was clear in the area, plus a good educational system were languages were widely learnt made no problems for the integration in a Community dominated by the French language. Finally Italy was completely outside this debate, because French, German or English were not spread among the Italian population.[2]

The European Communities accepted as official languages the ones of the member states, and hence French, German, Dutch and Italian became official languages of the Community. It means that all the documents had to be translated to these languages, the beginning of the current translation office of the Union. Nevertheless, as there were common institutions and common civil servants, the Communities decided to establish two working languages, French and German. But in fact, there was mainly one common language for the institutions of the Communities, the French language.

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[1] European Identity (Contemporary European Politics),Jeffrey T. Checkel and Peter J. Katzenstein, 2009.

[2] European Coal and Steel Community by Frederic P. Miller, Agnes F. Vandome and John McBrewster, 2010.

The situation changed with the first enlargement of the Communities to United Kingdom, Ireland and Denmark, two countries with English as official language and Denmark where the economic and cultural links with the Anglo-Saxon world were very important, and hence the influence of this language with an important presence in the educational system. In order to please these new members, English was incorporated as a working language of the Union, and the beginning of the decline of the French language started.

The cultural decline of France and the rise of the American culture, the political decline of France compared with USA, the economic power of USA, and the complete alignment of West Europe with USA in the Cold War meant the end of the French language as the international vehicle of communication. The own European states changed their educational policies fostering the learning of English where French was before the predominant second language, but the European institutions under the influence of France did not follow the changes included in the European and world society and kept the illusion of French as the Communitarian language. Currently the European institutions work mostly in English, not because of the influence of UK, but because if the international influence of USA, and English is the main language of communication between Europeans. But there is a resistance in France accepting the change, as Jacques Chirac, former president of the French Republic pointed up when he complained about the decline of the French language in the European institutions.[1] English is by far the most spoken language of the world, English is the lingua franca, and English is the most used language to communicate between people with different native languages. The Europeans of different nations with different languages mostly communicate between them in English. So it is clear that the European society already accepted naturally the predominance of this language in the European and world affairs. Nevertheless, the European Union still lives in the past, pretending to have 23 official languages and three working languages where in reality the communication is done in English, and the EU translation service is mostly focus on those who do not speak this language.

Languages are used for different tasks, as political, cultural and social matters, but obviously the main function of any language is communicating. More than 30% of the Europeans can speak English, when less than 15% can speak French or 9% German, and English is the first foreign language in more than 80% of the secondary schools in Europe, spreading the international communication skills of their citizens. A common language is needed in order to communicate people, and give them a feeling of belonging to a community. The great disparity in Europe in the educational systems gives us situations as in Denmark where around 70% of the population is able to speak English, or very low rates as in Spain, where the majority of the population just speak Spanish.

More efforts should be done in the field of education in order to increase even more the role of English as the non-official language of Europe. It is interesting the changes in Central and West Europe, where the predominant language before the IIWW was German, still the most known among the old population of these countries. Afterwards Russian became the lingua franca, but with the collapse of the Soviet Union and the political independence of these states the influence of the Russian language has mostly disappeared in a very short period of time. The younger generations of these countries almost do not speak Russian at all, and their educational systems have focus completely on English language. It is clear the political influence of this situation, the previous soviet domination meant the use of Russian as a the common language, afterwards, the will of independence and the will of incorporating to the West world, led by the United States of America, have made English the common language.

Another interesting topic related with East and Central Europe is the high number of citizens able to speak English in such a short time, pointing out the importance of the educational system. It invites to optimism for the rest of Europe, if the investment in education is important the knowing of English will increase as fast as it did in this part of Europe.[2]

English should be chosen as the official language of Europe mainly as a representation of the society, the institutions going behind the people, a mere reflection of the current reality. Sooner or later it will

[1] The Cold War, John Lewis Gaddis, 2007.
[2] The Collapse of the Soviet Union, 1985-1991,Seminar Studies In History, David Marples, 2004.

happen, but an effective action from the European institutions and the member states of the Union could accelerate the process and hence avoid further problems and increase the effectiveness of the Union.

At the moment there are 23 official languages in the EU, and 3 working languages: French, German and English. It is an inefficient system where almost all the documents are translated into so many languages instead of having all the documents just in English. At the moment there are many offices in charge of the translation and interpretation work in the different institutions of the Union. The European Commission has the Directorate-General for Translation, where around 2500 people work translating texts for the European Commission into and out of the EU's 23 official languages. It is one of the largest translation offices of the world and is located mainly in Brussels and Luxembourg. The oral translations are done in the Commission by the DG Interpretation, with around 1000 interpreters working there. The European Parliament has its own translation office with around 700 staff translating the written documents of the Parliament plus 3000 freelancers, and for the oral speeches and interpretation there is a staff in the European Parliament of 430 interpreters and 2500 freelancers.

The main point of this large body of civil servants in the European Parliament is increasing the communication and understanding between the members of the Parliament. Officially with this service, everybody can intervene in the sessions of the Parliament, and hence take part in the discussions avoiding obstacles for the good communication on decisions that have a direct effect on the European people. Finally, the EU Parliament stresses the idea of the members of the parliament being experts in their fields and not linguistics with high knowledge in other languages. The reality on the other hand, shows that most of the discussions and decisions are taken out of the plenary and commission sessions and hence are done by a direct contact between the leaders of the European Parliament. These contacts are widely done in English and it is a real handicap for those who do not speak it. The countries with les skills in English, Spain, Portugal, Italy and Hungary are less influential than other nations because they cannot communicate with their colleagues; they are isolated in the Parliament because of their lack of English language.

There is also a translation and interpretation service in the European Court of Justice, the Council, the Economic and Social Committee and Court of Auditors, and other European agencies, increasing the dependence of the translation service of the Union. All this services since 1994 are coordinated by the Translation Centre for the Bodies of the European Union. It makes thousands of people working in the European Union in translation and interpretation, making the organization slow and ineffective expending a huge amount of time and money, reducing the integration between the members of the EP, as they have the obstacle of the language for communicating.[1]

BENEFITS OF ENGLISH AS THE OFFICIAL LANGUAGE OF THE EUROPEAN UNION

1- The first and more obvious consequence of having English as the official language of the Union is expending less time and money from the interpretation services. As the agents involved in the European integration could communicate directly between them, the interpretation service would not be as big as it is. Of course it will be still needed for conferences and visits of personalities and head of governments from outside the territory of the Union, but its size will be much more reduce. It means an important saving in terms of money. Nevertheless, it will be more important the matter of time and effectiveness. As the politicians, civil servants and other groups involved in the management and development of the Union could communicate directly it will increase the understanding of each other plus a faster decision making. It will save a precious time to the Union, basic for succeed in the current global world, where the timing of the decisions means the difference between right and wrong.

2- Following the previous idea, the translation service of the Union could also be reduced, but not as much as the interpretation service, as the European legislation has to be translated in all member states languages. The translation office should focus on the legislation field, keeping the rest of the documents in English, reducing hence its size and productivity. In the middle term all the papers of the Union could remain in English, being the member states in charge of the translation of the legislation into their own

[1] http://ec.europa.eu/dgs/translation/index_en.htm

languages. It will make more effective the European Union, reducing the cultural gaps between the different nations included in the European Union.

3- The adoption of English as the sole official language of the Union will improve the communication inside the European Commission, the largest administration body of the Union. At the moment there are three working languages, English, French and German, but the first is more spread among the European civil servants. Nevertheless, there are some units of the Commission where the presence of French citizens is historically higher than any other nationality and their work is basically developed in French, breaking the unity of the working language of the Commission. This is the case, for example, of the agriculture DG, historically dominated by France. The dichotomy here is obvious, English cannot be the common language because all the Europeans have the right to communicate in their own language, and in French and German in the EU institutions. The real discrimination comes from the inclusion of French and German as working language of the Union, because most of the European citizens have English as their second language, and less European speak German or French. So this decision mainly benefits Germans and French over the rest of the European citizens. The historical development of the European integration shows us France and Germany as the center of the process, French as the cultural and partly international language of the beginning of the XX century and hence it is normal French and German were the working languages of the Union. The current situation has dramatically changed the role of both languages in the Union, and there is an overwhelming predominance of the English language, and hence the European institutions should adapt to the new situation, should adapt to the social reality. The main obstacle is the nationalism of France and Germany, but the European Integration is a supra national project, and hence should be able to break the national chains. Then the European Commission could work with a single language and become faster, more effective and closer to the European citizens.

4- There is another institution where the inclusion of a common language could improve in an outstanding way its effectiveness, the European Parliament. It is supposed that this institution represents the European people in the European level dealing with European issues that affect the life of the European citizens. But the communication is a big barrier between the members of the EU parliament and hence decreases the potential benefits of the institution. As each member of the Parliament has the right to intervene in the plenary sessions in their own language, the debates are long and boring, as the level of attention of the MP decrease after long hours listening the interpret. The debates in the parliament have the barrier of the language, where each speaker uses a different language and debate with himself and the other members of Parliament sharing the same nationality or mother tongue. Nevertheless, this is not the main problem in the European Parliament, because the most important decisions are taken in the commissions of the Parliament, the meetings of the political groups and the discussions in the corridors. None of these can be done with effectiveness without direct contact between the members of the Parliament. The inclusion of English as official language will sweep those barriers. It will also have some negative effects, as the marginalization of those European politicians who does not speak English as they could not be members of the Parliament. But as have been said before, if the Parliament is European, represents European people and have a direct effect on the life of the Europeans, it should be manage by European representatives, and hence able to communicate in a European level. The politicians who can just communicate in their own native language can play a role in their national parliaments, or regional institutions, because their language skills do not allow them to intervene in the supranational level. On the other hand, the inclusion of English as the sole official language of the Union and consequently of the European Parliament could have beneficial side effects, as the closeness between the institution and the European citizens. At the moment the MP mostly are just able to communicate with their fellow citizens, and their contact with other Europeans is much reduced. The inclusion of a common language in the Union and in this institution will make closer the contact between the Parliament and the European citizens, and it will open the possibility for creating European political parties and real European elections with a combination of different nationalities with a common language, English. Currently seems unrealistic the possibility of choosing in a European level the members of the EP because the European elections are merely the sum of the national elections. Most of the European states discuss about domestic problems in the European elections, instead of discussing about

common problems to the European people, and hence the gap between the citizens and the Parliament is huge. The used of a common language will reduced this gap, increasing the European role in the elections.

5- Creation of European political parties, in the European elections the language of the campaign English. This idea is link with the previous point of the European Parliament. The creation of European political parties is a necessity for the democratic representation of the institution, but nowadays the national barrier blocks this possibility. The inclusion of English as the official language of the Union should be accompanied with the inclusion of English as the co official language of the member states for the Union and the promotion of the education of this language among the common citizens, not just the European elite. Once it is achieved, the European elections could be developed with English as it main vehicle, with a direct contact between the different members of the European political parties and the European citizens. On the other hand, a common language will be also needed in terms of internal organization of these European political parties, as working language, and to increase the multi nationality of them.

6- Uniting the European people. Currently the main way of communicating between Europeans is English, but there are still many million citizens who cannot speak this language and hence reduce their political scope to the national level. In order to promote the European integration and the European identity, English should be promoted to the official language of the Union and the co official language of all the member states. It does not mean any discrimination to any European language, or destroying the great diversity of Europe. It will be just an action to promote the communication between the European people, currently based on travelling and economic relations. The most use language by tourists is by far English, the vehicle used to communicate outside your national state, it is also the most language used in the economic relations between companies or economic agents in the frame of the European Common market. It means that tourists and economic agents are already using English as the communication language, but still there are big parts of European population not included in these two groups. The political participation of the European citizens is granted in all the members of the Union as democracy is a pillar of the membership of the organization. Including English in the political field will lead to the inclusion of all the Europeans in a community, not just tourist or economic agents.

7- Breaking the nationalism based on the idea of one language, one nation and one state as rule of social behavior. Nationalism has been pointed out as the responsible of many conflicts in the world, especially in Europe, and following the main intellectuals of the XX century, even the IIWW can be blamed on the aggressive nationalism of many European states. The European Union was originally a peace system thought to break the national barriers between the European states, especially between France and Germany. The idea developed in the Schumann declaration by Jean Monnet, the so called father of Europe, was very simple. As much as we share, the more united we will be, and the possibilities of a conflict will be reduced. It is clear the European integration was a big success in this field, as the possibilities of a conflict between the members of the organization are really small nowadays, even impossible within the current system. Nevertheless, nationalism still threats the integration and all the benefits the EU has provided to Europe, as we can see with some member states that are blocking the way for further integration and could provoke the collapse of an organization that needs reforms in order to survive. As nationalism is still a driving force in Europe and in the world, the best way to combat it is by education, by understanding between different people and nationalities, and the best way to do it in Europe would be the promotion of a common vehicle of communication, a common language, English. There have been examples in the past, and even nowadays of multinational political structures, but most of them shared a common official language, so it will not even be a novelty in political terms, it will be just wider than other political projects and more democratic. The revolution of the communications currently makes possible the enlargement of multinational political projects to wider entities, as the European Union, and hence it makes possible the adoption of a single common language for the whole Union. The main opposition for a single common language in Europe comes from nationalist forces, because they see this measure as an attack to the national identity, something that is partly true. It will establish communication links between the European people above their national identity, ending with the exclusivity of the nation as the ultimate representation or identification of the people. It will not mean the end of the nation as a cultural expression, that will use the language as a cultural vehicle, but it will reduced the role of the nation as the main political power in Europe. Of course, the

nationalists never mention this differences and point out that the inclusion of English as the single official language of the Union will have mainly a cultural effect on Europe, abolishing the nations as cultural identities, making all of us the same, instead of speaking about the political consequences of the integration as a whole, and the English language in particular.

8- The creation of a more united Europe with a single voice in the world. The integration of Europe is also a consequence of the globalization of the world affairs, and the necessity of the Europeans of having a saying in the development of the world. As the states of the continent where used to play predominant role in the international arena, with European empires all over the globe, as the Spanish Empire, the French Empire, The British Empire, the German influence in many parts of the world, or even the Russian expansion in Asia. After the IIWW the world was divided in two areas of influence dominated by USSR and USA, none of them properly European states, even when their links with Europe are undeniable. The European states used to spread with their political dominance over the world their own languages. And hence Spanish is the mother tongue of millions of Americans, French is the lingua franca of important parts of Africa, and English was used in the worldwide British Empire as the official language. The victory of USA in the Cold War and the current domination of the North Americans in the international affairs mean the substitution of UK as an important global player, but the continuity of English as the common language of the world, the real international language. The importance of the European states currently is much reduced and their capacity of influencing the international arena is based on common decisions in the framework of the European Union, making good the motto of united we stand. The external relations of the Union are mainly conducted in English, French and Spanish depending on the area of the world, and it will follow in this way in the context of bilateral relations. Nevertheless, in the world institutions, the Union should work with English as its only official language in order to have a good communication between the European Union officials, and also to increase the effectiveness of the European actions. In the middle term, the creation of a Common Defense Policy depends on the development of a common language. This is the most obvious case, if a soldier cannot understand the commands of an officer; the result will be a catastrophe. There has been a long debate about the necessity of a Common European Army in order to increase the international influence of Europe, as an alternative to the American dominance of the world, or the rise of other powers as China. The inclusion of English as the sole official language of the Union will be a necessary step for the consecution of this project.[1]

CONCLUSIONS

The development of English as the only official language of the Union should be done in a progressive way, step by step, but with a firm tendency to this goal. It is clear this necessity for the European Union in particular and for the European people in general, so it is an action needed in order to improve the integration and the benefits of it. The main opponents to this important reform of the Union are the nations and the incapability of a wide part of the European population to speak this language. The nation will try to keep the political power in the national level, and hence will combat aggressively the introduction of a common language in Europe, even when the benefits will be bigger than the losses for the common citizens. And the strategy used will be moving the debate from a political perspective to a cultural ground. The only way to defeat this opposition will be increasing the powers of the European institutions and wait for their determination in the European building process. For the problem of the European population who does not speak English, the solution is easier, education. The member states should increase their investments in education and promote the English language with different measures. Obviously there are reasons for the widely use of English in Denmark, and the small portion of population who is able to speak the language in Spain, and they are merely educational reasons. So, the member states should investigate and use the knowhow of the most developed states in terms of learning English to implement similar measures all over Europe.

[1] http://www.stirringtroubleinternationally.com/2010/01/25/european-union-common-everything/

Another problem could be the predominance of the British and Irish citizens in the political arena as they have English as their native language in a political Europe with English as official language. Nevertheless, here could be debated the role of the British English and the continental English in the European relations.

Another complains will be the representation in the European level of the best linguistics of each member state instead of the best technicians or politicians, in other words, the politicians who speak English and the ones who do not. The inclusion of English should be gradual, adapting to the current reality, but fostering the learning of English for the future. It cannot be done at once, because certainly will left outside the European integration an important group of population, but it should be promoted with a clear deadline for those interested in participating in the European level for learning and communicating in English. The best way to deal with a common language would be the definition of this language as the sole official language of the organization, the promotion of the education and the learning of this language and the inclusion of this language as co official language in the member states following the current model of many European States where there are more than one official language, as Spain, France or United Kingdom. It just need a political push in order to increase the communication among Europeans and increase the effectiveness and development of the European Union and create some kind of European identity, basic for the challenges of Europe in the XXI century.

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European Higher Education Reforms in the Light of the Autonomy of Universities

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Abstract: The basis for EU competitiveness in the global market depends directly from qualified labor market that depends on quality of universities. Recent reforms in several member states are shaking one of the ground principles in the higher education i.e the autonomy of universities. As education is not the exclusive competence area of the European Union and the strategies of the member states differ, the standards, expectations in higher education may also be very different. The authors analyse the role of university autonomy as a prerequisite for efficiency and sustainability of educational reforms.
Key words: European higher education, university autonomy, educational strategy, educational policy, educational reforms, quality in higher education

1. INTRODUCTION: REASONS FOR REFORMS

The reforms during last decades in field of higher education have contributed to significant changes in European higher education system. Although the education has never been an area belonging under *Rechtsgemeinschaft* of European Union, the need for such reforms was inspired from the objective of turning the EU into world's most competitive knowledge oriented economic area. The obvious purpose of the changes was to increase effectiveness and flexibility, relying on practical administrative experience of the private sector,[1] whereas allowing the universities more autonomy should contribute to more efficient use of national facilities.[2] The "Europe 2020" emphasizes that a better education will contribute to improvement of current employment situation and shall help to reduce poverty; moreover given strategy will be used in every EU Member State as a foundation in accordance with local conditions.[3] The substance of the higher educational management is the formation of previously EU level accepted strategies and policies, with the further aim to create opportunities to put given experience into practice on national level.

Already in 1988, , the rectors of European Universities formally signed the *Magna Charta Universitatum*[4] in Bologna with the intention of assigning the common values of European universities as well as intensifying the cooperation between the universities. The compilation of the declaration was based on the need to "modernize" the universities in order to ensure that Member States would be prepared to contribute to contemporary globalized and knowledge-oriented world. Remarkably, the *Magna Chartas Universitatum* enacts the universities' institutional autonomy as well as independence from the political, economical and ideological power.[5]

The UNESCO World Conference on Higher Education in Paris, 1998, adverted that in order to improve the living standards, it is relevant to develop alternative study possibilities and "new types of higher education institutions".[6] The UNESCO conference adopted initial declarations which were

[1] Varghese, N.V. (2000). Incentives and Institutional Changes in Higher Education. *Higher Education Management and Policy*, Vol 16, No 1, 32.
[2] Salter, B. Tapper, T. (2000). The Politics of Governance in Higher Education: The Case of Quality Assurance. *Political Studies,* Vol 48, 66-87.
[3] Europe 2020." Available: http://ec.europa.eu/europe2020, 20.03.2012.
[4] *Magna Charta Universitatum*, Available: http://www.aic.lv/bolona/Bologna/maindoc/magna_carta_univ_.pdf.
[5] *Magna Charta Universitatum.*
[6] *Higher Education in the Twenty-First Century: Vision and Action*, 9 October 1998. Available: *http://www.unesco.org/education/educprog/wche/declaration_eng.htm, 12.01.2012*

prerequisite to reforms in European higher education system with the purpose of ensuring competitive and qualified higher education in the international level. As to realize such goals, the Bologna Declaration was adopted more than a decade ago, with further aim to adopt education systems based on two cycles, comparable degrees and qualifications, as well as to guide the assessment of curricula capacity and advancement in European Credit Transfer and Accumulation System (ECTS).[1] Further important objectives include supporting the mobility and ensuring the quality.[2] The Bologna declaration initiated the so called Bologna Process, by giving an important impulse to developments of a common European higher education system. The further aim of what was the creation of a single higher educational area by the year 2010.[3]

The European University Association (EUA), has been observing the success of the reforms in different universities, and presented public reports including analysis and comparisons. EUA has, by prioritizing the importance of autonomy, enacted numerous declarations: the Salamanca Declaration (2001), pinpointing that autonomy and accountability are the main principles which need to be ensured by legal regulations; the Graz Declaration (2003), highlighting the cooperation of different parties; the EUA Lisbon Declaration (2007), defining main components of autonomy – the academic, economic, personnel and organizational autonomy; while the Prague Declaration (2010) identified the 10 factors of success for the European universities for the next decade, including autonomy.[4] By several authors, universities need more autonomy in order to serve the society better with the means of shaping inner structures, choosing and educating personnel, creating new *curricula* and using monetary means in accordance with actual needs.[5]

The Bologna process is furthermore being supported by the Lisbon Strategy (2000), however, the expected success was not achieved and thus the process has been recommenced repetitively, while setting new goals.[6] In 2005, the focus was on achieving economic growth and creating new and better working places with special focus on knowledge, innovation and valuation of human resources.[7] There are also national strategies: for example, the Estonian Lisbon Strategy Action Plan[8], emphasizes that the education must be qualitative, ensuring readiness for lifelong studying, taking into account the needs of economy and employment market as well as considering the interests of the student.

The changes in field of higher education have contributed to significant increase in the number of students and are turning higher education from elite education to mass education. Developments brought by market economy led to establishment of numerous new universities, new curricula were opened, and in addition to common curricula, study opportunities were created to non-traditional target groups (e.g. distance education, further education or retraining, rise of average age of students, etc.). The competition requirements put the universities in situation where they had to prove the efficiency of their activities; making changes in administration and financing have turned universities into market oriented organizations.[9] "Activists in field of higher education must be economically rational and sustainable. The economical indications have become primary in order to evaluate the sustainability of universities and level of educational institutions."[10]

The primary aim of universities – qualitative study and research activities are not always taken account those who plan national educational reforms although inspired from high-minded ideas deriving

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[1] ECTS - *European Credit Transfer and Accumulation System.*

[2] *Progress Towards the Lisbon Objectives in Education and Training.* (2006).

[3] Praque communique. May 2001. Available: www.ehea.info/aricle-details.aspx?ArticleId=43, 10.01.2012.

[4] Estermann,T., Nokkala, T., Steinel, M. *University Autonomy in Europe II. The Scorecard.* EUA Publications 2011.

[5] Estermann,T., Nokkala, T., Steinel, M. *University Autonomy in Europe II. The Scorecard.* EUA Publications 2011.

[6] Andoura, S., Timmermann, P. Governance of the EU: The Reform Debate on European Agencies Reignited. European Policy Institutes Network. Working Paper, No 19, 2008.

[7] *Ibid.*

[8] Eesti majanduskasvu ja tööhõive kava 2008-2011 Lissaboni strateegia rakendamiseks. 2008. Available: http://www.riigikantselei.ee/failid/MTTK_2008_2011_EST_kujundusega3.pdf.

[9] Gumport, P., Sporn, B. (1999). *Institutional Adaption: Demands for Management Reform and University Administration.* NCPI Technical Report no 1-07. Available: www.stanford.edu, 20.01.2012.

[10] Kerikmäe, T. Õigushariduse ja juristikutse ühtlustamise probleemid Euroopa Liidus. 2007. Available: http://www.iuridicum.ee/public/files/30paevad/30Kerikmae.rtf, 2.02.2012.

from consensual EU level. The quality depends on control mechanisms and supervision, the regulations of which are in the competence of domestic law. The authors claim that frequent reforms and increasing financial control, regulated by Member States, are not in conformity with the resolution of the representatives of the EU Member States governments, in which it is emphasized that in order to organize higher education, higher education institutions must be able to adapt with changing situation, they need to be supported in elaboration of administration, and that is done by ensuring them sufficient autonomy. [1]

Lack of resources which followed the economic crisis, has led to stricter control over the budget of universities; likewise, it has increased administrative burden as well as reduced economical autonomy of *academia*; nevertheless, it is exactly during the economic crisis when the universities need new challenges and accepting that necessity needs extensive support from the government.[2]

The respect to autonomy as well as academic freedom have played a significant role in applying the Bologna Process. In 2001, the Salamanca Declaration provided that the European universities have the right to act in accordance with principles of autonomy, as is enacted in the *Magna Charta Universitatum*.[3] "Freedom in research and training is the fundamental European value, and governments and universities; each as far as in them lies, must ensure respect for this fundamental requirement. The Charter of Fundamental Rights of the EU declaims in Article 13 that "[t]he arts and scientific research shall be free of constraint. Academic freedom shall be respected."[4] However, mere declarations do not guarantee the autonomy if the national strategies ignore it directly or indirectly. The authors shall investigate factors, emerging from reforms that have the most influence on autonomy of universities.

2. REGULATING EMPLOYMENT MARKET

Since the 1990s, both the financing and administration of higher education institutions have been changed. Mainly State regulated and financed higher education system has been turned into rather market-oriented organization, by virtue of which increases the proportion of financing of private sector and inclusion of universities to national policy making,[5] which is satisfying the needs of employment market according to what society demands.

The higher education system, must take into account the current situation of the employment market, whereas the demand for the former grows gradually in parallel with economical and technological developments.[6] Assuredly, human resources progressively become more crucial in the development of world economy; and therefore, it become important to contribute to improvement of quality of human resources, by improving the quality of education.[7] According to Lomas' conception,[8] improving the quality of higher education contributes to socio-economic development of the states – the universities must adapt to new circumstances, whereby, one the one hand, they have an obligation to ensure qualitative higher education and on the other hand, they must also take into account the market demand. Thus, the needs of the parties (state, employment market, universities and students) must be balanced or as one of the authors has concluded, "If the market demand is the absolute indicator, then the academic freedom has been taken away, the innovation has been constrained. If the university teaches according to a curriculum which ignores the market demand or students' vision, then the graduates cannot find a job. If

[1] Resolution C 292 , 24/11/2005, p 0001 – 0002.
[2] Bologna process– reforming universities during next decade.Brussels 22.04.2009. IP/09/615. Available: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/615&format=HTML&aged=0&language=EN&guiLanguage=fr, 10.01.2012.
[3] Karran, T. (2007). Academic Freedom in Europe: A Preliminary Comparative Analysis. *Higher Education Policy,* no 20, 289–313.
[4] *Ibid.*, 290.
[5] Andoura, S., Timmermann, P. *Governance of the EU: The Reform Debate on European Agencies Reignited.* European Policy Institutes Network. Working Paper, No 19, 2008.
[6] Kanep, H. (2005). „Analüüs erinevate koolitusvaldkondade lõpetanute seisundite kohta tööturul ametialade, haridustasemete ja majandusharude lõikes." Poliitikauuringute Keskus Praxis, Tallinn.
[7] *Learning for All. Investing in Peoples Knowledges and Skills to Promote Development*. World Bank Education Strategy 2020. Available: http://siteresources.worldbank.org/EDUCATION/, 20.03.2012.
[8] Lomas, L. (2004) „Embedding quality: the challenges for Higher education." *Quality Assurance in Education,* Vol. 12, No. 4, 157-165.

the student has an excessive freedom of choice of study according to market demand, the employer shall most likely be disappointed."[1]

A survey conducted by PRAXIS indicates that people with higher education are more successful in the employment market; moreover, it confirms the hypothesis based on human resource theory, claiming that people with higher education have a higher salary.[2] Several surveys demonstrate that in the richest countries of the world, proportionality of people with higher education is significantly bigger than in poorer countries.[3] Even though the economic crisis has increased the unemployment among people with higher education, the unemployment rate, especially as compared to people with lower education, is relatively low. For example, according to Statistics Estonia, approximately 9100 people with higher education were unemployed in 2009, thus, the unemployment rate in given group is 5,1%.[4]

Market orientation has increased the number of students, which in turn is associated with the issue of quality. The World Bank report raises a need to pay closer attention to issues of quality, connected with inefficient quality control over curricula.[5] Insofar as higher education is globalized and the competitiveness of universities in the employment market defines their teaching quality in an international context,[6] it is clear that the curriculum should rather meet the needs of the employment market, which presupposes more efficient cooperation between different parties. UNESCO directs attention to the fact that the expeditious increase in educational services exceeds the existing infrastructures and might have a negative outcome on quality of study results, especially since the primary goal is not only to increase the number of students but rather to develop a thoroughly functional system.[7] Despite the apparent fact that proportion of people with higher education is very good in rate of employment, the substance of curricula does not meet the needs of the employment market. This concern has, for example, examined in Estonia. The Estonian Human Development Report accentuates that the presentation of number of students graduating is deceptive, and might differ from the actual situation.[8] Big proportion of CEO-s and high officials conduct the work of regular office workers, whereas the area of technology uses workforce with low qualifications.[9]

Increase in number of students acquiring higher education in the early years of reforms enhanced radically government's spending on higher education, which in turn brought about competition with other related national spheres (e.g. basic education, health care, environmental protection).[10] The aforementioned raised a need to limit the national funding of universities and since the resources were being reduced, it was important to find new opportunities.[11] National reforms contributed to greater independence of universities, which allowed them to receive additional financial resources from tuition fees and from the private sector.[12]

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[1] Kerikmäe, T. (2011). Prerequisites for European higher education in the context of Globalized Market. European Conference on "Higher Education in the Framework of the 2020 European Union's Strategy", Lisbon, 10th and 11th November. (Toim.) Prof. Fausto de Quadros, 2011.

[2] Kraut, L. (2005). „Kõrghariduse omandanute ja õpingud katkestanute võrdlus töötasult laekunud tulumaksu põhjal." Poliitikauuringute Keskus Praxis, Tallinn.

[3] Lundvall, B. (2007). *Higher Education, Innovation and Economic Development*. World Bank's Regional Bank Conference on Development Economics, Beijing, January 16-17, 2007.

[4] Ülevaade kõrghariduspoliitika arengutest 2006-2009. Haridus ja teadusministeerium. Kinnitatud Vabariigi Valitsuse poolt 16.09.2010.

[5] Lundvall, B. (2007).

[6] Altbach, P.G. (2004). Globalisation and the University: Myth and realities in an Unequal World. *Tertiary Education and Management,* Vol 10, No 1 3-25, 5.

[7] UNESCO (2005).

[8] *Eesti inimarengu aruanne* 2007

[9] *Eesti inimarengu aruanne* 2007.

[10] Johnstone, B., Arora, A., Experton, W. (1998*). The financing and Management of higher Education: A Status Report on Worldwide reforms.* Available: http://www.worldbank.org/html/extdr/educ/postbasc.htm, 20.01.2012.

[11] Sporn, B. (1999). Towards More Adaptive Universities: Trends of Institutional Reform in Europe. *Higher Education in Europe,* Vol 24, No 1, 23-33.

[12] Gumport, P., Sporn, B. (1999). Institutional Adaption: Demands for Management Reform and University Administration. NCPI Technical Report no 1-07. Available: www.stanford.edu, 20.01.2012.

Higher education reforms put the emphasis on regulation of previously centralised and state oriented higher education system by increasing the autonomy of universities as well as shifting them to be more market oriented.[1] Such tendency has an effect of turning universities into enterprises close to private sector, which in turn creates a new contradiction. The higher education policy is nationally an important sphere (teaching and scientific developments), whereas at the same time, the universities need to, according to the market situation and market principles, earn profit and finance themselves effectively.[2] The aforementioned contradiction has created a situation where the state's national reforms are delegating the responsibilities to universities, and the state is losing control over a sphere very important to society as a whole.[3]

The higher education reforms have not, despite numerous new tendencies, had the expected economical effect. Increasing the autonomy of universities implies greater responsibility, yet, the frequent reforms have drawn the attention to economical well-being of universities. The state has ceded the decision-making and liability to universities, and consequently is losing the control over formulation of national employment policy and thus, according to the authors, the balancing of needs of the employment market is being delayed. In order to find out what the employment market actually needs and expects, it is vital to conduct thorough analysis and research, so as to accurately shape national policy in this regard.

As emphasized in the introduction speech to "Europe 2020" by J. M. Barroso, every Member State is responsible for their own education system, the policies of the union are meant to support national activities in satisfying the needs of the employment market as well as to increase competitiveness in an international level.[4]

3. "QUALITY" AS A GOAL OF THE HIGHER EDUCATION REFORMS

Derived from the Bologna Process, the purpose of universities is to ensure qualitative education as a parameter of what society expects. Next to reforming higher education, the importance of ensuring qualitative education and scientific research has also been underlined, whereas more attention should be paid to qualifications of lecturers, suitability of curricula, improving evaluation and selection of students.[5] Granting the universities greater authority goes hand-in-hand with giving them greater responsibility, accountability of their own actions as well as national surveillance over universities' actions. In educational institutions, evaluation of quality is being done on the basis of autonomy and since the government has not established a formal control, the procedures are being inspected formally.[6] The basic right of universities is autonomy, hence, besieging such right by strict precepts and controlling mechanisms may lead to negative results.[7]

Global educational reforms done for the purpose of improving quality are based on different paradigms and theories, which could be observed in three stages. Since 1970, the reforms were mainly determined to organizations' internal effectiveness with focused studies and teaching methods as well as processes.[8] Since 1990-s, in addition to previously mentioned, in virtue of accountability in public and conformance of quality to what the parties had expected, the internal and external parties' contentment

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[1] King, R. (2007). Governance and accountability in the higher education regulatory state. *Higher Education*, 53, 412.
[2] King, R.P. (2007), 415.
[3] Johnstone, B., Arora, A., Experton, W. (1998*). The financing and Management of higher Education: A Status Report on Worldwide reforms.* Available: http://www.worldbank.org/html/extdr/educ/postbasc.htm, 20.01.2012.
[4] Europe 2020. Available: http://ec.europa.eu/europe2020/documents/president-barroso-on-europe2020/index_en. Johnstone, B., *et al.* (1998*)*.htm, 20.01. 2012.
[5] Johnstone, B., Arora, A., Experton, W. (1998*). The financing and Management of higher Education: A Status Report on Worldwide reforms.* Available: http://www.worldbank.org/html/extdr/educ/postbasc.htm, 20.01.2012.
[6] Eesti avalike ülikoolide õppetegevuse ühtne kvaliteedijuhtimise süsteem. Kvaliteedikäsiraamat (2004). MTÜ Rektorite Nõukogu, Haridus- ja teadusministeerium.
[7] Srikanthan, G., Darlymple, J. (2007) „A conceptual overview of a holistic model for quality in higher education." *International Journal of Educational Management*, Vol. 21, No. 3, 175.
[8] Cheng, Y., C. (2003) „Quality assurance in education: internal, interface, and future". *Quality assurance in education.* Vol. 11, No. 4, 202-213.

was to be added.[1] Future quality assessment shall put the emphasis on lifelong learning, global networking, internationalism and wider usage of information and technology.[2]

Quality is an important term in higher education and it is also situated in midst of reforms, however, in order to manage and control the quality, it first needs to be made clear, what is the quality in higher education. Definition of quality in higher education institutions is different. According to the assessment criteria of higher education quality by OECD and UNESCO, quality stands for certain fixed standards or it is attributed via quality control.[3] In context of education it is understood as conformity of institutional processes and policy quality assurance with basic standards.[4] Many universities have found that the definition of quality "in conformity with standards" is too narrow, and it has been replaced by the term "client satisfaction," thus, more attention is being paid to processes of quality administration and to relationships with clients.[5] Emphasis on quality in education is a dialogue between teacher and student with the aim to achieve learning outcome, while other parties are interested in its performance as well.[6]

Interpretation of quality as transformation is derived from changing expectancies and needs of students.[7] Due to the fact that more and more students are studying in international programmes (over the last 25 years, mobility has risen over 300%), higher standards are set for the quality of what is taught and thus it motivates universities to accentuate the issue of quality.[8]

Difficulties in defining quality are in many ways related to differences in public and private sector. In education system, not only quality assessment but also organisational management is relying on quality management principles, which, in private sector, stresses satisfaction of the client and hence has given exceptional results.[9] The central idea of quality management is consumer orientation, which in private sector is defined with the satisfaction of end consumer of certain product or service.[10] In scientific communities, there is still no consensus concerning the issue of who is the client in higher education. Mintzberg stresses that "consumers of education service as consumers of certain public service cannot be regarded as clients; they are rather taxpayers and citizens with citizenship rights, to whom a state is providing services."[11]

In education sector, it is important to firstly identify potential parties so as to take into account their expectancies of quality.[12] From one side, the students, academics and personnel; and on the other side, employers, government, administration of a university, potential future students as well as their parents, etc., who might have different anticipation of the quality.[13] In order to conduct a quality assessment in public sector, all parties are being involved, whereas in fact, the proficiency of each consumer and service provider is different. Since the evaluation of quality largely depends on consumer awareness and perception, the aforementioned has a special meaning in education sector.[14] The impact on quality, derived from different value judgments[15] occurs while making practical decisions concerning development

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[1] Cheng, Y., C. (2003).
[2] *Ibid.*, 210.
[3] Mizikaci, F. (2006) „A system approach to program evaluation model for quality in higher education." *Quality assurance in Education*, Vol. 14, No. 1, 39.
[4] *Ibid., 40.*
[5] Brigham, S., E. (1993). „Lessons we can learn from industry". *Change*, Vol. 25, No. 3, 42-46.
[6] Redmond, R., Curtis, E., Noone, T., Kennan, P. (2008) „Quality in Higher Education. The Contribution of Edward Deming's principles". *International Journal of Educational Management*, Vol. 22, Issue 5, 436.
[7] Srikanthan, G., Darlymple, J. (2007) „A conceptual overview of a holistic model for quality in higher education." *International Journal of Educational Management*, Vol. 21, No. 3, 175.
[8] Parthasarathy, M., Rapur, N., Krishnan, P. (2005) *Criteria That Influence The Quality of Higher Education – A Student`s Perspective.* ITHET 6th Annual International Conference, July 2005, Dominican Republic.
[9] Hewitt, F., Clayton, M. (1999) „Quality and complexity – lessons from English higher education". International Journal of Quality & Reliability Management, Vol. 16, No 9, 838-858.
[10] Oakland, J. (2006) „Terviklik kvaliteedijuhtimine." Tallinn, Külim.
[11] Mintzberg, H. (1996). „Managing Government." *Harvard Business Review*, May-June 1996.
[12] Parthasarathy, M., *et al.* (2005).
[13] Becket, N., Brookes, M. (2005) „Analysing Quality Audits in Higher Education". *Brookes e-Journal of Learning and Teaching*, Vol. 2, Issue 1, 3.
[14] Walsh, K. (1991). Quality and Public services. *Public admimistration.* Vol 69, Winter 1991.
[15] Walsh, K. (1991).

of subjects and curricula (feedback), providing reports on self-evaluation and accreditation (biased presentation of data), applications for national support (money!), etc.[1] Meanwhile, individual differences on quality requirements also have an impact, which could be regarded as one of the specifics of educational services[2] - namely, some students, since they contribute to quality in accordance with their motivation and interests, regard their studies differently, as well as do some participants of evaluation process.[3] Based on previously mentioned, interdependence of parties becomes detectable, on one side, in elaboration of curricula, evaluation, etc., while on the other, in alteration of roles. Inasmuch as students are future representatives of the society, their interests and values might change.

By virtue of specificity of education sector, quality, in terms of education, is most often handled as a sum of elements, which fully satisfies the expectations and needs of the parties, whereas their indicators of quality expectations might differ.[4] In academic communities, people are being unanimous – the approach to quality assessment must be based on scientific methods.[5]

Educational quality is a dynamic conception, which represents the relationship between educational purposes,[6] the final parameter of which is "the end result of students' actual capabilities," what the graduates truly know and what they can use; therefore, the emphasis is on assessment of education by learning outcomes, [7] as well as "promotion of high quality studies and teaching" and "accountability of higher education institutions."[8]

Granting the universities greater autonomy, goes hand-in-hand with giving them greater responsibility and control over fulfilling the results. In terms of accreditation, it is important to apply quality management system, which needs special attention on strategic processes (e.g., action plan for courses, realization and division of resources in order to fulfil the purposes).[9] In order to achieve the aim, the management must conduct continuous supervision, leadership, cooperation and feedback between all the parties,[10] nonetheless, scientific literature approaches the educational strategies in a narrow sense and from a systematic position, which arises from differences of management in business sector as well as identifying the approach with strategic leadership and management.[11]

4. INTEREST-GROUPS ATTRACTED TO SHAPING OF THE HIGHER EDUCATION POLICY

In support of the European Commission, the European Parliament and the Council, the purpose of the reforms is to achieve compatibility and comparability of European higher education systems, as well as improving their competitiveness throughout the world. Given process has attracted and it is being influenced by several noted world organizations;[12] international and regional working groups; in the same way, providers of higher education; local governments; accreditation bodies and assurers of quality; student unions, etc.,[13] the aforementioned is, on analysis of the author, the cause of large variety of different approaches.

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1 Becket, N., Brookes, M. (2005), 2.
2 Walsh, K. (1991), 509.
3 Becket, N., Brookes, M. (2005), 3.
4 Robinson, D. (2005) „GATS and the OECD/UNESCO Guidelines and the Academic Profession." *International Higher Education*, Spring 2005, No. 39, 1-5.
5 Eacott, S. (2008) „Strategy in educational leadership: in search of unity." *Journal of Educational Administration*, Vol. 46, No. 3, 353-357.
6 Mizikaci, F. (2006), 40
7 *Progress Towards the Lisbon Objectives in Education and Training.* (2006).
8 *Progress Towards the Lisbon Objectives in Education and Training.* (2006).
9 Harvey, L. (1995) „Beyond TQM." *Quality in Higher Education*, Vol.1, No.2, 123-146.
10 Friedman, A., A. (2004) „Beyond mediocrity: transformational leadership within a transactional framework." *International Journal of Leadership on Education*, Vol. 7, No. 3, 203-224, 214.
11 Eacott, S. (2008), 358.
12 *World Trade Organization* (WTO), *General Agreement on Trade in Services* (GATS), *Organization for Economic Coopertaion and Development* (OECD) ja *United Nations Educational, Scientific and Cultural Organization* (UNESCO).
13 Robinson, D. (2005); Kenny, A. (2006) „The emergence of Quality Assurance in Irish Higher Education. A review of European and national policy and description of the Dublin Institute of Technology practice." *Social Science Research Network.* Level 3, No 4, august 2006.

Over the last decade, the comprehension of classical university model has gradually shifted towards consideration of a university as an organisation of interest groups, and thus it presupposes taking into account interests of different parties.[1] At university level, inclusion of external staff is mostly done due to their participation in governing body; the latter is especially frequent in states with two-tier governance systems.[2] It does not mean that they merely have advising tasks, on the contrary, they are also able to fully participate in the decision making process.[3] Therefore, the state enacted university autonomy might be suppressed by interest groups of external parties, which indicates that in the classical sense, the universities are no longer autonomous and independent.[4] Inclusion of external parties presupposes mutual understanding and will of cooperation; such decisions cannot be made by supremacy.[5] The quality control has an effect of changing the assessment of external parties more objective, it contributes to changes of formal quantitative indicators.[6] According to OECD experts, during revisions of curricula and school-adjusted standards, it is detectable that they emphasize qualitative aspects, whereas enactments of legislation focus on formal and quantitative measures.[7]

Even though judicially, the Bologna Declaration may be considered as non-binding,[8] it is still being used as a magic argument by adversative interest groups to argue for their point of view.[9] The higher education reform being carried out in Estonia is an example of how different parties are trying to reach a consensus in amending the law. Different interest groups, such as rectors of universities, students as well as the public are included in the debate; whereby the most debated issue is limitation of autonomy of universities. The president refused to proclaim the Universities Act, claiming that it was in contravention of the constitution and limited the autonomy. Neither the Government of the Republic nor the minister has the right to limit the legal capacity of a university, or to regulate issues which are in the competence of the university.[10]

Diversity of different starting points is on the one hand related to numerous parties with different interests, and on the other hand, to aims and instruments of higher education policy, what issues and how they need to be solved. Inclusion of external parties in the administration of the universities or in the quality assessment might have an effect on the autonomy since the decision making process defines their actual awareness and motivation. According to the authors, in order to satisfy the needs of the community, it is of utmost importance to take into account viewpoints of different interest groups and thus to reach a consensus.

5. CONCLUSION: CONFLICTS IN HIGHER EDUCATION POLICIES

According to their characteristics, changes in education policy are enduring;[11] therefore, all the decisions must be especially well-reasoned.[12] Discontentment with the reforms is usually a result of them being unreasoned and inefficient. In order to synchronize the process, most attention needs to be paid to

[1] Bleiklie, I., Kogan, M.(2007). Organization and Governance of Universities. Higher Education Policy, No 20, 478.
[2] Karran, T. (2007). Academic Freedom in Europe: A Preliminary Comparative Analysis. *Higher Education Policy,* no 20, 289–313.
[3] Huisman, J., Santiago, P., Högselius, P., Lemaitre M., J., Thorne, W. (2007) OECD kolmanda taseme hariduse temaatiline ülevaade. Eesti . Tartu 2007, 51.
[4] Caughey, D., Chatfield, S., Cohon, A. (2009). Defining, Mapping, and Measuring Bureaucratic Autonomy. Universiy of California, Berkeley. Midwest Political Science Association Annual Conference.
[5] *The shift to learning outcomes Conceptual, political and practical developments in Europe.* European Centre for the Development of Vocational Training, 2008.
[6] Huisman, J., *et al.,* (2007), 55.
[7] Huisman, J., *et al.,* (2007), 55.
[8] Garben, S. (2010). The Bologna Process: From a European Law Perspective. *European Law Journal*, Vol 16, no 2.
[9] Kerikmäe, T. Õigushariduse ja juristikutse ühtlustamise probleemid Euroopa Liidus. 2007. Available: http://www.iuridicum.ee/public/files/30paevad/30Kerikmae.rtf, 2.02.2012.
[10] Merusk, K. (1995).
[11] Aher, G., Heinaru, A. (2005) *Haridus.* Available: http://www.agenda21.ee/ , 26.01.2012.
[12] Walsh, K. (1991), 511.

the national level, where harmonization is most uneven.[1] Amongst other things, the main cause of problems is limited autonomy of universities, increasing of which should help the universities to adjust to changing environment with more flexibility.[2]

Applying the education system based on two cycles also contributed to reforms of curricula; in that matter, both the students and tutors have been critical, experiencing the reforms as being suppressed on them and as being too formalized.[3] The OECD has criticized Estonia in its Review of Tertiary Education for its unwillingness to pay attention to one of the sub-topics of social dimension – creating equal opportunities to access education.[4] Purpose of given dimension is to reduce dropping out and to provide equal opportunities to access higher education irrespective of students socio-economic background. Alas, the review of practicing higher education policy specifies that higher education with social dimensions has not made any progression so far.[5] "In order to even the impacts of economic crisis, [--]."[6]

According to UNESCO, one of the most dramatic developments over the last decade in many countries regarding higher education is swift tendency to turn educational services into "international commerce."[7] Propagation of free commerce in educational services guarantees market access to all service providers, which in turn may allow access for diplomas of doubtful value.[8] With the intention of excluding such behaviour, and so as to support rapid internationalism, it is vital for the strengthening of quality of higher education to create similar assessment criteria and standards, comparable degrees and requirements to capacity of evaluation of studies, which are important to protect the students,[9] not done for commercial purposes.[10]

Critique of reinforcement of quality is based on, for example, lack of determined objective, laying emphasis on short-term results, evaluation of outcome, lack of consistency in administration as well as highlighting quantitative indicators in outcome assessment, etc.[11] Emphasis on ensuring qualitative learning activities[12] must draw the attention of supervisory authorities from administration to reason why students are studying in the first place.[13] Administration has not proved its cost-effectiveness or reasoned how a university, which has passed external evaluation, has turned out to be more successful.[14] Quality assessors do not share given point of view,[15] deeming it necessary to apply assessment based on international standards, so as to ensure comparable quality and to avoid manufacturing flaws of "diploma factories."[16] Regardless, research in innovation field stresses the need to shift from bureaucratic

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[1] Huisman, J., *et al.,* (2007), 7.
[2] Kerikmäe, T. Õigushariduse ja juristikutse ühtlustamise probleemid Euroopa Liidus. 2007.
[3] Kährik, A. Õppekavade toimimise uuring. Tartu Ülikool, Avatud ülikooli keskus, 2007.
[4] Huisman, J., *et al.,* (2007), 7.
[5] Bologna protsess Eestis 2004-2008. SA Archimedes, 2008.
[6] Ülevaade kõrghariduspoliitika arengutest 2006-2009. Haridus ja teadusministeerium. Kinnitatud Vabariigi Valitsuse poolt 16.09.2010.
[7] UNESCO (2005).
[8] UNESCO (2005).
[9] Parthasarathy, M., *et al.* (2005).
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[11] Badri, M., A., Selim, H., Alshare, K., Grandon, E., E., Younis, H. (2006). „The Baldridge Education Criteria for Performance Excellence Framework." *International Journal of Quality & Reliability Management*, Vol. 23, No. 9, 1118-1157; Verlet, D., Devos, C. (2008) *Evaluation of performance in the public sector:end or mean.* Conference of the European Group of Public Administration. September 2008, Rotterdam.
[12] Mizikaci, F. (2006), 39.
[13] Harvey, L. (1995), 128.
[14] Bradley, W., J., Schaefer, K., C. (1998) *The Uses and Misuses of Data and Models: The Mathematization of the Human Sciences.* SAGE Publications, Inc. Thousand Oaks London, New Dehli, 1-212.
[15] Biggs, J. (2001). „The reflective institution: assuring and enhancing the quality of teaching and learning." *Higher Education*, No. 41, 221-238;
Kinght, P., Trowler, M. (2000). „Department-level cultures and the improvement of learning and teaching." *Studies in Higher Education*, Vol. 25, No. 1, 69-83.
[16] Eaton, J., S. (2004) „National Leadership and International Quality Review in Higher Education." *International Higher Education*, Winter 2004, No. 34, 1-3.

organization to learning organization,[1] which is characterized by constant improvement, willingness of change and willingness to learn.[2]

Multiplicity of viewpoints in academic discussions regarding management processes of higher education policy is perplexing; thus, in the author's standpoint there is no common approach in different countries.

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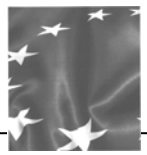

L'école, la république, et l'Union Européenne (UE) : le triangle des efforts. Comment batailler contre le décrochage scolaire ?

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Abstract: This scourge throughout Europe is a matter of concern to European political leaders. School plays an important role in the lives of today's societies. It also contributes to social mobility. European states give much importance to the school and future citizens in the EU. Despite a great deal of investment and school projects, many young people leave school too early, without a diploma and without qualification. The European or even global phenomenon of early school leaving is a matter of concern to the EU leaders. Which strategy should we adopt? What measures to take urgently? What should we do to prevent milliards of young people from leaving school very early? What place must be given to learning? What European examples should we follow?
Keywords: school, education, early school leaving, European Union.

INTRODUCTION

En théorie l'école contribue aux trois dimensions, politique, culturelle et sociale. Elle est elle-même une structure contraignante et conditionnante, la première que les jeunes fréquentent sur la base d'une obligation de vivre ensemble et non sur celle d'une communauté de naissance ou d'affinités, le fameux *melting pot*, pré-figuration et modèle réduit de la nation, par la transmission d'une même langue, elle permet aussi de construire le sentiment d'une appartenance solidaire à un même ensemble ; par l'apprentissage de normes et la formation professionnelle, elle contribue également à l'insertion sociale .

On pourrait s'en tenir à ce constat. Mais les mots ont aussi leurs charges idéologiques et, il faut le reconnaître, l'assimilation de nos jours n'a pas très bonne presse. Cette notion parait entachée d'un soupçon d'immoralité, en tout cas d'illégitimité. Assimiler, on le sent, ce n'est pas bien, c'est nier les particularités de l'Autre.

Pourtant comme le montre beaucoup de sociologues, l'assimilation culturelle continue de fonctionner, et l'école y a sa part.

La France, grande puissance, connaît un échec scolaire massif qui se traduit par la sortie du système d'environ 150.000 jeunes sans diplôme chaque année. Fortement inégalitaire, cet échec scolaire menace la cohésion sociale, à une époque où la réussite scolaire est un sésame de plus en plus indispensable à l'insertion sociale et professionnelle.

Au-delà des chiffres, c'est une réalité très difficile que vivent dans leur rapport à l'école, des milliers d'enfants et leur famille et dans une autre mesure les enseignants eux-mêmes. Le système scolaire est en effet caractérisé par une forte pression sur les élèves et leurs parents et par une compétition qui créent de la souffrance et nuisent à son efficacité.

Les spécialistes de l'éducation pensent qu'il faut passer d'un système de sélection à un modèle de promotion, d'où chaque enfant, quelles que soient ses difficultés et ses appétences, pourra sortir avec la qualification et les compétences nécessaires à son futur parcours, avec un rapport confiant aux apprentissages et une image positive de soi.

Ils ajoutent que ce ne sont pas des mesures, ni même des réformes aussi audacieuses soient-elles, qui suffiront à redonner à l'éducation son rôle premier et son efficacité.

Il faut aujourd'hui définir ensemble le modèle éducatif que nous souhaitons pour la société française.

C'est l'un des enjeux des prochaines années.

UN APPRENTISSAGE COMPLEXE

On constate en France une hiérarchie historique entre savoir et savoir faire, théorie et pratique, concept et application et bien entendu entre enseignement général et enseignement professionnel. Elle n'est pas aussi marquée chez certaines voisines et parfois elle n'existe pas comme en Allemagne et dans les pays scandinaves.

Au moment de l'orientation de fin de la 3ème (collège), la hiérarchie entre le lycée général et le lycée professionnel est telle que celui-ci est voué à accueillir des élèves qui sont sélectionnés négativement en raison de leurs incapacités à satisfaire les critères scolaires. On s'oriente vers la voie générale, mais lorsqu'il s'agit d'aller en lycée professionnel on est orienté.

Cette orientation concerne davantage les élèves issus de milieux sociaux défavorisés et d'origine étrangère surtout. Le fonctionnement par élimination, par exclusion génère de grandes difficultés dans les lycées professionnels (violence, désintérêt, absentéisme…) d'autant qu'un nombre important d'élèves vont y suivre des spécialités de formations qu'ils n'ont pas choisies.

Que doit connaître un (e) élève d'aujourd'hui, de l'histoire nationale et universelle**,** de l'histoire de l'art, de la littérature mais encore du chant, du dessin, des sciences naturelles, de la géographie dans l'école, d'aujourd'hui ?

À vrai dire, les programmes actuels sont exigeants, ils sont jugés par certains élèves étouffants, noyant l'essentiel dans la routine. La tâche des enseignants est toujours de ramener leur enseignement à la clarté et à la simplicité, et sans perdre de vue l'éducation du jugement.

Aujourd'hui chacun le sait, l'école n'a a plus la même situation dans la société actuelle qu'il y a trente ans Actuellement. Les élèves sont d'avance « éduqués » (ou déséduqués, selon le point de vue que l'on adopte), en dehors de l'école, par un système de communication dont ils sont les consommateurs privilégiés, à leur insu. L'école est tenue de faire ce qui a été défait par ce bain d'images et de bruits (parfois à tendance communautariste, il ne faut pas le négliger). Elle doit relativiser les idoles, construire l'attention, la concentration, la mémoire, la considération d'autrui. Il faut doter l'élève de cette arrière-boutique -au sens où l'entendait Montaigne- où il puisse prendre du recul vis-à-vis de la grande machine à émotions préfabriquées, de situations victimaires, tsunamis compassionnels et téléthons ethniques.[1]

UN GRAND PRECURSEUR DE L'ECOLE: MONTAIGNE (1533-1592)

Humaniste, il apprend le latin qui devient sa langue maternelle. Entre au collège où il apprend le grec, le théâtre, le français, la rhétorique. Il a son bac. Fait des études de droit et de philosophie. En 1568, Montaigne s'enferme dans une tour (Rez-de-chaussée : Chapelle, 1er étage : chambre, 2e étage : bibliothèque.) et consacre son temps à l'étude et à la réflexion. Il voyage alors qu'il est atteint d'une maladie, en Allemagne, Autriche, Italie...

Essais : C'est en 1572 que Montaigne rédige les écrits cependant la première édition ne paraît qu'en1580. Ils contiennent en tout trois livres (107 chapitres) dans lesquels Montaigne examine de nombreux sujets. Dans un premier temps, il s'agit de réflexions tirées d'écrits anciens (Sénèque, Horace, Platon, Virgile...); puis ensuite, d'idées que présente et propose Montaigne. Dans le chapitre 26 «*De l'institution des enfants* », il écrit à Madame Diane de Foix, Comtesse de Gurson, qui attendait un enfant. Il lui propose une « bonne éducation » à la comtesse pour son enfant. Il critique l'éducation traditionnelle basée l'apprentissage par cœur. Dans le chapitre 14 il écrit qu'« *On ne cesse de criailler à nos oreilles, comme qui verserait*

[1] Pour beaucoup de parents étrangers, l'école représente une attaque de leurs représentations, une attaque, tellement forte qu'ils adoptent une attitude méfiante envers cette institution. Eux qui jadis auraient magnifié d'ordinaire l'école et adopté une position de fascination à l'égard des enseignants. C'est ce changement de repères qui est dérangeant pour ces parents. Les étapes sont brouillées et les espaces sont mal définis. On passe alors de la sphère privée (transmission, famille, éducation de l'enfant, transmission…) à la sphère publique (école, rapports avec l'administration scolaire, avec l'assistance sociale…) In « *Les élèves et leurs implications dans l'histoire* », 140 p. L'Harmattan, Paris, 2010.

dans un entonnoir». Comparaison entre l'apprentissage et un entonnoir = « bourrage de crâne » « *Qu'il ne lui demande pas seulement compte des mots de sa leçon, mais du sens et de la substance* »

Montaigne et l'éducation collective

« *D'une même leçon, régenter plusieurs esprits de si diverses mesures et formes* »1.34 antithèses : une / plusieurs et même/diverses.

Montaigne critique l'éducation collective, d'après lui chaque esprit n'apprend pas la même quantité de choses, de la même façon.

L'éducation par le gain

Il écrivait que « *qui cherche des lettres, non pour le gain ni tant pour les commodités externes (…) habile homme* ».

Les buts de l'éducation refusés par Montaigne : le gain, la vanité c'est-à-dire, tout ce qui pourrait servir pour le futur.

Ce que propose Montaigne comme éducation est une éducation adaptée à chacun. Il disait :*« Il est bon qu'il le fasse trotter (…) pour s'accommoder de sa force », il ajoute : «* trotter » + « train » = Métaphore cheval / élève.

Montaigne est pour le système du précepteur = un maître pour un élève.

Sur une ouverture d'esprit par soi-même Montaigne écrivait :« *Et qu'il juge du profit de ce qu'il aura fait, non par le témoignage de sa mémoire, mais de sa vie* ».

Le seul but de l'éducation pour Montaigne : s'enrichir soi-même.

Montaigne et la volonté : Il ; avance les différentes argumentations suivantes :

Argument d'autorité. Montaigne s'en sert pour appuyer sa **proposition d'éducation**. Dans un subjonctif ayant valeur d'ordre on peut lire :« *je veux qu'il fasse* », « *qu'il invente* » , « *qu'il écoute* ».

Les images données par Montaigne

Les images visant la critique : « *comme qui verserait un entonnoir* »

Comparaison de l'élève ave une oie = idée de « *gavage de savoir* »

« *C'est témoignage de crudité et indigestion que de regorger (…) donné à cuire* ».

Métaphore indigestion / par cœur = critique l'apprentissage par cœur.

Les images illustrant l'éducation que propose Montaigne.

« *Mettre sur la montre (direction d'un cheval) » ; « trotter » ; « juger » ; « allures* »

Métaphore élève / cheval = renvoi à l'apprentissage autonome.

« *Quelques fois lui ouvrant le chemin, quelques fois le lui laissant ouvrir* ».

Métaphore chemin / savoir = renvoi à l'apprentissage autonome.

Pour conclure nous pouvons dire que c'est un texte polémique dans lequel Montaigne remet en cause l'éducation traditionnelle et en propose une autre ; système du précepteur.

L'ECOLE ET LA REPUBLIQUE

La IIIe République a rendu l'école obligatoire (l'Angleterre en 1870), laïque et gratuite. Elle a mis en place un corps de spécialistes, avec pour mission la recherche de la vérité historique et son inscription dans la légalité républicaine. Ces spécialistes seront chargés de l'enseignement moyennant un salaire versé par l'Etat. Ces historiens devenus professionnels ont pour objectif de produire des connaissances sur le passé, des connaissances non partisanes.[1]

La grandeur de l'enseignement et l'intérêt qu'on lui porte résident pour une part, dans une transmission rigoureuse intergénérationnelle des valeurs républicaines assurée à la fois par ceux qui en ont été témoins et des enseignants scrupuleux, tous conscients de la valeur sociale et civique de leur discipline. Ces derniers ne se proclament ni censeurs ni gardiens du temple mais cherchent à revitaliser l'histoire en ramenant au jour tous les pans muets du passé comme le sont encore actuellement les temps de la colonisation et de la décolonisation ou encore de l'esclavage.

Deux principes doivent guider le travail de l'école : le premier est celui de la légitimité des appartenances multiples (familiale, religieuse, régionale, politique…), le deuxième est celui de la hiérarchie

[1] Conclusions du Conseil européen des 25 et 26 mars 2010.

de ces appartenances. C'est l'appartenance à la France qui primera sur les autres appartenances légitimes. Nos jeunes ne sont pas en premier lieu, chrétiens, musulmans, juifs, immigrés ou de telle ville, de tel quartier. Ils sont d'abord Français.

LA BATAILLE CONTRE LE DECROCHAGE SCOLAIRE EST UNE PRIORITE EUROPEENNE

L'abandon scolaire est un phénomène complexe, et sa réduction nécessite un engagement politique fort. Pour le comprendre il est utile voire nécessaire d'analyser les répercussions de l'abandon scolaire sur les personnes, la société, et les économies, en décrit les causes et donne un aperçu des mesures qui sont ou seront prises au niveau de l'Union Européenne (UE) pour traiter le problème.[1]

L'ABANDON SCOLAIRE : UN HANDICAP DIFFICILE A SURMONTER

Le futur de l'Europe dépend en grande partie des jeunes européens par l'intermédiaire de sa stratégie Europe 2020 ; l'UE vise mieux à soutenir les jeunes et à leur permettre de développer pleinement leur talents, dans leur propre intérêt mais également dans celui de l'économie et la société.

L'un des objectifs phare approuvés par le Conseil européen est de réduire le taux d'abandon scolaire à moins de 10% et de garantir qu'au moins 40% de la jeune génération dispose d'un diplôme de l'enseignement supérieur ou d'un équivalent.[2]

L'amélioration des résultats scolaires des jeunes répond à la fois à l'objectif de « croissance intelligente » en améliorant les niveaux de compétences et à l'objectif de « croissance inclusive » en s'attaquant à l'un des plus importants facteurs de risque de chômage et de pauvreté.

L'une des initiatives phare d'Europe 2020, souligne la nécessité d'améliorer la qualité et l'équité dans l'éducation et la formation, afin de fournir à davantage de jeunes les compétences pour devenir des apprenants tout au long de la vie et la possibilité de faire l'expérience de la mobilité à des fins d'apprentissage. La réduction sensible du nombre de jeunes quittant l'école prématurément est un investissement essentiel non seulement pour l'avenir de chacun de ces jeunes mais également pour la prospérité et la cohésion sociale futures de l'UE en général.

La réduction de l'abandon scolaire ouvre également la voie à la réalisation d'autres objectifs d'Europe 2020. Par son impact direct sur l'employabilité des jeunes, elle contribue à accroître l'intégration sur le marché du travail et donc à atteindre l'objectif phare d'un taux d'emploi de 75% pour les femmes et les hommes âgées de 20 à 64 ans. Dans le même temps, elle contribue de manière significative à rompre le cycle de la misère qui mène à l'exclusion sociale de tant de jeunes. La réduction de l'abandon scolaire représente donc une mesure essentielle pour atteindre l'objectif visant à réduire de 20 millions le nombre de personnes menacées par la pauvreté selon les conclusions du Conseil européen du 25-26 décembre 2010.

En 2009, plus de 6 millions de jeunes, 14,4% de tous les jeunes de 18 à 24 ans, ont quitté l'éducation ou la formation en n'ayant accompli que le premier cycle de l'enseignement secondaire ou un niveau inférieur. Plus inquiétant encore, 17,4% n'ont suivi qu'un enseignement primaire.

L'abandon scolaire est synonyme de chances perdues pour les jeunes et de perte de potentiel pour la société et l'économie de l'UE dans son ensemble.

Au niveau des individus, les conséquences de l'abandon scolaire influent sur les personnes tout au long de leur vie et réduisent leurs chances de participer à la vie sociale, culturelle et économique de la société. Elles augmentent leur risque de chômage, de pauvreté et d'exclusion sociale et se répercutent sur les rémunérations perçues au cours de leur carrière et sur leur bien-être et leur santé ainsi que ceux de leurs enfants. En outre, elles réduisent les chances de leurs enfants de réussir à l'école.

[1] Eurostat, Enquête sur les forces de travail (EFT), 2010.
[2] Eurostat, communiqué de presse 162/2010, 29 octobre 2010.

Dans un communiqué de presse du 29 octobre 2010, le chômage des jeunes s'élève actuellement à 20% et l'abandon scolaire y contribue directement. L'employabilité dépend fortement du niveau de qualification atteint.

En 2009, 52% des jeunes ayant abandonné l'école prématurément dans l'union étaient sans emploi ou exclus du marché de l'emploi. Même lorsqu'ils travaillent, ces jeunes gagnent moins, ont tendance à exercer des emplois plus précaires et sont plus souvent dépendants des aides sociales. Ils participent moins à l'apprentissage tout au long de la vie et donc à des mesures de recyclage. Leur retard scolaire peut représenter un handicap croissant.

Pour l'économie et la société dans leur ensemble, des taux élevés d'abandon scolaire ont des effets à long terme sur l'évolution de la société et sur la croissance économique. Les personnes ayant abandonné l'école prématurément ont tendance à moins participer aux processus démocratiques et sont des citoyens moins actifs. L'innovation et la croissance se fondent sur une main-d'oeuvre compétente, non seulement dans les secteurs de haute technologie mais également dans l'ensemble de l'économie.

L'initiative phare d'Europe 2020 intitulée « une stratégie pour des compétences nouvelles et des emplois » insiste sur la nécessité de mieux armer les personnes en leur permettant de développer leurs compétences tout au long de la vie, et d'améliorer la participation au marché du travail. Le fait de réduire de seulement un point de pourcentage le taux européen moyen d'abandon scolaire permettrait à l'économie européenne de disposer chaque année de presque un demi million supplémentaire de jeunes travailleurs qualifiés potentiels**.**

Depuis 2000, le taux européen moyen d'abandon scolaire a diminué de 3,2 points de pourcentage, mais les progrès ont été insuffisants pour atteindre l'objectif de réduction de 10% pour 2010 initialement adopté par le conseil. En outre, cette moyenne masque des disparités importantes entre les Etats membres. Sept Etats membres ont déjà atteint l'objectif de 10%, alors que trois autres ont des taux supérieurs à 30%.Eu égard à la performance relative des Etats membres, il existe toutefois des raisons d'être optimiste : depuis 2000, tous sauf trois ont réduit leurs taux d'abandon scolaire, certains de manière très significative.[1]

LES MOTIFS DU DECROCHAGE

Les raisons pour lesquelles les jeunes quittent prématurément l'éducation ou la formation dépendent fortement des individus. Toutefois, il est possible de déterminer certaines caractéristiques récurrentes. L'abandon scolaire est fortement lié au handicap social et à un milieu peu instruit. Les enfants de parents à bas niveau d'éducation et issus de milieux

Socialement défavorisés sont plus susceptibles que les autres jeunes de quitter l'éducation ou la formation avant la fin du deuxième cycle de l'enseignement secondaire.

Certains groupes dans la société sont particulièrement touchés par l'abandon scolaire,notamment les personnes issues des milieux socio-économiques les plus pauvres et des groupes vulnérables,comme les jeunes provenant de l'assistance publique,les personnes souffrant de handicaps physiques ou mentaux ou ayant d'autres besoins spécifiques en matière d'éducation (SEN).Les jeunes issus de l'immigration étant souvent concentrés dans des groupes socio-économiques défavorisés,leur taux moyen d'abandon scolaire est le double de celui des jeunes autochtones(26%contre13,1%en 2009).Ce taux est encore plus élevé pour les populations roms,qui ont tendance à compter parmi les membres de la société les plus socialement exclus.

Ces groupes ont tendance à pâtir d'un soutien familial plus faible, à subir une discrimination dans le système éducatif et à disposer d'un accès plus limité aux possibilités d'apprentissage non formelles et informelles en dehors de la scolarité obligatoire.

L'abandon scolaire est influencé par des facteurs éducatifs, des situations individuelles et des conditions socio-économiques. Plutôt que d'un événement isolé, il s'agit d'un processus. Celui-ci débute

[1] Conclusions du Conseil européen des 25 et 26 mars 2010.

souvent dès l'enseignement primaire, avec les premiers échecs scolaires et une distanciation croissante vis-à-vis de l'école.

Les transitions entre écoles et entre différents niveaux d'éducation sont particulièrement difficiles pour les élèves menacés de décrochage scolaire. Les inadéquations entre les programmes d'éducation et de formation et les besoins du marché du travail peuvent augmenter le risque d'échec scolaire puisque les élèves disposent de perspectives limitées dans le parcours éducatif qu'ils ont choisi. Souvent, les systèmes d'éducation et de formation ne fournissent pas un soutien suffisamment ciblé pour que les élèves puissent surmonter leurs difficultés émotionnelles, sociales ou éducatives et poursuivre leur éducation ou leur formation.

S'adapter aux différents styles d'apprentissage des élèves et aider les enseignants à répondre aux besoins variables de groupes d'élèves dotés de capacités diverses représente toujours un défi pour les écoles. Des systèmes d'apprentissage personnalisés et flexibles sont particulièrement importants pour les élèves qui préfèrent «l'apprentissage par la pratique »et qui trouvent leur motivation dans les formes actives d'apprentissage.

L'abandon scolaire soulève également des questions d'égalité des sexes qui requièrent plus d'attention. Dans l'UE, 16,3 des garçons quittent l'école prématurément,contre 12,5%des filles. Dans l'enseignement obligatoire, les garçons ont tendance à rencontrer plus de difficultés que les filles pour s'adapter à l'environnement scolaire et ont généralement des résultats plus faibles. Ils sont surreprésentés parmi les élèves handicapés (61%) et ont une plus grande propension à souffrir de problèmes émotionnels et comportementaux, ou à rencontrer des difficultés d'apprentissage spécifiques (65%).[1]

Les Etats membres font face à différents défis concernant l'abandon scolaire. Dans certains d'entre eux, l'abandon scolaire est un phénomène majoritairement rural fréquent dans les régions excentrées et qui peut être lié à un accès insuffisant à l'éducation. Dans d'autres Etats membres, l'abandon scolaire touche surtout les zones défavorisées des grandes villes. Certains marchés régionaux et saisonniers de l'emploi (par exemple le tourisme ou la construction) peuvent pousser les jeunes à quitter l'école pour des emplois peu qualifiés offrant peu de perspectives .La disponibilité de ces emplois et la perspective de gagner de l'argent plus tôt, pour améliorer la situation économique de la famille ou gagner en indépendance, incitent de nombreux jeunes à quitter prématurément l'éducation ou la formation. Certains pays sont confrontés à des niveaux élevés d'abandon scolaire dans certains filières professionnelles,alors que d'autres enregistrent ,par exemple,des niveaux plus faibles dans les filières d'apprentissage.

Il convient de prendre en compte toutes ces conditions dans le soutien des élèves menacés de décrochage scolaire. Toutefois, seuls quelques Etats membres appliquent une stratégie cohérente et globale pour réduire l'abandon scolaire. De nombreuses initiatives contre ce phénomène ne sont pas suffisamment liées à d'autres mesures visant les jeunes. Bien souvent, on constate également l'absence d'une analyse solide des problèmes spécifiques au sein d'une région ou d'un groupe cible.

COMMENT Y REMEDIER ?

Les stratégies de lutte contre l'abandon scolaire doivent s'appuyer sur une analyse des spécificités nationales, régionales et locales du phénomène.

Les données devraient permettre d'analyser les principales causes de l'abandon scolaire pour différentes catégories d'élèves, régions, localités ou écoles particulièrement touchées par le phénomène. De fortes disparités entre les niveaux de décrochage scolaire peuvent révéler des problèmes structurels dans certaines zones géographiques ou certaines filières éducatives.

La conception des stratégies doit reposer sur des informations précises, de façon à mieux cibler les mesures ; un système de suivi de l'évolution de l'abandon scolaire peut contribuer à l'adaptation constante des stratégies, sur la base d'information telles que les raisons individuelles liées à l'abandon de l'éducation ou de la formation.

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[1] GHK (2005), *Study on Early Leavers, Final Report*, p.77 sally Kendal, Kay Kinder (2005), *Reclaiming those disengaged from education and learning-a European Perspective,* p.15.

Numéros d'étudiant individuels

En 1997, le Royaume –Uni a introduit le « numéro d'élève unique » « unique pupil number »-UPN, qui offre une précieuse source d'analyse et aide à cibler plus efficacement la politique scolaire, également dans des domaines autres que l'abandon scolaire. D'autres pays ont introduit des «numéros d'éducation individuelles », des collectes de données basées sur des données relatives à chaque élève ou des registres d'étudiants nationaux (par exemple les Pays-Bas, l'Allemagne et l'Italie).Pour les Pays-Bas, l'introduction du « numéro d'éducation individuel »et la surveillance en ligne de l'abandon scolaire sont considérés comme les principaux facteurs de réussite dans la réduction du phénomène.

Les politiques globales de lutte contre l'abandon scolaire devraient mettre l'accent sur la prévention, l'intervention et la compensation.

LES POLITIQUES PREVENTIVES

La prévention **a** pour but d'éviter l'instauration des conditions susceptibles de favoriser le déclenchement de processus aboutissant au décrochage scolaire. Un renforcement de la participation à une éducation et un accueil préscolaires de bonne qualité a été reconnu comme l'une des mesures les plus efficaces pour fournir un bon départ aux enfants de développer leur résilience. Toutefois, il convient d'améliorer l'accès à l'éducation et aux services d'accueil préscolaires de qualité. D'autres mesures préventives concernent le soutien linguistique systématique des élèves issus de l'immigration, une politique de déségrégation active qui améliore la diversité sociale, ethnique et culturelle dans les écoles, permet un meilleur apprentissage par les pairs et favorise l'intégration, ou encore le soutien ciblé aux écoles défavorisées. D'autres obstacles potentiels à la réussite du parcours scolaire peuvent être éliminés par l'augmentation de la perméabilité des parcours éducatifs et par l'amélioration de la qualité et du statut des filières d'enseignement professionnel.

Les politiques de déségrégation visent à modifier la composition sociale des écoles « défavorisées » et à améliorer le niveau d'instruction des enfants issus de milieux socialement défavorisés et à bas niveaux d'éducation .Des programmes de déségrégation active en Hongrie et en Bulgarie ont amélioré,au niveau régional,les résultats scolaires des élèves roms en soutenant les écoles qui intègrent les élèves roms et favorisent dans le même temps la qualité scolaire,notamment par des activités périscolaires et un soutien scolaire ciblé.

Les mesures de discrimination positive comme les zones d'éducation prioritaires (Chypre) et les programmes qui apportent un soutien ciblé aux écoles dans les zones défavorisées (France, Espagne) améliorent l'offre pédagogique des établissements concernés, fournissent un soutien supplémentaire à leurs élèves et créent des environnements d'apprentissage novateurs adaptés à leurs besoins spécifiques. Les mesures de discrimination positive sont souvent combinées à une mise en réseau active et à une coopération étroite entre les écoles concernées.

Les parcours éducatifs flexibles combinant l'enseignement général,la formation professionnelle et une première expérience professionnelle pratique sont destinés aux élèves qui pourraient être découragés par des résultats scolaires faibles et souhaiteraient commencer à travailler le plus tôt possible. Ces parcours leur permettent de continuer simultanément à suivre un enseignement général. Plusieurs Etats membres (par exemple le Luxembourg, l'Italie et le Danemark) ont eu recours à ce système pour aider des élèves qui ne suivaient plus d'études à obtenir un diplôme de fin d'études tout en acquérant une expérience professionnelle précieuse et motivante.[1](7)

L'intervention s'attaque aux difficultés émergentes à un stade précoce et vise à empêcher ces dernières de provoquer un décrochage scolaire. Les mesures d'intervention peuvent être centrées sur l'ensemble de l'école ou de l'organisme de formation où peuvent s'adresser individuellement à des élèves

[1] Tous les exemples de politiques sont tirés du document de travail de la Commission intitulé *Reducing Early School Leaving* (SEC(20111)96).Celui-ci contient des informations supplémentaires sur les exemples de politiques ainsi que des informations plus détaillées sur l'abandon scolaire, ses causes et les stratégies qui contribuent à réduire le phénomène de façon satisfaisante.

risquant d'abandonner l'éducation ou la formation. Les mesures concernant l'ensemble de l'école visent à améliorer le climat scolaire et la création d'environnements d'apprentissage favorables.

Des systèmes d'alerte rapide et une meilleure coopération avec les parents peuvent constituer une forme efficace d'aide aux élèves à risque. En outre, la mise en réseau avec des interventions en dehors de l'école et l'accès aux réseaux d'aide locaux s'avère hautement efficaces pour apporter les soutiens adéquats. Les mesures centrées sur les élèves sont axées sur le parrainage et le tutorat,les méthodes d'apprentissage personnalisées,une meilleure orientation et un soutien financier, par exemple des allocations scolaires. Les organismes chargés du marché de l'emploi devraient également s'occuper davantage de l'orientation professionnelle des jeunes.

Les écoles sont des « communautés d'apprentissage » qui adoptent une conception, des valeurs fondamentales et des objectifs communs en matière de développement scolaire. Elles accroissent ainsi l'engagement des élèves, des enseignants, des parents et des autres parties prenantes et soutiennent la qualité et le développement des établissements.

Les «communautés d'apprentissage »poussent les enseignants et les élèves à chercher à s'améliorer et à s'approprier leurs processus d'apprentissage. Elles créent également des conditions favorables pour réduire l'abandon scolaire et pour aider les élèves menacées de décrochage scolaire.

La mise en réseau avec les intervenants extérieurs à l'école permet aux écoles de mieux soutenir les élèves et de s'attaquer à toute une gamme de problèmes qui mettent les enfants en difficulté, y compris la consommation d'alcool ou de drogues, le manque de sommeil, les violences physiques et les traumatismes. Des programmes tels que le *School Completion Programme* (programme d'achèvement de la scolarité) en Irlande favorisent fortement les approches intercommunautaires et intersectorielles. Les écoles sont en liaison avec les agences pour la jeunesse, les services sociaux, les agences de développement local, les équipes spéciales de lutte contre la drogue, etc.

Une plus forte implication des régions dans l'élaboration de mesures de lutte contre l'abandon scolaire,par l'octroi d'un soutien financier et la mise en œuvre de mesures d'incitation,s'est révélé être une stratégie payante dans certains pays,notamment aux Pays-Bas. Les municipalités, écoles et établissements d'accueil peuvent eux-mêmes décider des mesures à mettre en œuvre. Par l'intermédiaire des administrations locales, les écoles peuvent également faire appel aux services d'établissements d'accueil, à la police et aux autorités judiciaires.

Les écoles ouvertes**,** comme les *scuole aperte à Naples* (Italie), visent à lutter contre le désengagement des élèves en organisant un large éventail de projets en collaboration avec la société civile locale. Les activités sont organisées en dehors des heures d'école et sont ouvertes à tous les enfants, y compris ceux qui ont déjà abandonné l'enseignement ordinaire. Elles représentent un moyen de réinsérer ces enfants, ainsi que de nombreux autres qui étaient menacés de décrochage.

Les mesures de compensation offrent des opportunités d'éducation et de formation aux élèves qui sont sortis du système d'enseignement et de formation. Elles peuvent prendre la forme d'aides financières ou d'autres types de soutiens et visent à favoriser la réinsertion des jeunes dans l'enseignement ordinaire ou à proposer une «seconde chance ».Les approches fructueuses dans les dispositifs de la deuxième chance différent donc considérablement de celles des écoles ordinaires en s'attaquant aux difficultés rencontrées par les élèves dans l'enseignement général. Toutefois, il a été démontré que la prévention de l'abandon scolaire a de meilleurs résultats que la compensation des effets négatifs liés à cet abandon. L'expérience de l'échec, le manque de confiance en soi en matière d'apprentissage et la multiplication des problèmes sociaux, émotionnels et éducatifs qu'entraîne un abandon scolaire réduisent les chances d'obtenir une qualification et d'achever des études avec succès.[1]

La reprise d'une scolarité ordinaire nécessite souvent une période de transition entre un précédent échec scolaire et un nouveau départ plus réussi. Les programmes durent de trois mois à un an, en fonction des attentes et de la motivation des participants. En raison des problèmes multidimensionnels complexes rencontrés par le groupe cible, il convient d'appliquer des méthodes alternatives de pédagogie et de conseil

[1] Active inclusion of young people with disabilities or health problems. Background paper, Fondation européenne pour l'amélioration des conditions de vie et de travail, 2010.

pour aider les participants à réintégrer un enseignement ou une formation. L'un des facteurs de réussite est la mise à disposition d'un environnement d'apprentissage individualisé et favorable et l'application d'une méthode flexible adaptée aux besoins de chaque jeune. Des programmes tels que le «projet d'apprentissage pour jeunes adultes »en Slovénie, les classes de transition en France ou les centres SAS en Belgique offrent la possibilité aux jeunes à risque de reprendre progressivement confiance en eux, de rattraper leur retard et de réintégrer l'enseignement ordinaire.

Trop souvent, les projets et initiatives visant à réduire l'abandon scolaire existent parallèlement, sans lien avec d'autres initiatives. En dépit des succès, l'impact de ces projets et initiatives reste trop souvent local ou régional. Compte tenu de l'urgence qu'il y a à réduire l'abandon scolaire, il convient avant tout de passer de mesures individuelles à l'introduction d'une politique globale contre l'abandon scolaire. Les éléments d'une telle politique doivent être adaptés à la situation concrète au sein de l Etat membre.

Les expériences des Etats membres, les données comparatives et la recherche analytique suggèrent que la nature intersectorielle de la collaboration et la globalité de l'approche constituent des aspects essentiels de politiques efficaces. L'abandon scolaire ne concerne pas uniquement l'école, et ses causes doivent être combattues dans toute une gamme de politiques concernant la protection sociale, la jeunesse, la famille, la santé, les communautés locales, l'emploi et l'éducation. Des concepts pédagogiques élargis, tels que l'éducation culturelle, la coopération avec les entreprises ou d'autres intervenants extérieurs à l'école et le sport, peuvent également jouer un rôle important dans la réduction de l'abandon scolaire par la promotion de la créativité, de nouvelles manières de penser, du dialogue interculturel et de la cohésion sociale.

COMPARAISON DES METHODES PRATIQUEES POUR LUTTER CONTRE LES DECROCHAGES[1]

L'Allemagne

Les services d'orientation dans les écoles et le service psychologique scolaire sont organisés de manière transversale au niveau des collectivités locales. Dans les cas d'absence injustifiée et de décrochage scolaire avéré, une coopération rapprochée s'opère entre les écoles ; le service d'assistance sociale de jeunesse et d'autres institutions. De plus le programme »refus scolaire-la deuxième chance »soutient les jeunes à risque dans leur retour dans le système scolaire général

L'Espagne

Le nouveau « plan scolaire 2.0»vise à réduire le nombre de décrocheurs scolaires en introduisant les TICE à l'école. L'idée est que tous les élèves de 10 ans aient leur propre PC portable et la formation appropriée pour l'utiliser.

Des séances de conseils en face-à-face ont principalement lieu dans les départements de conseils des collèges d'enseignement général publics. Les écoles avec un haut pourcentage d'échec scolaire bénéficient de programmes spéciaux.Il existe aussi des programmes alternatifs pour les élèves qui ne peuvent pas achever les deux dernières années d'enseignement secondaire obligatoire.

Les Pays- Bas

Au pays –Bas, le sujet du décrochage est abordé selon une approche intégrée à travers le programme »lutter contre le décrochage », qui place l'orientation en son cœur (fournir la meilleure orientation professionnelle et des informations qui aident les étudiants à choisir la filière d'étude la plus juste). Les pays –bas ont également développé des programmes « sur mesure » pour les décrocheurs scolaires âgés de 18 à 23 ans en prenant en compte « les compétences acquises ailleurs » et en concluant des conventions avec de grandes entreprises afin d'aider ces élèves à obtenir une qualification de base. L'engagement des professionnels dans les territoires (écoles, collectivités locales et services de jeunesse, milieux économiques, etc.) est ici essentielle pour une attaque ciblée sur le taux des décrocheurs scolaires.

[1] Ministère de l'Education nationale- Programme national de réforme français, 2011.

Le Royaume Uni

La loi de responsabilisation des parents a été promulguée en 1998 avec l'arrivée au pouvoir du *New Labour*. Donnant lieu à un jugement civil initial, le jugement devient pénal dès lors que les parents ne se plient pas aux décisions de justice.

Des *parenting orders* (ordonnances parentales) qui peuvent être appliquées à des enfants entre 10 et 17 ans condamnés pour des délits, mais également en cas d'absentéisme scolaire, ont été mis en place en Angleterre et aux pays de galles. Elles prévoient un suivi hebdomadaire ou un soutien sur une période de trois mois, afin d'accompagner les parents dans le contrôle de leurs enfants et de les aider à mieux les éduquer.

Le refus d'exécution des décisions de justice est susceptible d'entraîner une amende allant jusqu'à 1000 livres. Les *parenting programs* reposent quant à eux sur une base volontaire, des injonctions à comparaître pouvant néanmoins être adressées aux parents.

UNE NECESSAIRE COOPERATION ENTRE LES ETATS EUROPEENS

Dans le cadre de la stratégie Europe2020,les Etats membres ont convenu au plus haut niveau politique de fixer des objectifs nationaux pour la réduction de l'abandon scolaire,en tenant compte de la situation de départ et de la réalité nationale de chaque Etat membre.Les Etats membres intégreront la question de l'abandon scolaire à leurs programmes nationaux de réforme(PNR),en décrivant les stratégies et actions qu'ils entendent mettre en œuvre pour atteindre les objectifs nationaux.Les objectifs nationaux sur la réduction des taux d'abandon scolaire favorisent l'élaboration de mesures en la matière et accentueront la pression en faveur de politiques efficientes et efficaces.Le travail de compte rendu sur les objectifs nationaux d'Europe 2020,par l'intermédiaire des enquêtes annuelles sur la croissance,donnera plus de poids au suivi de l'efficacité des politiques,de leurs succès et de leurs faiblesses.

Le cadre stratégique pour la coopération dans le domaine de l'éducation et de la formation, « Education et formation 2020 », ses instruments et ses mécanismes de compte rendu soutiendront la mise en œuvre de politiques efficientes et efficaces de lutte contre l'abandon scolaire. Il constituera une plateforme permettant de faire apparaître les progrès réalisés par les Etats membres, qui sera appuyée par la disponibilité de statistiques solides et comparables via Eurostat.

Afin de mieux soutenir les Etats membres dans l'élaboration de politiques nationales efficientes et efficaces pour lutter contre l'abandon scolaire, plusieurs mesures et instruments, offrant une approche globale face à ce défi à multiples facettes, seront mises en place :

La proposition de recommandation du Conseil concernant les politiques de réduction de l'abandon scolaire**,**accompagnée d'un document de travail des services de la commission,vise à aider les Etats membres à innover et à mettre au point des stratégies ayant un impact important et un rapport coûts -bénéfices satisfaisant. Il est proposé que la recommandation fixe un cadre européen commun pour des politiques performantes et efficaces de lutte contre l'abandon scolaire d'ici à 2012, conformément à leurs objectifs nationaux.

La prochaine communication de la Commission sur l'éducation et l'accueil de la petite enfance, qui sera adoptée en 2012, soulignera le fait que les systèmes d'éducation et d'accueil des jeunes enfants peuvent contribuer à poser les bases de l'apprentissage tout au long de la vie comme meilleur moyen de lutter contre les inégalités par l'éducation, et donc à prévenir efficacement un bon nombre d'abandons scolaires. La communication définira des points clés pour le renforcement de la qualité et de l'accès à l'éducation et à l'accueil de la petite enfance.

La commission a présenté en décembre 2012 une communication sur une nouvelle stratégie européenne pour l'intégration destinée à appuyer les politiques des Etats membres en matière d'intégration. Afin d'améliorer les résultats scolaires des élèves issus de l'immigration, la nécessité de lutter contre l'abandon scolaire devrait également être prise en compte dans ce contexte.

L'enseignement et la formation professionnels (EFP) peuvent constituer des instruments de choix pour éviter la sortie précoce des jeunes du système d'enseignement. A la suite à la communication de la commission intitulée « Donner un nouvel élan à la coopération européenne en matière d'enseignement et

de formation professionnels pour appuyer la stratégie Europe 2020 », les ministres de l'éducation se sont entendus sur une stratégie ambitieuse de modernisation de l'EFP, qui inclut une action spécifique visant à réduire la sortie prématurée de l'éducation ou de la formation professionnelle.

Un critère de référence pour mesurer l'employabilité des jeunes sera proposé par la Commission fin 2013.L'augmentation de l'employabilité des jeunes est essentielle à l'amélioration de leurs perspectives d'emploi et de leur future carrière, et donc à leur totale implication dans l'éducation et la formation. Le critère de référence offrira de meilleures possibilités de contrôler la situation et de soutenir l'échange de bonnes pratiques et d'expériences des Etats membres.

Afin de cibler plus efficacement l'élaboration de mesures et d'accélérer le processus d'apprentissage mutuel, un groupe de décideurs au niveau européen, représentant différents Etats membres, accompagnera la mise en œuvre de la recommandation du Conseil et soutiendra la Commission et le Conseil dans le suivi des évolutions dans les Etats membres et au niveau européen. Le groupe aidera à déterminer des mesures et pratiques efficaces pour faire face aux défis communs des Etats membres, soutenir l'échange d'expériences et contribuer à la formation de recommandations politiques mieux ciblées.

En outre,les débats ministériels et les discussions officielles de haut niveau se poursuivront et des événements à haute visibilité tels que les conférences de la commission ou de la présidence continueront à être organisés. Ils contribueront de manière importante aux discussions en cours et favorisent l'adoption de nouvelles stratégies et mesures efficaces et met en place des fonds structurels européen notamment le Fonds social européen et le fond européen de développement régional. Les débats, discussions et conférences permettront de faire apparaître les bonnes pratiques dans les Etats membres et d'améliorer la compréhension des différences entre les performances nationales par rapport aux objectifs,et donc de soutenir les Etats membres dans leurs efforts.[1]

CONCLUSION

Pour conclure nous pouvons dire que le décrochage est un processus qui conduit un jeune en formation initiale à se détacher du système de formation jusqu'à le quitter avant d'avoir obtenu un diplôme.[2] En France, un décrocheur est un jeune qui quitte prématurément un système de formation initiale sans avoir obtenu le diplôme de niveau V (BEP ou CAP) ou de niveau supérieur.

Les raisons pour lesquelles les jeunes quittent prématurément l'éducation ou la formation dépendent fortement des individus. Toutefois, il est possible de déterminer certaines caractéristiques récurrentes comme nous avons tenté de le démonter dans cet article.

Plutôt que d'un évènement isolé, il s'agit d'un processus. Celui-ci débute souvent dès l'enseignement primaire, avec les premiers échecs scolaires et une distanciation croissante vis-à-vis de l'école. Les transitions entre écoles et entre différents niveaux d'éducation sont particulièrement difficiles pour les élèves menacés de décrochage scolaire. C'est pour ces raisons (entre autres) que l'UE a déclaré que le décrochage scolaire est sa priorité.

La lutte contre l'abandon scolaire est une préoccupation essentielle à la stratégie Europe 2020.

Le programme pour l'éducation et la formation tout au long de la vie et les programmes connexes pour la recherche et l'innovation seront plus intensivement utilisés pour soutenir l'expérimentation et les approches innovantes en matière de réduction de l'abandon scolaire. Cela permettra l'échange d'expériences et de bonnes pratiques au niveau des organismes d'enseignement et de formation et

[1] Eurostat, EFT, 2010.

[2] Dans certains quartiers, l'itinéraire de l'enfant qui a réussi est celui de l'isolement. Traité d' »intello » de « traître » de « bouffon » dans le quartier, il vit douloureusement cette situation de rejet. les jeunes du quartier pensent que si ce dernier a réussi c'est parce qu'il est vendu, car il s'est identifié aux français. En conséquence on provoque chez lui un sentiment de culpabilité. Un mouvement d'éloignement et de séparation s'effectue entre celui-ci et son groupe d'origine, le quartier qui valorise l'échec scolaire. Dans un souci d'une stratégie identitaire, l'identification et la loyauté aux quartiers poussent certains élèves au suicide scolaire à seule fin de réintégrer leur groupe d'appartenance. In « les élèves et leurs implications dans l'histoire » op cit.

favorisera le développement de mesures de soutien efficientes et efficaces pour les élèves menacés de décrochage scolaire.

Les priorités de financement pour 2012 comprennent la réduction de l'abandon scolaire, l'amélioration de l'apprentissage des élèves issus de l'immigration et la valorisation de l'égalité des sexes et des méthodes d'enseignement inclusives.

Les fonds structurels européens, notamment le Fonds social européen et le Fonds européen de développement régional, constituent de très importantes sources de financement des mesures prises au niveau national et régional pour la réduction de l'abandon scolaire. Le cadre politique européen commun contenu dans la recommandation du Conseil rendra les investissements au titre des Fonds structurels européens plus précis et plus rigoureux et renforcera donc leur rapport coût-efficacité dans la lutte contre l'abandon scolaire.

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The Ongoing Public Debt Crisis in the European Union: Impacts on and Lessons for Vietnam

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Abstract: The current public debt crisis in the (European Union) EU began in Greece in November 2009, quickly spreading to Ireland (September 2010), Portugal (January 2012), Spain (June 2012), Italy (November 2012) and most recently, Cyprus (March 2013). This crisis has not only impacted on Europe but also on the entire global economy, including that of Vietnam. This article will analyze the causes of this crisis, its impacts on the economy of Vietnam and lessons for Vietnam to avoid a potential public debt crisis and guarantee sustainable development.
Keywords: EU, Vietnam, economic crisis.

1. THE PUBLIC DEBT CRISIS IN THE EU.

a. Public debt and public debt crisis

Public debt is a relatively complex concept that most current approaches agree to refer to the sum of debt whose obligation to repay falls on the government of a country[3]. According to the World Bank (WB)'s approach, public debt is understood as the liability of four main groups of institutions: (i) Central government liability, (ii) Local government liability, (iii) Central banking institution liability, and (iv) Liabilities of independent organizations, state-owned enterprises of whose capital the state owns more than 50%, or other organizations whose debt the government has the responsibility to settle should they fails to do this[4].

Owing to the widespread nature of public debt and the fact that countries can easily fall into public debt crisis – especially since the 80s of the 20th century – the global community had created a number of criteria to supervise and warn countries about to, or in the middle of a public debt crisis[5]. However, the criteria most commonly used to estimate a country's public debt situation is public debt as a percentage of Gross Domestic Product (GDP). This figure reflects the size of a country's public debt as a fraction of the economy's income and is calculated as of the 31st December each year.

According to a 2010 research of the American National Bureau of Economic Research (NBER), a survey of more than 44 countries showed that when the public debt/GDP ration exceeds 90%, it will negatively impact on economic growth and reduce the economic growth rate of the country in question by around four percent on average. In particular, for newly emerging economies like that of Vietnam, the healthy public debt/GDP ratio threshold is 60%, and exceeding this threshold will stall annual economic growth by around 2%. However, the ratio between public debt and GDP alone is not a comprehensive

[1] Editor-in-Chief, Journal of International Studies, Diplomatic Academy of Vietnam, Ministry of Foreign Affairs of Vietnam
[2] Master of Financial Management, Australian National University.
[3] The public sector as defined by the United Nations System of National Accounting (SNA) includes public service (government) and state-owned enterprises. Hence, the term "public debt" is also taken to mean the same as such terms as "governmental debt" (United Nations, System of National Accounts 2008, para. 22.15, http://unstats.un.org/unsd/nationalaccount/docs/SNA2008.pdf: "the public sector includes general government and public corporations"). However, public debt differs from national debts in that the latter refers to a country's debt obligation in its entirety, including both governmental debt and private debts. In other words, public debt is only a component of national debt.
[4] This definition is similar to that of the Debt Management and Financial Analysis System (DMFAS) of the United Nations Conference on Trade and Development (UNCTAD)
[5] Supervisory criteria for a country's public debt and foreign debt includes: (i) Public debt as a percentage of GDP, (ii) Foreign debt as a percentage of GDP, (iii) National debt as a percentage of GDP, (iv) Foreign debt as a percentage of gross export value, (v) Public debt as a percentage of state budget revenue and so on.

estimate of the safety or riskiness of a country's public debt – we need to examine public debt in a more comprehensive manner, in its relation with the system of macroeconomic criteria of a national economy[1].

Public debt crisis refers to an escalated public debt situation – or worse, public insolvency – that damages the economy resulting from an imbalance between national budget revenue and expenditure. The typical scenario arises from an excess of governmental expenditure over revenue, forcing the state to borrow money in many ways such as government bonds, debentures or credit agreements. This results in the state's inability to repay its debt obligations. Persisting budget deficit will increase public debt. Should the state be unable to settle these debts in a timely manner will lead to an accumulation of interest, further exacerbating the problem.

Hyman Minsky (1986)[2] gave an explanation to what would cause the serious crisis starting in 2007, a flaw of the financial-credit system. According to him, the financial-credit system plays a key role in a financial crisis: It led to a large amount of risky and speculative borrowing by firms and the public alike (borrowing far more than their existing assets, for instance) to seek profit from appreciating assets. However, if and when assets depreciates instead (the credit bubble pops), these speculators will lose much - if not all – of their solvency, resulting in the insolvency of the entire financial and credit system, leading to a financial crisis[3]. This happened because there was not yet the necessary systems to control and reduce these speculative and highly risky activities..

b. Cause of the EU public debt crisis

The current public debt crisis in the EU began in Greece when the Greece Prime Minister announced in November 2009 that the country's budget deficit for the year would be 12.7% of GDP, twice as high as a previously announced figure (Lane, 2012), and that he would try to save Greece from insolvency. In reality, the country's public debt had peaked at €300 billion (around US$440 billion), equal to 124% of the country's GDP, twice as high as the level permitted by the Maastricht Treaty. Immediately, on December 22nd 2009, Moody's Investors Service had reduced Greece's public debt credit ranking from A1 to A2 because of its rising budget deficit. Previously, Fitch Group an Standard & Poor had reduced Greece's credit rating below investment grade. In April 2010, Greece's budget deficit had risen to 13.6%, followed by a spike in government bond interest rate; Standard & Poor reduced Greece's credit rating to "junk status" - the lowest possible rank[4]. Ireland followed Greece with a budget deficit of 32% GDP (September 2010), Portugal (January 2012), Spain (June 2012), Italy (November 2012) and presently Cyprus (March 2013), all fell into debt crisis[5]. Why did this debt crisis happen? There were several causes as follows:

i. Root causes:

First, the problem arises from inefficiencies of an economic model based heavily on banking and financial services[6] as well as shortfalls in the EU and Eurozone's management system. Every time an

[1] These criteria are: (i) rate and quality of economic growth; (ii) total factor productivity; (iii) capital utilization efficiency (via the Incremental capital-output ratio – ICOR); (iv) budget deficit ratio; (v) domestic saving rate and gross domestic investment; and (vi) a number of other criteria. Additionally, such criteria as public debt structure, weight of different debt classes, interest structure and payment period also require in-depth analysis when addressing the sustainability of public debt. For instance, a public debt worth 100% of Greece's GDP caused its bankruptcy, while Japan's public debt is worth around 200% of its GDP and is still considered sustainable. Another example, Argentina, has a public debt ratio to GDP less than 60% yet is still undergoing public debt crisis. According to the Maastricht Treaty in 1992, the European Union countries are not allowed to have their public debt exceed 60% of their GDP.

[2] Hyman Minsky, 1986, *Stabilizing an Unstable Economy,* Yale University Press, Yale.

[3] Minsky classified borrowers into three categories: (i) hedge borrowers, who can repay their both principal and interest from their investment flows; (ii) speculative borrowers, who can repay interest but has to regularly roll over principal to stay afloat; and (iii) Ponzi borrowers, who operates on the basis of borrowing money from one creditor to repay another. His view was that a crisis would happen if the last two categories outnumbers the first.

[4] On the 2nd May 2010, the Prime Minister of Greece had accepted the aid package worth €110 billion (US$143 billion) from Eurozone and IMF, which would come into effect over the following three years.

[5] At the end of 2009, typical countries of the EU had the high public debt-GDP ratios such as Greece – 124%; Portugal – 84,6%; Italy – 120,1%; Germany - 84,5%; Ireland – 82,9%; France – 82,6%.

[6] Two energetic crises in 1973-1974 and in 1979-1980 pushed countries in Europe and America into recession. That was the time when Europe and America restructured and transformed their economies from industrial production into banking and financial services with the boom of portfolio investment.

economic recession occurs or an election takes place, public debt would spike as governments have not brought forward long-term solutions to the public debt problem and instead focusing on short-term solutions. The accumulation of this problematic management and failure to solve the problem at its root results in an eventual loss of control of the public debt burden.

Second, the problem also owes to the rapid development of the financial and banking services based on exploiting market inefficiencies and based heavily on speculation and speculative investment of the early 90s, leading to a "fake prosperity". This caused much instability in the labor structure, big gap of wealth and increasing unemployment and welfare dependencies. This development of the financial system also, paradoxically, stabilized the supply of credit, making it easier and promoting borrowing and rapid growth of credit. These contributed greatly to increasing public debt.

Third, the global financial crisis in 2008 was greeted with old policies – borrowing to sponsor credit funds, firms and unemployment support, while government bonds had come to maturity. This caused an overload as several decades' worth of debt obligation fell on these governments at the worst possible timing. While governments have realized the unsustainability of an economy geavily stilted towards financial services, they have been unwilling to give up the old habit of a "false" economy, instead they were opting for a short-term solution of borrowing new funds to repay old debts and keep insolvent banks afloat.

Fourth, owing to structural problems, the European Union is heavily restricted in managing its economy as a whole, lacking mechanisms that would enable the governments of member countries to reduce budget deficit (Guillen, 2012). This leads to monetary policies not being consistent with fiscal policies, expecially tax reform and labor policies. While the EU has a limit on member countries' budget deficit and public debts, the managing and supervisory institutions remain lax, making it easier for countries to borrow and much harder for the group to control said borrowing. The EU and the European Central Bank had responded too slowly when the crisis struck. When the politics of opposing national interests is taken into the equation, the mechanism becomes even more complicated and self-defeating (Bastasin, 2012).

Fifth, this was the emergence of the Euro (€). This allowed smaller countries to attract a huge amount of foreign investment owing to the common currency[1]. However, this also caused a major challenge: When the capital flow exceeds the economy's capability to sustainably absorb it, the excess capital would easily be wasted on activities that do not efficiently benefit the economy, leading to an increase in bad debts among banks, causing an even faster outbreak of a debt crisis. This is one of the ways the sovereign debt crisis is linked to the banking crisis in Europe (Shambaugh, 2012)

Sixth, the monetary flows into smaller economies in the EU were too great, resulting in a huge monetary supply and an increase in price level, causing a far higher rate of inflation in smaller economies compared to larger ones, sometimes even greater than the rate of interest (causing, among others, the value of debts to decrease with time, causing borrowers to gain rather than lose). The consequence of taking advantage of external monetary flows was a long-term current account balance deficit, yet countries were unable to control this by their own monetary policies because of the common currency. Additionally, the use of an external monetary flows would further increase budget deficit (for want of stimulating domestic production), exceeding the 3% of GDP as allowed by the EU. This long-term budget deficit plays a contributing role to exacerbating public debt.

ii. Direct causes

First and foremost, causes pertaining to interior characteristics of countries undergoing crisis:

First, all of the countries currently undergoing public debt crisis have lax fiscal discipline. End-of-year spending realization of budget would always exceed the expenditure decision of their respective Parliaments as announced at the beginning of the year. In addition, these countries had

[1] For instance, the small countries of EU like Greece, Ireland were allowed to borrow money with interest rates equal to that of Germany, France. In other words, the small countries took advantage of the whole EU for their benefit.

undergone a missed opportunity to tighten fiscal policies throughout the earlier part of the last decade, owing in no small part to their poor analytical framework (Lane, 2012).

Second, the distribution of capital, in many cases, is influenced more by political rather than economic goals. (For example: defense and security expenditure, social welfare, retirement wages, interest subsidy of banks for social welfare projects, governmental protocols or celebrations and so on.)

Third, state projects generally are not completed in a timely manner. This causes an increase in interes payable over the borrowed funds.

Fourth, low capital utilization efficiency (often lower than that of private projects with commercial loans), since the borrower in the state sector are not directly held responsible for its repayment. This is to say borrower responsibility is not high as those in charge of borrowing are not necessarily those who have to settle the debt, especially if they have a slim chance of being reelected into office.

Fifth, these governments have the capability to hide problematic issues of the country's public debt situation over an extended period (up to ten years), making it impossible to make readjustment in a timely manner. In fact, the severity of the crisis can be attributed to the governments' lack of initiative in the years leading up to, as well as during the 'lulls' in between the crises (Lane, 2012). Coupled with the complex and overlapping nature of this crisis (Shambaugh, 2012), this inactivity has proven to be extremely damaging.

2. SECOND, CAUSES PERTAINING TO EXTERNAL FACTORS:

First, credit rating and risk analysis firms like Standard & Poor, Moody's and Filch Group is a contributing factor to the instability of the market and the crisis itself, owing to their announcement of lowering the credit rating of these government bonds, thereby decreasing investors' confidence in these markets[1].

Second, political pressure from speculators, major financial organizations and economic powerhouses managed to persuade governments to adjust rather than reform their financial institutions. Governments had to spend many billions of Euros to bail out banks and on stimulus packages to save banks and the economies from collapse. This would invariably lead to an increase in public debt. At the same time, private banks received funds from central banks at a low interest rate (around one percent) to finance enterprises for production, but instead, they used these funds to repurchase government debts and debentures at a higher interest rate (4 to 5 percent).

Third, arbitrage activities with an aim to raise government bond interest to the highest possible level for maximum arbitrage profit. In practice, public debt is usually negotiated through private banks and priced by these private institutions. Such financial institutions like Alpha Bank, Bank of America, Merrill Lynch, ING Group and so on have ample opportunities to artificially raise government bond interest[2].

- The Vietnamese economy under the impact of the EU public debt crisis.

The public debt crisis in the EU in addition to the current problems of the Vietnamese economy may have a number of negative impacts on it:

First, an increased difficulty in exporting to the EU market. According to the General Office of Statistics of Vietnam, EU has been Vietnam's largest export market (the EU alone consumed around 17.5% of all products produced in Vietnam in 2012, worth US$20 billion)[3]. In 2012, difficulties in the

[1] At the beginning of 2009, the long-term interest of EU countries' government bonds reached an all-time low by the time the governments issued new bonds, but within a few weeks the bond market had undergone significant changes. As S&P's Ratings Services and Fitch Group began to examine Greece's debt and ranked her bonds as junk, their bond interest statred to increase dramatically while the stock market index went down quite as dramatically.

[2] For example, IMF's report on the 22nd of April 2010, stating that the economy of Portugal that was deteriorating, would grow less than forecasted and would not be able to reduce her deficit. This caused the interest on Portugal's 10-year bond to increase significantly, and as at present Portugal, Spain, Greece, Ireland and Italy are countries that are almost certain to meet with extreme difficulties reducing their public debt.

[3] Nguy□n Sinh Cúc, "An overview on the economy of Vietnam in 2012 and a forecast for 2013", *Communist Magazine*, Hanoi, Jan 2013, pp 69-73. The impact of the European public debt crisis on Vietnam's export goods are not very large owing to Vietnam's

Eurozone economies (high inflation, lowered income, increase in unemployment) resulted in a general tendency to reduce spending among EU consumers, giving rise to the demand of goods and services – including those from Vietnam – not rising. Additionally, EU countries have been increasing protectionist measures to protect domestic industries, resulting in greater difficulties for Vietnamese exports, in addition to competition from other exporters. While the major relatively inexpensive export products such as agricultural and forestry products, seafood and foodstuff experienced a low drop in demand, the other products like furniture, handicraft, textile and footwear suffered a major demand hit.

Second, there was an increase in domestic market competition. In the backdrop of the ongoing public debt crisis and the difficulties challenging the entire global economy, Vietnamese firms are under pressure from foreign investors looking to diversify their market and hedge risks. These foreign firms are additionally granted advantageous borrowing rates (in many foreign countries, interest rates of commercial loans for their own firms are very low), and have greater competence and stronger trademarks than Vietnamese products, making Vietnamese firms being severely disadvantaged all but inevitable.

Third, foreign investment and investors' confidence in Vietnam decreased. The crisis had forced European firms to constrict production and lay off employers owing to a decrease in consumption in both the EU and the world. The most obvious countermeasure is decreasing inefficient foreign investment. As a result, foreign direct investment flow from both Europe and the world into Vietnam has decreased. In 2009, Europe's FDI into Vietnam took up 18% of total FDI. This figure was reduced to 11% in 2011, continued to decrease in 2012 and seems to continue on this downward trend in 2013.[1]

Fourth, according to the evaluation of WB, Vietnam's business environment index is on the decrease (in 2011, Vietnam's business environment ranked 98th out of the 183 ranked economies, falling eight ranks compared to 2010), showing the faltering confidence of foreign investors on the Vietnamese business environment. The main reason behind this is that the public debt crisis in Europe had caused investors and credit ratings services firms pay greater attention to the public debt issue. The three groups of main criteria used as early warning are: (i) excessive debts, reflected in a high public debt over GDP ratio; (ii) excessive spending, reflected in a high budget deficit over GDP ratio; and (iii) a continually decreasing GDP growth rate. In 2011, Vietnam's public debt was 106% of GDP (see Table 1), state budget deficit was 4.9% of GDP (see Table 3), the GDP growth rates continually decreased[2] (see Table 2), making it the riskiest economy in the ASEAN region, with a S&P credit rating of BB- (a deterioration from the BB rating at the beginning of the year). This not only negatively impacted on the ability to attract foreign investment and borrowings, but also increased the cost of borrowing from international financial organizations owing to a higher interest.

exports mainly being necessaries. In 2012, the amount of goods exported did not decrease, yet did not increase as much as expected.

[1] In addition, accoding to general analysis, global FDI in general and of the EU in particular into Vietnam, aside from the present crisis, are subject to a number of limiting factors: (i) low general effectiveness of FDI, still mainly being assembly and processing projects with little value added and low capability to participate in the global value chain; (ii) low ratio of disbursed to registered capital, small project scale, many projects slow on the execution; (iii) the majority of technologies attracted via FDI is not modern and is only average compared to the world, very few firms bringing high technology; (iv) the number of employment created by FDI is not high, as is the living quality of FDI firm employees, as well as an increasing number of labor disputes, (v) there appear many cases of price transfering and tax evading in FDI firms with an increasing level of sophistication (falsely raising the capital value, input costs, overheads, education and so on) to create "real profit, false losses", (vi) low diffusion value to ofther economic sectors, and (vii) a number of projects cause environmental pollution and waste of resources.

[2] In 2012, GDP growth rate of Vietnam economy that was only 5.03% compared with that of 2011, was lowest growth rate since 2000 (Nguy□n Sinh Cúc, 2013, Ibid). In 2010, although GDP growth rate was 6.8%, but this rate attributed to estate bubble and consequence of economic stimulus packages of 2009 whose utilization was not strictly controlled and supervised , therefore was not used in proper manner.

Table 1: **Vietnam's public debt, 2011**

Figure	Billion VND	Billion USD	Percentage of GDP
Public debt according to Vietnam's definition	**1,391,478**	**66.8**	**55%**
State debt	1,085,353	52.1	43%
State guaranteed debt	292,210	14	12%
Local government debt	13,915	0.7	1%
Public debt according to the international definition	**2,683,878**	**128.9**	**106%**
Public debt according to the Vietnam definition	1,391,478	66.8	55%
State-owned enterprise debts	1,292,400	62.1	51%

Source: Vũ Quang Việt, "Public and banking debts of Vietnam at a glance", *Forum Magazine*, Hanoi, 25/11/2011.

Fifth, there was an increase in exchange rate risk. In the short term, the appreciation of the US$ relative to the € will decrease Vietnam's export goods into the Eurozone owing to Vietnam's export goods being valued in USD. In addition, recently the USD are also appreciating relative to the VND (Vietnamese currency) owing to high inflation in Vietnam from 2008 to 2011 (see Table 3), creating a pressure to adjust exchange rate, yet Vietnam has maintained the same rate. This causes a risk of existing two interest rates and the potential risk of smuggled import owing to cheaper import. This will put a greater pressure on Vietnam's national foreign exchange reserve.

3. LESSONS FOR VIETNAM IN PUBLIC DEBT CRISIS PREVENTION

a. Current difficulties of the Vietnamese economy.

The main reason causing Vietnam's current difficulties began to emerge in 2006 and was rooted before that. To promote high growth, Vietnam had promoted investment very strongly and over an extended period had had an investment-to-GDP ratio, rating second only behind China (see Table 2). The rate of increase in money and credit supply was also among the world's highest and consequently the rate of inflation was record high in the world. This can be clearly seen when comparing Vietnam's exceedingly high investment-to-saving ratio from 2005 to 2011.

Table 2: **GDP growth rate and the rate of investment and saving of Vietnam (2000-2011)**

Figure / Year	2000-2004	2005	2006	2007	2008	2009	2010	2011
Investment/GDP (%)	33	38	41	43	40	38	39	33
Saving/GDP (%)		28	28	26	23	23	23	24
Difference between investment and saving (%)		10	13	17	17	15	16	9
GDP growth rate (%)	7.1	8.4	8.2	8.5	6.3	5.5	6.8	5.9

Source: Vu Quang Viet, *Crisis and the financial-credit system: Practical analysis in regard to the American and Vietnamese economy*, Washington D.C., February 2013; Nguyen Anh Tuan; *Vietnamese External Economic Syllabus*, National Political Publisher, Hanoi 2005.

The rate of investment was much higher than saving; some years up to 16-17% of GDP (see Table 2). To achieve this there were only two ways: (i) borrowing from foreign sources, or (ii) extensive (excessive) issuing of credit lines, resulting in bad debts and very high inflation as of the last few years (see Table 3). As a result of high inflation while the government did not adjust the exchange rate between the VND and the USD, import was highly stimulated, resulting in an unprecedented trade balance deficit, some years as high as US$18 billion (See table 3). This excessive investment while efficiency was low

resulted in an excessive public debt. As shown in Table 1, Vietnam's public debt could have reached US$129 billion, equal to 106% of GDP in 2011, in which state-owned enterprises' were US$62.1 billion (see Table 1).

***Table 3*: Increase in money supply, credit, CPI, trade balance deficit and state revenue-expenditure of budget in Vietnam (2006-2011)**

Figure / Year	2006	2007	2008	2009	2010	2011
Increase in money supply (%)	34.0	46.0	20.0	29.0	33.0	12.0
Increase in credit (%)	25.0	50.0	28.0	46.0	32.0	14.0
Inflation (CPI) (%)	7.1	8.3	23.1	5.9	10.0	18.6
Change in exchange rate (%)	0.9	0.7	1.2	4.7	9.1	10.1
Balance of trade (billion USD)	-5,1	-14,2	-18,0	-12,9	-12,6	-9,8
State revenue (Trillion VND)	na	na	357.4	390.6	456.0	590.5
State expenditure (Trillion VND)	na	na	398.9	441.2	581.0	725.6

***Source*:** ADB, *Annual Report 2011*, Manila 2012; General Office of Statistics of Vietnam, *Annual Report 2012,* Hanoi 2013.

b. Lessons and suggestions for public debt crisis prevention in Vietnam

i. Basic Guidelines

In order for the Vietnamese economy to avoid negative impacts from the public debt crisis, we need to examine intrinsic factors within the Vietnamese economy as well as the causes of the public debt crisis in the EU and its existing impact on Vietnam as previously analyzed. There are a number of suggestions:

First, in order to manage and prevent public debt crisis, the most pressing requirement is an effective governmental regulatory mechanism in order to control financial activities and the flows of financial sources. This includes transparency of information, the effective maintenance of macro-level supervisory mechanism, while guaranteeing the needs for social welfare and mobilizing and combining resources to develop the country in a sustainable manner.

Second, it is necessary to properly manage and improve efficiency of state investment. In the long term, state investment needs to be actively reduced while investment from non-budget sources needs to increase relative to total social investment; shift the focus of state investment outside of economic activities so as to concentrate on social and infrastructural investment. In the same time, there is also a need to reform and standardize the state investment process in an appropriate manner so as to serve as a selection and standardization criteria for public projects[1].

Third, state-owned corporations and enterprises diversifying investment outside of their main business and production must cease. State-owned enterprises should be concentrated on key industries of the national economy, mainly those related to and dealing with socio-economic infrastructure, public services and those pertaining to macroeconomic stability.

Fourth, systemic stability, prevention of side effects and debt "traps" and practical efficiency in both SOE and financial-banking sector restructuring should be ensured. At the same time, proper care should be taken to effectively handle such matters as firm acquisitions and mergers, unemployment insurance and social welfare.

[1] In particular, there is a need to distinguish between two classes of goals and criteria for assessing the efficiency of public investment (for- and non-profit investment), alleviate the confusion between tcapital for for profit and for non-profit activities as well as the social responsibility of state-owned enterprises.

ii. In-depth suggestions and areas for attention

On the basis of the guidelines above, we can draw a number of in-depth lessons and suggestions for public debt crisis prevention in Vietnam.

First, there are a number of issues pertaining to state-owned enterprises (SOEs), as followed: (i) cease excessive investment into SOEs and only maintain a minimal, manageable number of SOEs (between one to two dozen)[1]; (ii) put an end to diversification outside of expertise (especially letting a SOE own a bank, or vice versa)[2]; (iii) every decision to found new SOEs must be carefully discussed and approved by the National Assembly. The government needs to stop spending more than the budget previously approved by the National Assembly (notably, in a number of countries this is considered illegal)[3].

Second, the government should not continue to have the State Bank issue money for spending and credit distribution, especially for SOEs as a spearhead for development owing to its lack of efficiency and also owing to the very large existing budget deficit (from 5% to 7% of GDP, while in these times a 3% of GDP deficit is already seen as a warning threshold in some countries). Stimulation of demand through budget deficit is only a temporary solution and should only be used when there are no other options when the economy – for any reason – falls into a crisis owing to plummeting demand. It should never be used as a method for stimulating economic growth because it will lead to high inflation and loss of stability, since budget deficit would invariably be remedied by printing money. The reason for Vietnam's current economic situation is the stimulation of demand via credit growth (which increased from 35% to 125% of GDP between 2007 and 2011), but without good control of the utilization of credit flow.

Third, it is necessary to raise the ratio of equity (paid-up or owner's capital) in both private firms and SOEs to ensure stable development. Currently, in Vietnam the debt-to-equity ratio is 1.77, much higher than in the United States or Europe (around 0.7). This high ratio of debt can very quickly lead to financial distress and insolvency should the interest rate rise.

Fourth, there is a need to focus the power for development investment into seven regions of Vietnam instead of on a provincial basis in order to avoid waste owing to overlapping construction investment, as well as to reduce the influence of the locality on the central organs located in provinces[4]. In addition, management of territory, forests, rivers and seas needs to be stratified between central, regional and local government so as to concentrate power for infrastructural development. Local governments should not be permitted to issue their own bonds to foreign markets. Furthermore, local government bonds should be tightly regulated so as to avoid uncontrollable layering of debts.

Fifth, it is worth noting that the excessive expansion of credit in Vietnam (See Table 3) is because the State Bank lacks the independence according to the standard of a market economy and of a central bank. Because of this, it had acted not on the ultimate goal of maintaining market price stability, but according to the government's directive to print money for SOEs to become as spearheads for the economy (that, in reality, was quite inefficient), but consequence of that was the detriment of the economy. The difficulties facing the Vietnamese economy occurred when the government began to execute stimulus packages but did not closely supervise them. Hence most of those funds were not

[1] This can be achieved by promoting equitization of SOEs, reduce the weight and number of SOEs of which the state owns controlling shares, only maintaining SOEs with 100% state capital in industries and fields that the state needs to maintain a monopoly, or hold a key role in the economy, or that the private sector cannot or is unwilling to take part in. Additionally, this can also be done by promoting a multi-owner corportations where SOEs play a key role that can take on the role as the economy's lead, while operating according to economic laws, on the basis of voluntary agreement and cooperation between independent legal entities.

[2] At present, the Credit Law of Vietnam permits this.

[3] Since 2007 the government of Vietnam has been spending more than the amount approved by the National Assembly on a yearly basis: In 2007, exceeding 31%; 2008 - 29%; 2009 - 46% and 2010 - 11%. (calculation based on the statistics on budget estimates approved by the National Assembly and the budget liquidation at the end of each year).

[4] In other words, all branches of central organs like the State Bank, the Ministry of Finance, the Ministry of Planning and Investment, the General Office of Statistics and so on would be stationed on a region rather than provincial basis, as they are at the moment.

invested on production but on stocks and real estate. When the bubble pops, this caused great difficulties for the financial-banking system with an increasing ratio of bad debts.[1]

Sixth, according to the Credit Organizations Law (2010), many banks that had been given permission for establishment but whose sole purpose was to help local governments and clienteles to carry out rent seeking activities because the Law does not distinguish between commercial and investment bank. According to the experience from the EU and the US, commercial banks use deposits from clients to lend, while investment banks mainly implement portfolio investment using their own money, or serve clients to invest in portfolio for the service fees. Hence, in order to avoid risks for the financial-banking system and crisis, there is an urgent need to amend this law to emphasize on the difference between the role and function of these two categories of banks, as well as stopping allowing a bank to own a non-financial enterprises, or conversely, a non-financial enterprises founding a bank to serve itself.

Seventh, the state bank should establish a standard for minimum capital for each category of banks, as well as set up and announce basic statistics of each bank in particular and the financial-monetary system in general to serve both policy-makers and users of financial services. The Vietnamese financial-banking system has (i) 101 banks and foreign bank branches including (a) 5 national commercial banks, each of which having more than US$1 billion in chartered capital and total assets of between US$15 to US$25 billion, (b) 39 private commercial banks, of which only a few banks are large like Eximbank with chatered capital of US$630 million, Sacombank - US$550 million, ACB - US$470 million[2]; (c) 53 foreign bank branches and banks with 100% foreign capital; (d) 5 foreign joint banks; (ii) 18 financial firms, 12 financial-lease firms and 1,202 public credit funds, (iii) 105 stock companies, 47 investment funds, 43 non-life insurance and 10 life insurance firms[3]. This financial system is a very complicated, overlapping that was not properly supervised and controlled [4].

4. CONCLUSION

As the public debt crisis in Europe continues, casting further doubts on the already tumultuous and shaky macroeconomic and financial system worldwide, two questions demand a satisfactory answer. The first, what should be done to save those economies already engulfed in it and bring them back to financial healthiness. The second, what should be done for economies not yet in the crisis to avoid its ripple effect, or worse, being involved in its own crisis. This paper seeks to find an appropriate answer for the second question in a manner that is relevant to the Vietnamese economy.

As has been discussed, the macro-economy of Vietnam is currently displaying a number of worrying issues and symptoms. The crisis has struck in the wake of Vietnam's rapidly changing economy and exposed a number of key weaknesses in the country's macro-economy such as inflation, state budget deficit and the inefficient use of SOEs as spearhead for the economy, to name a few. This article has named a number of suggestions to restructure the economy so as to alleviate these deficiencies at the root, while avoiding a potential public debt crisis.

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[1] Until the 31st of May 2012, the total outstanding debts of the banking system of Vietnam are around VND2,500 trillion. If we assume 10% of this figure is bad debt, it would have an absolute value of 250 trillion. According to senior banking expert, Mr Nguyen Tri Hieu, bad debts in Vietnam are around 15% (VND370 trillion) of which 50% (VND190 trillion) is irretrievable (according to international precedences), which is very large compared to the banking system's provident fund (VND70 trillion). At the same time, State Bank Governor of Vietnam Nguyen Van Binh insinuated that the rate of bad debt is only 4.47% (around VND117 trillion) and 84% of all debts have collaterals worth 135% total outstanding debts. On the other hand, according to the banking inspectional body, the rate of bad debts is closer to 8.6% of outstanding debts (VND202 trillion).

[2] According to the 141-ND-CP decree dated the 22th November 2006, up to 31st December 2010, each private commercial bank has to have a minimum chartered capital of VND3 trillion (more than US$150 million). However, at that time there were 21 banks with a chattered capital less than VND2 trillion, 9 banks having a chartered capital between VND2 to VND3 trillion, and only 9 banks with a chartered capital of above VND3 trillion. At the meantime, the average global commercial bank has a typical chartered capital of US$1 to US$2 billion.

[3] Vũ Quang Việt, *Crisis and the financial-credit system: Practical analysis in regard to the American and Vietnamese economy*, Washington D.C., February 2013 .

[4] *Labor* (*Người lao động*), Market-dominating financial group, 23/1/2013, (http://nld.com.vn/20130123104917462p0c1002/tap doan tai chinh lung doan thi truong.htm)

While a number of issues underlying the European crisis – one may even say key issues – are inapplicable to Vietnam, namely the dependence on a shared currency and fiscal policies and the political costs thereof, the situation in Europe has proven that weaknesses in government budget, in the banking system and low growth are inseparable and one cannot be examined or solved without the other. Considering the present state of the Vietnamese banking and financial sector and its many issues, how these three problems interact and how to tackle them is an important area that policymakers and future researches should pay attention to.

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E. National and European issues in a world of complex interdependence

European Union's Bizcommunication Value in the Economics of Globalization Context

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Motto: *People who have knowledge have the power to change the world* (Paul Rosner)

Abstract: Communication is the principal form to understand others and to make you to be understood by them. For a globalized economy, communication is more than a simple instrument, is a manner to attract new customers and partners from around the world. We present in this work a new method of communication for the European Union that we studied for first time in Norway and Spain from 2006-2007. This method is based on the art of communication transmitted by a business channel to create the economic collaboration between different companies at economic globalization standards. Bizcommunication is a concept that can describe the European Union communication in the global context.
Key words: European Union bizcommunication, economic globalization, art of communication, global influence.

FROM THE DEFINITION OF COMMUNICATION TO UNDERSTANDING GLOBALIZATION

Communication is a complex activity that involves mastering the art of conversation, the ability to negotiate, to talk and to teach the others[1]. Briefly communication can be defined as being the process of sending and receiving messages. Any act of communication is a response to a previous act of communication and it is open to change[2]. There are different analyzes of globalization, some purely abstract, others overly pragmatic, but to a lesser extent they can address to understand how globalization can be improved by ***bizcommunication***, a concept which we consider being an important value for the communication role on the global influence nowadays. We tried to point out in this study that economic globalization is viewed from different perspective and we explain how it can be influenced and how can become more dynamic.

We present the communication as a very commented field, but also we are trying to show more the impact that it can have on the economic globalization, on its analysis and how it can be transformed in a sustainable communication. Bizcommunication involves the concept of sustainable communication that allows us to believe that will be a concept with a large importance integrated in economic analyses of the future.

Technological progress and market interaction actors in European Union are not sufficient for increasing economic globalization, there is the need of support and cooperation between Europe, Asia, America, but also there is the need to create a very well structured business communication, that represents the basis for the development of exchanges and interactions in an effective manner for all participants at the new *glocal*[3] commerce exchange. We are trying to show why communication is so important for the economy of European Union and how can be used to increase the economic

[1] Kate Keenan ,*Ghidul managerului eficient.Cum să comunici*, Ed. Rentrop & Sraton, Bucureşti, 2002, p.5.
[2] Denis Mcquail, *Comunicarea,* Ed. Institutul European, Iaşi, 1999, p.42 .
[3] Glocal- global adapted to local commerce.

collaboration between European Union 28 countries. We consider that communication involves change, and is very important to be developed an efficient system through the values of bizcommunication, through with the economics systems can cause major changes worldwide, affecting the economic activities and the collaborations between different corporations.

Global economic society is a living organism whose development in a positive way is not guaranteed and predetermined. Bicommunication is not only a source of understanding in the global economy, but also a way to improve the collaboration between economies of European and other economics systems, a value that can give to Europan Union a new place in the economics globalization context.

PRO AND AGAINST ECONOMIC GLOBALIZATION

Point of support

If after 1945, the postwar world become largely *a creation of America*[1], the everyday world must become, in our opinion, the creation of freedom in communication for a future world that will allow the business communication to develop its values through the creation of *bizcommunication*.

„Making Globalization Work" is one of the best works about globalization, a book published by Joseph Stiglitz in 2006. The Nobel Laureate for Economics, Stiglitz, presents in his analyses the way that economics has to take to deal with globalization[2]. Communication in international business can be, in our opinion, one of the tools that may cause other approaches to globalization toward achieving better living standards and a new way to understand the globalization. Our research aims to demonstrate that in order to understand and to promote the global economy, European Union and other international powers should be more open to dialogue and should develop an effective bizcommunication and promote „an open global economy."[3] From analyzing communication at a company level and in the system of economic policies, we can observe that communication can be constructively and promptly if it is used in the best way and with enough resources. To achieve the effective economic globalization, multinational companies and institutions have to create a globally direction to allow interaction and to create connections in time and space[4], recognizing the legitimacy of each collaboration in different business fields. Bizcommunication can allow unity among companies, in terms of collaboration between them, and between companies and other institutions or local communities. Over time there have been different perceptions of globalization, according defenders globalization means free trade, more wealth and growing need for freedom, but viewed from critically, globalization means loss of sovereignty, and at the same time a „social disintegration, economic and aesthetic"[5]. Samuel Huntington says that: „The Cold War was followed by the clash of civilizations"[6]. There can be a clash of civilizations that it has the beginning in misunderstanding, but with the time and with the developing of a modern society, based in mutual respect and open mind system, politic powers and economic organizations will be able to create a new model of business and society. This could have result in shocks for beginning, but also is an invitation to dialogue and advantages or disadvantages for different economic systems, but involve also new standards of competition and the new standards of life.

What is an effective bizcommunication?

Bizcommunication is effectively based on the art of communicating and actively receive of a message that is sent through a business chain. In the era of economic globalization, different economic analyses can take into account different aspects that can be structured in function of the bizcommunication system. These aspects can be observed very well during the business trips, where first

[1] Henry Kissinger, *Diplomația*, Ed. All, București,1998, p.47 .
[2] Joseph Stiglitz, *Making Globalization Work*, Ed. PenguinBooks,2006 .
[3] Robert Gilpin, *Economia mondială în secolul XXI. Provocarea capitalismului global*, Ed. Polirom,București,2004, p.259 .
[4] Remi Brague, *Europa,calea romană*, Ed. Idea Design & Print,Cluj, 2002, p.165.
[5] Roger Scruton *Vestul și Restul*, Ed. Humanitas, București, 2004, p.120.
[6] Samuel Huntington, *Clash of civilizations*, "Foreign Affairs", sept.1993.

the managers have to be informed about the local taboos, they have to accept and understand the multiculturalism and they have to be understood also, they have to find the way in which the free exchange provides mutual benefit. Multinational corporations must operate under the collaboration and interaction with the governments and other economic or social actors involved in international trade. The prosperity and consumer society must not enslave the consumers, but must provide the necessary conditions of living around the world.

In the figure 1 we describe the system of the bizcommunication, that can be a value promoted in European Union. This process begins with the art of communication which is transferred by a business channel to support the economic activities.

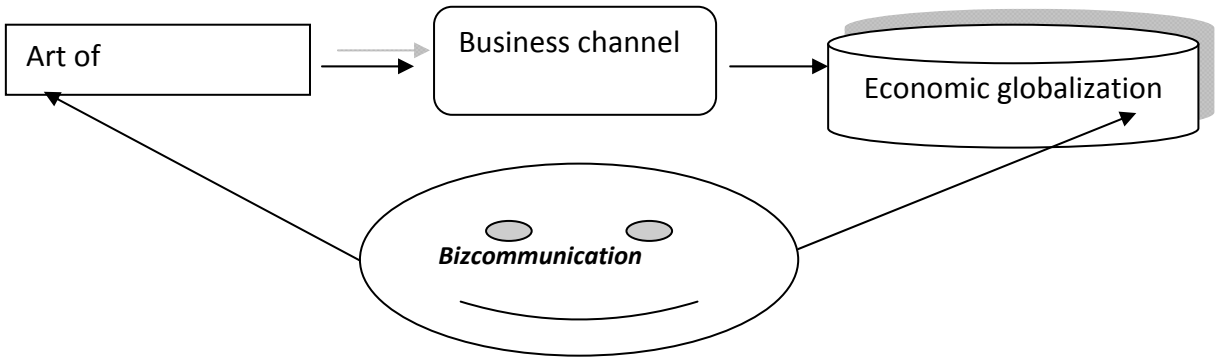

Figure 1 *The system of Bizcommunication*
Source: Own representations

Through bizcommunication different management functions can be utilized in the business activities. The lack of communication can cause bad function or failure in international relations, but also the delay of implementation of objectives and especially non-election timing to achieve a partnership agreement and disadvantage parties to reach agreement. The implementation of collaborative exchanges and dialogue, the market analysis on feasibility studies allow the companies and customers to collaborate on the market. Among multiple partners can be a mutual benefit if they operate under conditions commonly established and developed accordingly.

Communication involves change, and can cause major changes when bizcommunication value can affect positively the economic activities in the context of globalization which requires an opening and mobilizing interaction between firms. Globalization it is the result of the multinational corporation's competition and cooperation. And business communication is an exchange of information between partners, resulting in high value of new information, that can be based on promoting the value of bizcommunication. Due to technological development, communication has become a special scale, space and time are no longer obstacles, European Union business at this level is not just inside the 28 members, but has to be open to a real cooperation on the global level. Bizcommunication involves exchange of information and experiences that may cause change mentalities and attitudes worldwide.

The importance of bizcommunication may result from several theories and analyses of communication, from the analyses of communication system and communication species.

General communication system and communication species

In 1941 the New York James Burnham published „The Managerial Revolution", a book that explains what the „new managerial society" [1], that holds all economic and political power. Claude Elwood Shannon in 1948 the book called „The Mathematical Theory of Communication" proposes a scheme of *general system of communication*. Communication problem „is to reproduce a given point, either exactly or approximately a message selected at another point „[2].

[1] http://www.george-orwell.org/James_Burnham_and_the_Managerial_Revolution/0.html.
[2] Armand şi Michèle Mattelart, *Istoria teoriilor comunicării*, Ed. Polirom, 2001, p.44.

Communication is based on source which produces a message, encoder or the transmitter, which converts the message into signals, the channel and decoder, the destination. Whether you refer to relations involving machines, beings, social organizations, the communication responds linear scheme that makes communication a process affected by random phenomena between a send, free to choose the message that you send and the recipient. Source, which is the starting point of communication gives the message form, turned to the broadcaster information it encodes, is received at the other end of the chain. Mathematically speaking communication source gives a message from the sender to the receiver. Economists use the language and communication to develop a message that is send to different consumers. Companies encode messages to make their products or services allowing them positive feedback from the costumers.

In France, Abraham Moles launches the „ecology of communication". For the author, the ecology is the science of communication, of interaction between different species within a given area and different ideas that are analyzed in this context[1].

The spatial communication can be close or distant, personal or anonymous, is a message transferred from a point to other point in the Earth. These approaches to communication analysis have impact for the logical structure of communication between firms.

LOGIC OF EFFECTIVE COMMUNICATION

The researchers of Palo Alto School are trying to explain the overall situation of interaction, and not just to study several variables taken in isolation. They are based on three assumptions:

1. the essence of communication resides in relational and interactional processes;
2. any human behavior has communicative value, successive messages ;
3. vertical context will emerges communication logic.

In 1959 Edward T.Hall published book „*The Silent Language*". Hall presents the silent language of each culture, the language of time, space, material properties, and ways to develop the friendship, to negotiate and to create agreements. All these languages are based on informal *cultural shock,* which begin with misunderstandings between people, who have not the same codes, rules of organization and time management. Also for different people around the world, the space has not the same symbolic meaning. In European Union from a country to another we can observe the difference between cultures and the difference between people attitude.

Managers and employees have many opportunities to learn different languages at multinationals level; they can use the system of bizcommunication to improve the global communication in business. If Europe starts to use the value of Bizcommunication, to develop more words from Economic lexicon, the economic crisis effects will start to be reduced and people will start to understand their importance in the new context of tomorrow business systems.

COMMUNICATION-POWER

To study and to understand the power of communication, there is important to analyze two groups of concepts: signifier-signified and denotation-connotation. Language is an organized system of signs. Each sign has a double aspect: a perceptible and audible-signifier, other content, first, signified. From denotation-connotation could result almost-mythical correlation.

Communication-power may be based on a successful negotiation, but also is developed with different strategies. Successful negotiation involves *training, strategy development, negotiations and declaring positions*[2]. Providing power through communication, the strategy must be done by a coherent plan and joint choice of tactics and techniques that provide the best chance of achieving the goals.

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[1] Samuel Huntington, *op. cit.*

[2] Ştefan Prutianu , *Manual de comunicare şi negociere în afaceri, vol. II, Negocierea*, Ed.Polirom,Iaşi, 2000, p.163.

Communication that is based on power has influence to change people attitudes and to develop new products that attract the consumers from the entire world. In this context, the economy of information has an important impact on the economic activities, on the marketing decisions and attitudes. Developing new ways to speak through business communication in European Union, the value of Bizcommunication can be a way to develop the dialogue between companies around Europe and outside Europe and can provide a new structure of collaboration between European Union and its partners.

CONCLUSIONS

The bizcommunication methode is the instrument of communication that can be used in the global relations between different companies or states. Bizcommunication value can be an important determinant of attending the interests in the international business communication. Through the concept of **Bizcommunication**, the communication in European Union can open the door to the globalized economic world more developed and more productive in the terms of collaborations between the international networks of manufacturers and customers. The bizcommunication is the system of management of a productive communication between manager and employers, between a transformational leader and his partners.

The bizcommunication value is the future of the global business and is a solution for European Union economics development on the beginning of XXI century.

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EU Legal Area and Legal Person in Public Law as a Versatile Subject of Law in Estonian Legal Space

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Abstract: This article discusses legal person in public law as a subject of law in Estonian legal space. The article aims to find answers to the following questions: What are the criteria under which the state should decide to establish a person in public law for performing public administrative duties? How is the legal person in public law connected with EU legal area? Is it necessary to unify the regulation for the legal arrangement of the management and activity of persons in public law, and to what extent?
Keywords: European Union, European Union law, European System of central banks, Estonian legal system, decentralised administrative systems.

1. INTRODUCTION

With regard to the implementation of a decentralised administrative arrangement model in Estonia, the creation of legal persons in public law that operate on the basis of an Act pertaining to them and perform the administrative functions assigned to them by the state has played an important role. In deciding for a person in public law as an institution, the legal policy emphasises above all their independence and self-accountability. At the same time, there is no consensus in legal theory as to why it is necessary to establish legal persons in public law, in particular. The state has a number of different options at its disposal, after all: functions can be delegated to the private sector, for example; various forms of co-operation between the public and private sector can be developed, etc.

This article is not intended to judge the practice of founding persons in public law as it has been applied thus far. The selection of the topic was motivated by two reasons. Firstly, the establishment of persons in public law has not been grounded in a unitary legal-theoretical concept. Secondly, the regulation level of the Acts serving as a basis for the activity of these persons varies greatly.

Hence, the article aims to find answers to the following two questions:

What are the criteria under which the state should decide to establish a person in public law for performing public administrative duties?

Is it necessary to unify the regulation for the legal arrangement of the management and activity of persons in public law, and to what extent?

2. CRITERIA FOR ESTABLISHING A PERSON IN PUBLIC LAW

2.1 Desirable level of decentralisation

It is not always possible or even practical for the state to perform all of the public law functions through its own agencies (government agencies or state authorities managed by government agencies). Therefore, some of the public administrative duties are transferred by law to independent subjects of law, persons in public law, who thereby become bearers of public administration.[1] When administrative duties are transferred to legal persons in public law, this process is called decentralisation. Decentralisation means the transfer of the final power of decision to independent subjects of law and it involves important democratic values. Decision-making is thereby taken as close as possible to those whom the decisions affect.[2]

[1] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution. Commented edition). Tallinn 2008, p. 502.

[2] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution. Commented edition). Tallinn 2012, p. 606.

Pursuant to subsection 3(1) of the Administrative Co-operation Act[1], public law administrative duties may be assigned also to private persons, both natural and legal, by law or pursuant to law with a contract under public law or administrative legislation. The purposeful and effective functioning of these bearers of public administration is ensured by means of state supervision.[2] The state itself remains ultimately responsible for performing the administrative function in question. Such a process is called delegation.

The volume, nature and scope of public administrative duties are constantly changing. A state working in the interests of the public must inevitably take the occurring changes into account in such a situation and find ways to perform its functions in a more practical, economical and effective manner. With regard to the arrangement of modern community life, the creation and implementation of decentralised administrative systems has justified itself in administrative practice.

The decentralisation of the decision-making process in public administration and the reinforcement of local democracy was one of the key objectives of the political and administrative reform in Central and Eastern European countries in the 1990s.[3] Hence, Estonia's starting point was similar to those of the other former socialist countries or Soviet Union Republics.

Furnishing the applications of the decentralisation principle with theoretical meaning has merited discussion by researchers in different fields. In political science as well as management science literature, it has been taken to refer to a variety of different processes of change. According to Lane, the concept of decentralisation is controversial and can be applied to various processes of change: the geographic relocation of offices from towns to the periphery; privatisation; an emphasis on the execution, rather than planning and policy-making; participation at the local level, etc.[4]

The balance between the different forms of decentralisation has varied quite extensively by country. Hence, Pollitt and Bouckaert point out that it is a process that consists of at least three strategic possibilities:

1) political decentralisation or administrative decentralisation;
2) competitive decentralisation or non-competitive decentralisation;
3) internal decentralisation or external decentralisation (transferring the power of central government to local or regional bodies).

The balance between these different forms of decentralization has been rather different in EU countries. Once more, different countries have started from very different positions. Thus, for example, in each of France, Sweden, Finland, and the UK central governments have praised the virtues of decentralization, but in the early 1980s France and the UK were relatively centralized countries while the two Nordic states were both already extensively decentralized. Germany had been very decentralized since the Second World War, at least by Franco-British standards. Taking this into account, we can say that administrative decentralization has been the preferred form in the UK, while political decentralization has been the dominant type in Belgium, Finland, Germany, France and Sweden.[5]

We can conclude from the preceding discussion that the implementation of decentralisation is, above all, an expression of political will. The establishment of a person in public law is one option of modernising the state's organisation of public administration. This criterion provides the first argument for the use of the person in a public law model. Without a legal-political desire for decentralisation, a person in public law cannot be founded.

2.2. Public interest

Pursuant to subsection 25(2) of the General Part of the Civil Code Act[6], in addition to the state and the local governments, a person in public law can also be another legal person founded in the public interest

[1] RT I 2003, 20, 17; RT I, 10.07.2012, 10.

[2] (Note 2), p. 606.

[3] J. Prokop. G. Wright. Strateegiline haldusjuhtimine: põhimõtted ja rakendamine (Strategic Public Management: Principles and Applications). - Haldusjuhtimine Kesk- ja Ida-Euroopa siirderiikides: teooria juhtumianalüüsid (Public Management in the Central and Eastern European Transition: Concepts and Cases). G. Wright. J. Nemec (Ed.). Tartu 2003, pp. 78-79.

[4] J.-E. Lane. Avalik sektor. Kontseptsioonid, mudelid, lähenemisviisid (The Public Sector. Concepts, Models and Approaches). Külim.1996, pp. 202-203

[5] C. Pollitt. G. Bouckaert. Public management reform: a comparative analysis. 2. ed. Oxford University Press 2004, p. 87-88.

[1] RT I 2002, 35, 216; RT I 06.12.2010, 12.

and pursuant to an Act concerning the corresponding type of legal persons. With regard to the selection of this other person in public law as one form of the decentralisation concept, it is certainly in order to emphasise the public interest as a decisive legal criterion.

In legal argumentation, the concept of public interest is typically used as a justification for a restriction on the fundamental rights. In addition to a ground for restriction, the concept of public interest also serves another purpose in the legal order. Pursuant to the above-mentioned clause of the GPCCA[1], a person in public law is founded in the public interest. However, the Act fails to define the concept of public interest.

In literature, attempts have been made to explain the concept of public interest by providing a description of its nature, according to which public interests are the common interests of the members of the state as a community. In the most general form, these constitute a certain sum total of the private interests of the community members. Unless the public interests are ensured, people cannot coexist socially. Public interests are realised through fields such as education, culture, healthcare and legal order, among others.[2]

The concept of public interest is quite often used in legal argumentation. However, few lawyers have tried to construe the actual meaning of this concept in depth. We must accept the fact that it is an undeterminable legal concept, for due to its high level of abstraction and contextual relevance it is impossible to define the concept of public interest exhaustively.[3]

The state's administrative agencies are founded and they function in the public interest. Hence, the public interest is the objective of the creation and functioning of the state's administrative agencies as well as legal persons in public law. There are no qualitative differences here, nor can there be any.[4]

Public law administrative duties can also be assigned to private persons, both natural and legal, by law or pursuant to law with a contract under public law or administrative legislation. Here, too, the public interest is realised.[5] The state may also found legal persons in private law in the public interest.[6]

It has been pointed out in literature that the interest criterion is above all a guideline to help the legislator decide whether a person in public law governed by a separate Act must be founded for activity in the area related to the particular public interest, or whether the corresponding duties might be delegated to a legal person in private law.[7] With a person in public law, a heightened public interest in its existence and functioning has been emphasised, in particular.[8]

In the author's opinion, an explanation and justification of the need for public interest would be in order in the explanatory memoranda to draft Acts. The exact meaning of public interest, however, can be determined in relation to a specific case, whereby it must be taken into account that such a determination is bound to change in time as well as in space. A distinction should be made between the existence of a public interest and its realisation through the will of the legislator by means of a foundation of a person in public law. A person in public law serves the interests of the public, i.e., it is directed to the achievement of objectives unrelated to the interests of a specific individual or group of persons. If the performance of a particular administrative function requires the protection of the public interest, founding a person in the public law is the most practical option of all the possible choices.

2.3. Transfer of functions to persons in public law

In addition to public interest, what matters in the foundation of a person in public law is the determination of its functions. Here it is relevant to analyse what kinds of public functions the state decides to assign to the bearer of indirect state administration that is to be created or is already operating. One of the

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[2] (Note 8)

[3] K. Merusk. Avalik-õiguslik juriidiline isik avaliku halduse organisatsioonis (Public Legal Person in the Public Administration). - Juridica 1996/4, pp. 174-178.

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[5] K. Merusk (Note 10), pp. 174-178.

[6] (Note 2), p. 606.

[7] Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (General Part of the Civil Code Act. Commented edition). Tallinn 2010, p. 85.

[8] *Ibidem*, pp. 85-86.

[9] Tsiviilõiguse üldosa (General Civil Law). Tallinn 2012, p. 261.

decisive arguments for or against the rationality of using a person in public law is, no doubt, the question of the extent and purpose of the decentralisation of the performance of state functions. The peculiarity and historic traditions of the area of activity often play an important part here (e.g., public universities, the Cultural Endowment of Estonia).

The most important part of the state authority is called the core duties or core functions of the state.[1] The Supreme Court holds the view that the core functions consist in the duties that are to be performed by the state in the meaning of the Constitution. The state authority must not delegate the performance of the state's core functions to any natural or legal person in private law.[2]

This could be called a prohibition on the delegation of the state's core functions arising from subsection 3(1) of the Constitution. It means that pursuant to the Constitution, the state itself must typically perform its core functions, and it is only in exceptional cases that these can be delegated to a legal person in public law subordinate to the state.[3]

The Preamble to the Constitution sets forth the main functions of permanent nature that the state is obligated to perform. For instance, the primary duty of the state is to protect internal and external peace and security within the society. The traditional functions of a state also include foreign relations, finance, the compulsory execution of judicial decisions, and of course legislation and administration of justice, although these are not part of the administrative matters.[4]

From the perspective of legal theory, we can here rely on the opinion of the Supreme Court, according to which the public functions (administrative duties) can be defined as functions assigned to administrative institutions either directly by law or pursuant to law, or as functions derived from the corresponding legal provisions by means of interpretation. A public function does not necessarily entail the use of the authority of the executive power.[5]

If there is a political will in the state to decentralise the organisation of public authority, and there are certain functions whose transfer to a person in public law is in the public interest, the main question is whether the performance of a particular function by a person in public law makes it possible to best protect the interests of the public.

2.4. Autonomy

2.4.1. Overview

Having analysed the criteria cited above, the state can choose between different solutions to all of them. Hence, an additional key criterion is needed for deciding why a particular administrative function should be assigned to a person in public law. This criterion is autonomy.

In European Judicial Area, autonomy refers to an independent subject of law, the principle of self-government. The legal independence of persons in public law, including universities, enables them to carry out administration with sole responsibility, i.e., to perform public law administrative duties in a solely responsible manner.[6]

Once the state has decided for a person in public law, it must be able to explain why the autonomous person in public law is better able to perform the particular administrative function and protect the public interest than, for example, an institution managed by a government agency or a person in private law. The following aspects must be taken into account here: persons in public law are not part of the state's administrative organisation, their competence and right to self-regulation are provided by law, their employees are not public servants, the persons in public law are not generally subject to supervisory control, etc. Autonomy gives the person in public law, as the person solely responsible for performing the administrative function, independent competence and right to self-regulation within the limits set by the will

[1] (Note 2), p. 53.
[2] RKÜKo (judgment of the general assembly of the Supreme Court) 16.05.2008, 3-1-1-86-07, p. 21.
[3] Note 2), p. 53.
[4] K. Merusk. Avalike ülesannete eraõiguslikele isikutele üleandmise piirid. Konstitutsiooni- ja haldusõiguse aspekte (Limitations to the Transfer of Public Functions to Persons in Private Law: Aspects of Constitutional Law and Administrative Law). - Juridica 2000/ 8, p. 501.
[5] Riigikohtu erikogu määrus (Ruling of the Special Panel of the Supreme Court). 16.02.2010, 3-3-4-1-10, p. 5.
[6] K. Merusk. Ülikooli õiguslik staatus (Legal Status of the University). - Juridica 1995/5, pp. 183-186.

of the legislator. Here a distinction should be made between persons in public law with constitutional autonomy and those whose legal status and competence are only provided by law. The Constitution acknowledges three autonomy clauses of a similar structure: the autonomy of the university and the research institution, the autonomy of the Bank of Estonia, and the autonomy of the local government.[1] The latter falls beyond the scope of this article.

2.4.2. Constitutional autonomy

Next, we will discuss the constitutional autonomy of the university and the Bank of Estonia. Subsection 38(1) of the Constitution provides for freedom of science and its instruction. Pursuant to subsection 38(2) of the Constitution, universities and research institutions are autonomous within the restrictions prescribed by law. The freedom of science and its instruction (academic freedom) and the autonomy of universities and research institutions (institutional autonomy) are intrinsically connected: free scientific research and instruction cannot exist without autonomous universities and research institutions.[2]

The autonomy of the university and the research institution means that such an institution must have a right to self-regulation. This right protects the universities and research institutions from outside interference, especially excessive interference by the state.[3]

Institutional autonomy entails sufficient independence in aspects related to internal organisation and management structure, the internal allotment of resources and the procurement of resources from the private sector, the recruitment of personnel and setting the terms for studies, but most of all the freedom of research and instruction.[4]

A typical modern central bank is a legal person founded by the state, separated from the bodies of executive power, and given the monopoly on the issue of money. The most important requirement to the central banks of the European Union member states is their autonomy.[5] The independence of the central bank is achieved through institutional, personal and economic independence.[6]

The Bank of Estonia acts pursuant to law and reports to the Riigikogu (§112 of the Constitution). The cited provision sets forth the guarantees of the independence of the Bank of Estonia as a bank of issue. The independence of a bank of issue from the government is an important guarantee of the state's economic development and stable currency.[7]

Pursuant to subsection 3(1) of the Bank of Estonia Act, when performing the functions of the European System of Central Banks, the only body from which the Bank of Estonia and members of its governing bodies may request and receive instructions for execution is the European Central Bank.[8]

Eesti Pank is central bank of the Republic of Estonia and a member of the European System of Central Banks. Estonia adopted the euro on 1 January 2011. This also meant that Eesti Pank joined the Eurosystem.

2.4.3. The autonomy of other persons in public law

The legal status and competence of all other persons in public law are provided solely by law. Pursuant to subsection 3(1) of the Constitution, the state authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. This is a principle of legality characteristic of a state based on the rule of law.[9] An indispensable adherence to this provision must occur in the realisation of the legislator's will also in the Acts concerning all the other persons in public law.

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[1] (Note 2), p. 81.
[2] (Note 2), p. 425.
[3] *Ibidem,* p. 427.
[4] *Ibidem*, pp. 427-428.
[5] A. Tupits. Euroopa Liidu riikide keskpankade õigusliku seisundi võrdlus (Comparison of the Legal Status of the Central Banks of EU Member States). – Juridica, 2000/1, p. 55.
[6] A. Tupits. Keskpanga funktsioonid (Functions of the National Central Bank). - Juridica 2001/3, p. 163.
[7] (Note 2), p. 664.
[8] RT I1993,28,498; RT I 23.12.2011,13.
[1] (Note 1), p. 46

Although they lack constitutional autonomy, these independent subjects of law also have a right to self-regulation and competence pursuant to the Act serving as a basis for their activity. These persons in public law must be given autonomy by law to an extent that enables them to independently perform the administrative function transferred by the state through self-regulation and competence in the best possible manner.

3. ON THE POSSIBILITIES OF HARMONISING THE REGULATION OF PERSONS IN PUBLIC LAW

Given that other persons in public law are founded on the basis of separate Acts, the main problem here lies in the question of whether, and to what extent, it would be necessary to harmonise the current regulation. The range of issues needing harmonisation could be as follows: general principles of foundation, operation and termination; types of persons in public law; requirements for the articles of association; directing bodies, their formation procedure, competence and responsibility; principles of funding; conditions of the possession, use and disposal of assets; requirements for the accounting procedure, reporting and auditing; relationship to the state. Due to the limited scope of this article, the author will only discuss the following issues: types of persons in public law; requirements for the articles of association; the formation of directing bodies; the legal status of members of directing bodies and the requirements set for them.

3.1. Types of persons in public law

Pursuant to subsection 25(1) of the GPCCA[1], the legal persons in private law are: general partnerships, limited partnerships, private limited companies, public limited companies, commercial associations, foundations and non-profit associations. This list is exhaustive.

To ensure the protection of third party rights and legal certainty, the legislator has established a principle of *numerus clausus* with regard to the types of legal persons in private law, i.e., only the associations defined by law as persons in private law are recognised as persons in private law.[2]

No similar exhaustive list can be found in the law for the types of persons in public law. In the Comments on the Constitution, a traditional classification of other persons in public law has been given: self-governing professional associations, institutions with passive legal capacity, and public foundations. Even though it may sometimes prove difficult to categorise a particular legal person, all persons in public law can still be grouped under these types.[3]

All these types are actually represented in the Estonian legal space. There are 22 persons in public law in total.

A self-governing professional association is a membership-based legal person. In Estonian legal order, self-governing professional associations include, for example, the Estonian Academy of Sciences, the Estonian Bar Association, the Chamber of Notaries, etc.[4]

An institution with passive legal capacity means that a set of human and material assets constituted for performing a public function (i.e., an institution) has been given the status of a legal person by law. An institution with passive legal capacity may also be a person in public law that has no characteristics of another type. Estonian institutions with passive legal capacity include, for example, Estonian Public Broadcasting, public universities, the National Library, etc.[5]

A public foundation is a legal person created for managing the assets allotted to a specific purpose. Public foundations include the Health Insurance Fund, the Unemployment Insurance Fund and the Guarantee Fund, among others.[6]

The classification of persons in public law could take place according to the generally accepted principles described above. This would make it possible to improve the legal clarity of the general regulation.

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[2] (Note 8)
[3] (Note 14), p. 86.
[4] (Note 2), p. 81.
[5] (Note 2), p. 81.
[1] *Ibidem*, p. 81.
[2] *Ibidem*, p. 82.

Providing legal definitions of the types would help to elucidate the peculiarities of the respective persons as well as to unify the level of regulation within the type.

3.2. Articles of association of persons in public law

A person in public law is required to have articles of association if so provided in an Act pertaining to it (subsection 28(4) of the GPCCA).[1] As a result of such regulation, not all persons in public law have articles of association, including the Cultural Endowment and Estonian Public Broadcasting.[2]

When comparing the legal purposes and natures of the internal instruments grounding the activity of persons in private and public law, several fundamental differences emerge. Articles of association are an instrument of constitution to be compiled as an annex to the memorandum of association or the foundation resolution upon the establishment of any foundation or any association of persons with a corporate structure.[3]

Once a person in private law has been entered into the register, the articles of association remain the sole instrument reflecting the principles of the organisation and activity of that legal person.[4]

The approval and registration of the articles of association of a person in public law does not usually involve the acquisition of passive legal capacity.[5] Pursuant to subsection 26(2) of the GPCCA[6], the passive legal capacity of a person in public law arises at the time provided in an Act. In a situation where a person in public law is founded with a separate Act, the person is deemed as founded and its passive legal capacity as present from the time of entry into force of the Act pertaining to it, e.g., subsection 3(1) of the Guarantee Fund Act[7] (GFA). The passive legal capacity of a person in public law is generally not affected by its entry in the state register of state and local government agencies, nor is it affected by the question of whether or not the instruments serving as a basis for its internal operations have been approved and the directing bodies formed.[8]

When it comes to the requirements for the contents of the articles of association, regulation varies. As a general rule, the requirements for the contents of the articles of association are as follows, for instance in subsection 9(6) of the Universities Act[9] (UA):

1) the full name of the university in Estonian and in English and seat of the university;

2) the purpose of the activities and the functions of the university, and the areas of activity of the university (education, research, development, etc.);

3) the conditions and procedure for studies and the procedure for the preparation of curricula;

4) members of the university and their rights and obligations;

5) the council of the university, the procedure for its formation and the bases for its activities;

6) the structure of the university, the development thereof, the procedure for amendment thereof, and the management of structural units;

7) reporting and auditing;

8) the procedure for the adoption of the statutes of the Student Body.

At the same time, no requirements have been set for the articles of association in the National Institute of Chemical Physics and Biophysics Act.[10]

The articles of association of a person in public law are approved by an authorised person or agency cited in the Act pertaining to it. This could be the Government of the Republic (e.g., the Guarantee Fund) or

[3] (Note 8)
[4] (Note 14), p. 101.
[5] (Note 14) p. 99.
[6] *Ibidem,* pp. 99-100.
[7] *Ibidem*, p. 101.
[8] (Note 8)
[9] RT I 2002, 23, 131; RT I, 08.07.2011, 32
[10] (Note 14), p. 94.
[11] RT I 1995, 12, 119; RT I, 10.07.2012, 28
[1] RT I 1998, 101, 1664; RT I 2002, 90, 521

a Minister (e.g., the Chamber of Notaries). The articles of association may be approved by the highest directing body of the person in public law (e.g., the University of Tartu).[1]

In the author's opinion, all persons in public law should have articles of association. The articles of association would make it possible to further specify the legal relations between the directing bodies, the organisational structure and internal procedures, in addition to what has already been regulated by law. By means of articles of association, a person in public law is able to realise its right to self-regulation. When the legislator founds a person in public law without the requirement of articles of association, this limits the autonomy of the person on the one hand, while the complexity of the legislative process and its connections to the political will might prove a hindrance to the execution of a change of a self-regulatory nature. Minimum requirements for the articles of association, by type if necessary, should be provided by law. Regulation concerning the approval of the articles of association also needs to be harmonised.

3.3. Formation of directing bodies

Both persons in private and public law need bodies in order to take part in legal relations and to shape and express the will required for it.[2]

The bodies of a person in public law are prescribed by law (subsection 31(4) of the GPCCA).[3] This goes for bodies in general, but also directing bodies.[4]

Given that persons in public law vary greatly by function, historic traditions and type-specific features, different names are used for their bodies and directing bodies.

In a self-governing professional association, the highest directing body is the general meeting of its members, which can be given different names (e.g., general assembly of the Bar Association, meeting of the Chamber of Notaries). In most cases, management is carried out by the management board, whereas in the Estonian Bar Association, managerial duties are additionally performed by the chairman and the chancellor of the Bar Association.[5]

In institutions with passive legal capacity, the highest directing body is the supervisory board.[6] Executive management is carried out by the rector in a university (subsection 16(1) of the UA)[7], by the management board of Estonian Public Broadcasting (subsection 23(1) of the Estonian National Broadcasting Act)[8], and by the director general in the National Library (subsection 15(1) of the Estonian National Library Act).[9]

In public foundations, the directing bodies are the supervisory board and the management board (e.g., the Unemployment Insurance Fund). However, the number of supervisory board members varies quite a bit. For instance, pursuant to subsection 28(1) of the Unemployment Insurance Act[10] (UIA), the supervisory board of the Unemployment Insurance Fund consists of six members, whereas the supervisory board of the Health Insurance Fund has 15 members (subsections 9(1) to 9(5) of the Estonian Health Insurance Fund Act).[11]

The terms of authority of the supervisory boards also vary. In addition to the common 5-year authority, like that of the supervisory board of the Unemployment Insurance Fund (subsection 29(3) of the UIA)[12], there are also terms of authority lasting for only 2 years, for example in the supervisory board of the Cultural Endowment (subsection 11(3) of the Cultural Endowment of Estonia Act).[13]

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[2] (Note 14), p. 101.
[3] (Note 14), pp. 107-108.
[4] (Note 8)
[5] (Note 14), p. 109.
[6] *Ibidem*, p.109.
[7] (*Ibidem*), p. 109.
[8] (Note 46)
[9] RT I 2007, 10, 46; RT I, 06.01.2011, 27
[10] RT I, 09.03.2011, 4
[11] RT I 2001, 59, 359; RT I, 26.03.2013, 11
[1] RT I 2000, 57, 374; RT I, 23.12.2011, 7
[2] (Note 57)
[3] RT I 1994, 46, 772; RT I, 29.06.2012, 9

The procedure for the formation of directing bodies, their numbers and the different terms of authority, as analysed above, raise the question of the justification of such great variations. The author believes that here, too, regulation should be harmonised.

3.4. The legal status of members of directing bodies of persons in public law and the requirements set for them

Pursuant to subsection 1(5) of the Employment Contracts Act[1], the provisions concerning employment contracts do not apply to the contracts of members of directing bodies of legal persons. Their relationship to the legal person is that of authorisation.[2]

The Supreme Court, too, maintains that the legal relations between a member of the management board and an incorporated entity are based on the law of obligations and are similar to a contract by nature, and the provisions of an authorisation agreement can be applied to these relations.[3]

Pursuant to subsection 31(2) of the GPCCA[4], the directing body of a legal person in private law is the management board. If the law provides for the existence of a supervisory board, the supervisory board is also a directing body. The bodies of a legal person in public law are prescribed by law (subsection 31(4) of the GPCCA).[5]

It follows from this that the bodies and especially the directing bodies of a legal person in public law must be determined on the basis of the Act grounding its activity. If the directing body is a management board or its substitute, a separate contract should be concluded with a member of the management board or its substitute also in the case of a person in public law (a so-called management board contract). This contract merely supplements and specifies the rights and obligations arising from the legal relations between the parties that are already regulated by law (e.g., the amount of remuneration, duration of holiday, compensations).[6]

The legal status of the members of management boards (or their substitutes) of persons in public law has been defined in different ways. In most cases, the Employment Contracts Act does not apply to the members of management boards; however, pursuant to subsection 11(4) of the National Opera Act[7] (NOA), an employment contract is concluded with the director general. In a similar manner, an employment contract is also concluded with the creative director (subsection 12(4) of the NOA).[8] Pursuant to the Act, the National Opera is directed by the supervisory board, director general and creative director (ROS §5).[9] It remains unclear whether the director general and the creative director have the status of members of a management board with whom a management board contract should thus be concluded.

A comparison of public foundations points to varying regulation with regard to the requirements and restrictions set by law for members of management boards. For example, pursuant to subsection 19(1) of the GFA[10], a director of the Guarantee Fund is required to have active legal capacity, Estonian citizenship, adequate higher education, etc. The legislator has also stipulated who cannot be appointed as director of the Guarantee Fund (subsection 19(2) of the GFA)[11]. At the same time, the legislator has set no requirements or restrictions for members of the management board of the Unemployment Insurance Fund (§30 of the UIA).[12]

The legal status of members of directing bodies, especially the management board or its substitute, is in need of harmonisation. A situation where employment contracts are concluded with members of bodies

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[4] RT I 2009, 5, 35; RT I, 22.12.2012, 30
[5] Võlaõigusseadus III. Kommenteeritud väljaanne (Law of Obligations III. Commented edition). Tallinn 2009, p. 5.
[6] RKTKo (ruling of the Civil Chamber of the Supreme Court) 11.05.2005, 3-2-1-41-05 p 18.- RT III 2005, 17, 181
[7] (Note 8)
[8] *Ibidem*
[9] (Note 14), p. 127.
[10] RT I 1997, 93, 1558
[11] *Ibidem*
[12] *Ibidem*
[1] (Note 44)
[2] *Ibidem*
[3] (Note 57)

of some persons in public law (essentially substitutes for the management board) whereby this points to a labour law relationship, although the Employment Contracts Act excludes this possibility, cannot be deemed legally correct. The requirements and restrictions for members of directing bodies are also in need of legal analysis and unified regulation.

3.5. Principles of Persons in Public Law Act – a practical outlet for the legal-theoretical model

Persons in public law as independent subjects of law have been operating in our organisation of public administration for nearly twenty years. The practice of these indirect bearers of administration, positive and negative experience, but most of all the development of constitutional and administrative law have created a pressing need for an analysis of the Acts serving as the basis for the activity of the persons in public law in order to harmonise regulation.

The General Part of the Civil Code Act[1] regulates the foundation, activity, management, termination and other issues concerning the legal status of a person in public law in a highly generalised manner. The passive legal capacity of a person arises at the time provided by the respective Act. Directing bodies and their competence has also been left for the specific Act to regulate. Hence, the legislator has exercised very little discretion here, most likely taking into account the autonomy as well as historic traditions of the persons in public law. In a democratic state based on the rule of law, law is the main means of implementing political decisions. Therefore, the success of the implementation of political decisions greatly depends on the quality of the chosen legal solution. This inevitably raises the question of the limitations to the legal regulation of the will of the legislator. Does the highly generalised regulation as described above not give rise to a possibility that each specific law concerning a person in public law seems to be supplying a new idea of the nature of a person in public law and of the regulation of its activity?

The author believes that the legal framework of the person in public law could be improved by developing harmonised basic principles, whose practical outlet might be the development of a Principles of Persons in Public Law Act or the addition of this part to the General Part of the Civil Code Act. The range of issues in need of harmonisation could be as follows:

1) general principles of foundation, operation and termination;
2) types of persons in public law;
3) requirements for the articles of association;
4) directing bodies, their formation procedure, competence and responsibility;
5) principles of funding;
6) conditions of the possession, use and disposal of assets;
7) requirements for the accounting procedure, reporting and auditing;
8) relationship to the state.

4. CONCLUSION

Legal persons in public law have an important role in the organisation of Estonia's public administration by performing the administrative functions transferred to them by the state as indirect bearers of state administration. An analysis of the possibilities of this form of legal arrangement in the organisation of public administration took place years ago, and in more recent times, the theoretical advancement of the concept of a person in public law has been modest.

The author believes that the foundation process of persons in public law should be based on a theoretically organised concept. In the future, when deciding for the person in public law model, the state should first analyse all of the founding criteria to be able to arrive at the conclusion that it is indeed a person in public law that is best able to perform the particular administrative function transferred by the state on the basis of independent competence and self-regulation, thereby protecting the interests of the public, first and foremost.

[4] (Note 8)

The legal environment of persons in public law requires a systematic analysis, in the author's opinion, as the level of the existing legal regulation varies greatly. The situation could be improved by the development of unified principles, whose practical outlet might be the development of a Principles of Persons in Public Law Act or the addition of this part to the General Part of the Civil Code Act.

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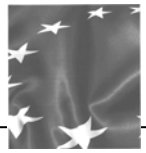

Peculiarities of Organization and Functioning of Specialized Judicial Bodies in Great Britain

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Abstract: Issues connected with peculiarities of functioning of specialized judicial bodies in Great Britain are considered in the article, taking into account the general law system dominating in this country. In view of the progressive movement to Ukraine's Association Agreement with the EU, the achievements gained by the British judicial system, in the context of the organization and activities of the specialized judiciary, is important for Ukraine and for the construction of specialized courts.
Keywords: Association agreement with the EU, British judicial system, Ukrainian judicial system, specialization, specialized judicial body, competence, jurisdiction.

In modern world there are different legal systems. This fact is caused by diversity in national-historical and social-economical development, customs, religion impact, etc. Therefore, legal system, on the basis of which structure of a certain judicial system, organizational and legal order of authorities realization by courts, competence content of their legal status and constructing of judicial defence mechanism are formed, depends on legal traditions of each country.

In Ukraine holding of judicial reform events is inseparably connected with changing of legal status of specialized courts as a component of system of general jurisdiction courts. Despite significant amount of works devoted to this topic, such as works of I. Nazarov, V. Shyshkin, O. Frytskyi, R. Davyd, T. Aparova, E. Bodenheimer and others, experience of English legal system in the issues of judicial system construction, competence of judicial bodies, determination of place and role of specialized judicial bodies has special significance for successful reforms holding in Ukraine. This fact determines the relevance of this article.

First of all it is important to remark peculiarities of judicial system of Great Britain through the prism of organization and activity of specialized component in courts system. According to I. Nazarov, a Ukrainian scholar, in Great Britain judges and the parliament participate in law establishment[1]. Therefore, it is obvious that functioning efficiency of specialized courts is provided by the level of realization of judges' legislative functions. In return, it depends on development of public society institutions, ramification of functions in the sphere of state management, adaptation of legislative norms to contemporary conditions of state establishment and social co-existence in their different spheres, as well as the necessity of improvement of human and citizen rights judicial defence in all legal spectra.

Herewith, it is important not to omit other spectra in establishment of courts system which impact on its efficiency, level of legal culture, stability of political and legal, as well as society's trust to court provided by the institution of judicial defence in forms of different judicial procedures (subject competence of separate judicial system links). It allows to talk about multiplicity and diversity of existent special jurisdiction courts in Great Britain, which obviously are different from each other according to organizational, procedural features, as well as according to criteria of efficiency and formality (land court, arbitrations in labour conflicts, courts in cases on apartment rent, General and Special tax departments and appeal courts on social provision)[2].

Courts system establishment in Great Britain is a reflection of two basic order features of this country – constitutional monarchy and federal structure, which encouraged establishment of independent judicial systems: England and Wales, Scotland, Northern Ireland. Historically, courts in England and Wales are divided into courts of lower and high level (magistrate court, county courts, military courts; the Supreme

[1] Назаров І. В. Судові системи країн Європейського Союзу та України : генезис та порівняння : Монографія / І. В. Назаров. – Харків : Видавництво «ФІНН», 2011. – 432 с. – С. 190.
[2] Шишкін В.І. Судові системи країн світу: Навч. посіб. (У 3-х кн.). / В. І. Шишкін. – Кн. 1. – К.: Юрінком Інтер, 2001. – 320 с. – С. 54-55.

Court of England and Wales, Lords Chamber). Herewith, the absence of solely organized supreme ("the highest") court is compensated by functioning of three independent judicial bodies of general jurisdiction on the basis of the Supreme Court of England and Wales – the Appeal Court, the High Court and the Crown Court. According to jurisdiction, the High Court consists of the Admiralty Court (deals with disputes concerning violation of sea transport rules, ship accidents and compensation of damages connected with them), the Commercial Court (considers disputes connected with trade), the Patents Court (considers motions and complaints concerning patents, design and trade marks)[1].

That is why judicial system of England and Wales has branch specialization, which is realized due to establishment of separate but not always hierarchically constructed judicial bodies[2]. Herewith, such specialization foresees external factor of outlining of specialized component in judiciary, which foresees forming of some separate sub-systems of common (general) jurisdiction, as well as courts of administrative, military, social, labour, tax, financial justice[3]. Except for the noted courts, in England there are also specialized courts of different competence, in particular, the Anti-monopoly Court, the Canonical Court, the Court of Protection, the Legal Committee of Secret Council, the Court for Violent Death Investigation, military courts. However, an English scholar

E. Bodenheimer considers that such courts do not create separate judicial systems with clear hierarchical structure; also they are not independent directions of England's judicial system construction[4].

It is generally known, that legal system in Great Britain is precedential. In the context of judicial investigation specialization it should be noted that the right to cancel or to change essentially wrong precedents is one of basic tasks of high courts in the sense of provision of fair legislation and independent lawmaking under conditions of social life fluidity[5].

The characteristic peculiarity of judicial bodies' specialization in Great Britain is the fact that some of them are called "tribunals", which testifies their inferiority concerning general jurisdiction courts. For example, in 1964 industrial tribunals started their activity. Sessions in these tribunals were held by panels. The panels were headed by a specialist in law and consisted of entrepreneurs' and workers' representatives. Such tribunals considered disputes between employees and employers. The Appeal instance concerning decisions of these tribunals is the Appeal Tribunal on Labour Disputes. Besides, one more special competence establishment is considered to be influential in forming of market economy principles. This establishment is called the Court for Complaints on Entrepreneurship Freedom Restriction. The basic function of this court is to avoid monopolization of industry and trade, as well as artificial keeping of high prices. At the same time, this court also considers complaints in the sphere of trade rules violation and issues on exemption from taxation of separate types of goods on the basis of social interest comprehension[6].

In the sphere of military judicial specialization it is necessary to admit its complication from the point of view of jurisdiction, the essence of which is existence of ordinary and extraordinary jurisdiction. The first one consists in the fact that military courts of Her Majesty's armed forces consider all cases, which involve persons, who perform military service, irrespectively on time and place of this service performing. The essence of the second one is the fact that the courts consider cases where the parties are civil individuals during announcement of martial law. In general, the system of military courts consists of military courts of land and air forces, which are established for justice administering by an authorized commander or military chief; a court-martial (the court-marital during the Falkland Conflict in 1982 can be the example of such a

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[1] Ковалев В. А. Органы расследования и судебная система Великобритании : учеб. пособие // ВЮЗИ. — М., 1985. — 148 с. – С. 12.

[2] Шишкін В.І. Судові системи країн світу: Навч. посіб. (У 3-х кн.). / В. І. Шишкін. – Кн. 2. – К.: Юрінком Інтер, 2001. – 336 с. – С. 6.

[3] Фрицький О.Ф. Конституційне право України : підручник / О. Ф. Фрицький. – 2-е вид., переробл. та допов. – К. Юрінком Інтер, 2004. – 510 с. – С. 411 – 412.

[4] Bodenheimer E., Oakley J., Love J. An Introduction to the Anglo-American Legal System: Readings and cases. – St. Paul; Minn: West Publishing, 1998. – P. 85.

[5] Eisenberg, M. The nature of common law (Текст) / M. Eisenberg. – Harvard : Harvard University Press, 1988. – 204 p. – P. 13.

[6] Давид Р. Основные правовые системы современности. — М., 1988. — 667 с. – С. 24.

court's activity) and naval court (consists of 5-9 officers), the composition of which is determined by the Admiralty. Military courts of land and air forces are divided into three levels: general, circuit and courts marital. They differ from each other due to amount of officer-judges. The composition of court for solution of a certain case is determined in accordance with rank of accused person[1].

The highest courts in England and Wales are the Appeal Court (considers civil, criminal and family cases in appeal order), the High Court of Justice or the High Court of England and Wales (considers civil, criminal and family cases) and the Crown Court (considers criminal cases). In general, justice administering in England and Wales is connected with basic components of general jurisdiction: civil and criminal. At the same time, on the basis of civil sphere of legal relations, family cases are distinguished. This fact lets tell about existence of separate judicial specialization within civil jurisdiction. Besides, there is no separate branch of courts, which would consider family disputes. However, specialization of judges and courts on consideration of civil cases provides more qualified solution of this category cases.

Special courts with different competence are tribunals established at the beginning of the XX century as the bodies for "single settlement of disputes". English legislator describes them as special judicial bodies which function in the national system of administrative justice. However, in 2007 new system of tribunals was established. Generally, it can be characterized as tribunals of lower and higher level. The Tribunals, Courts and Enforcement Act distinguishes following types of tribunals: 1) the First-tier Tribunal; 2) the Upper Tribunal; 3) employment tribunals; 4) the Employment Appeal Tribunal; 5) the Asylum and Immigration Tribunal (p. 4 art. 2).

The First-tier Tribunal currently consists of six chambers: the General Regulatory Chamber (considers complaints on decisions of state bodies, the authorities of which include solution of issues concerning environmental protection); the Health, Education and Social Care Chamber; the Tax Chamber; the Immigration and Asylum Chamber; the Social Entitlement Chamber; the War Pensions and Armed Forces Compensation Chamber. Procedurally, complaints on decisions by the First-tier Tribunal can be submitted to the Upper Tribunal by means of getting of prior permission from the lower or higher level Tribunal. This permission testifies existence of procedural order of complaints admission.

The Upper Tribunal consists of the Administrative Appeals Chamber, the Immigration and Asylum Chamber, the Lands Chamber, the Tax and Chancery Chamber. Decisions of this body can be appealed in the Appeal Court of England and Wales. Besides, there are also other tribunals, such as the Special Commission for Foreigners' Cases, the **Agricultural Land Tribunal, the Tribunal for Registration of Lands with Narrow Specialization According to Branch Features and Spheres of State Impact**[2].

From the point of view of the investigation, taking into account specialization of high courts, the establishment of the High Court can be considered as the beginning of their separation. The High Court consists of three divisions (judicial bodies): Court of Queen's **Bench**, Chancery and Family Divisions. These divisions (courts) are an appeal instance to appeal decisions of the Crown Court, magistrate courts and some tribunals. In general they consider wide range of legal disputes. Besides, the High Court also includes specialized components: the Administrative Court, the Technology and Construction Court, the Commercial Court and the Admiralty Court. The High Court is considered to be the third one in judicial hierarchy of English system and has authorities of the second and the third instances, as well as supervising court in cases of civil, criminal and family jurisdictions.

The Queen's Bench Division (consists of the President and 69 judges) considers some types of civil cases which appear in the sphere of commercial activity (concerning contracts (drafting, amending, execution) in general order. Besides, according to the competence it is composed of following organizational specialized establishments: the Arbitration Court, the Admiralty Court (considers cases where foreign subject is a party of case), the Mercantile Court (considers cases where special knowledge in trade is required), the Technology and Construction Court (considers cases which appear from technical, technological, construction and other legal relations). The Chancery Court, as the first level court, solves a range of disputes connected with contracts and property, as well as disputes which appear from land legal relations, lending,

[1] Бельсон Я. М. **Полиция «свободного общества»** [Текст] / **Я. М. Бельсон**. – М. : Юридическая литература, 1984. – 176 с. – С . 41.

[2] Tribunals of United Kingdom [E-source]. – Access mode: http://www.justice.gov.uk/ about/hmcts/tribunals.htm

intellectual property, corporation law and obligations, etc. As for review of judicial decisions, this court considers appeals on decisions of county magistrate courts. The Patent Court and the Bankruptcy and Companies Court, which settles disputes between enterprises, act in the High Court as divisions.

Another specialized component of the High Court is the Family Division, which considers complaints on decisions by county courts concerning all issues of family relationship. It is also the first instance to consider the most complicated family cases. Appeals on decisions of the High Court in civil cases are applied to the civil panel of the Appeal Court. Therefore, the peculiarity of justice administering in the High Court is the clear separation of jurisdictions between divisions. However, it does not eliminate its status as a unique and indivisible judicial body[1].

On the example of the Land Chamber of the Tribunal of the highest level (it situates in London, but, if it is necessary, cases consideration can take place in other cities of England and Wales), it is possible to state that this court is an independent, special judicial establishment and legal successor the Land Tribunal[2]. It consists of the President (a professional lawyer), six judges (they have a special working schedule – half-time), three specialists in the sphere of real estate objects evaluation, two registrars and staff of the court. The Land Chamber considers disputes concerning land territories (for instance, estimation of land and other real estate, amendment or cancellation of special restriction, payment of compensation connected with decrease of land territory price due to activity of power bodies, determination of rent) and complaints on decisions, activity or inactivity of the state power bodies authorized to solve land issues[3]. Cases consideration in the Land Chamber is similar to disputes consideration in courts of general jurisdiction, which consists of following stages: submission of a claim, paying of court fee, preliminary court hearing, court hearing, announcement of resolution, appeal of judgement.

It should be remarked that the peculiarity of judiciary in the Land Chamber is a significant amount of expert examinations within the case, visits to the place of disputable territory to hold its inspection, involvement of mediators for out-of-court settlement of land disputes. Herewith, usually the term of cases consideration does not exceed three month. However, in complicated cases it can be continued for one year. Decisions of the Land Chamber can be appealed to the civil panel of the Appeal Court of England and Wales[4].

It should be noted that in England there is specificity in organization of administration jurisdiction courts. Consideration of this category cases, so-called "judicial review", is held by the Administrative Court as a unit of the High Court of England and Wales. Herewith, there is no any separate judicial unit in the High Court, which would solve administrative legal conflicts. In return, there was implemented practice of determination of judges from the High Court, who are authorized to consider such cases according to the legislation.

In Northern Ireland and Scotland judicial system in the context of specialization and functioning of a specialized component are rather similar to court system of England and Wales. Moreover, the Appeal Court, the High Court of Justice, which consists of the Queen's Bench Division, the Chancery and the Family Divisions, the Crown Court, county courts, magistrates courts and different tribunals are functioning. In fact, they have the same procedural authorities as English judicial bodies[5].

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[1] Апарова Т. В. Суды и судебный процесс Великобритании: Англия, Уэльс, Шотландия / Т.В. Апарова; Институт международного права и экономики. – М.: Триада, ЛТД, 1996. – 157 с. – С. 81-82.

[2] The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments), Order N 1307, 2009 [E-source]. – Access mode: http://www. legislation.gov.uk/uksi/2009/1307/contents/made

[3] Upper Tribunal (Lands Chamber) of United Kingdom. Explanatory leaflet, a guide for users [E-source]. – Access mode: http://www.justice.gov. uk/downloads/guidance/courts-and tribunals/tribunals/lands/forms-and-guidance/ExplanatoryLeaflet.pdf.

[4] The Tribunal Procedure (Upper Tribunal) (Lands Chamber), Rules N 2600 (L. 15), 2010 [E-source]. – Access mode: http://www.legislation.gov. uk/uksi/2010/2600/introduction/made

[5] The Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments), Order N 1307, 2009 [E-source]. – Access mode: http://www. legislation.gov.uk/uksi/2009/1307/contents/made; The Lands Tribunal Rules (Northern Ireland) 1976 (as amended) [E-source]. – Access mode: http://www.courtsni.gov.uk/en-GB/Tribunals/LandsTribunal/Rules/Pages/trib_lands_rules.aspx

However, unlike in England, Wales and Northern Ireland, the Supreme Court in Scotland considers complaints on decisions by lower level courts only in cases of civil jurisdiction. The highest judicial establishments in Scotland are following ones: the Court of Session (civil cases), which includes the Outer House (the first instance for the most important civil cases); the Inner House (the appeal instance for consideration of complaints on decisions by the Outer House, Sheriff Courts, the Scottish Land Court, the Lands Tribunal for Scotland). Decisions of this establishment can be appealed in the Supreme Court of England and Wales. In criminal cases the High Court of **Justiciary** is determined as the highest judicial body. This court acts as the first instance for the most complicated cases, as well as an appeal instance.

Talking about organization of specialized courts in the context of separate judicial systems, which exist in Great Britain, for example in Scotland special courts function together with general courts. The competence of such courts covers only the region where they are situated. Besides, there are special courts and tribunals, which are included into the general British court system (for example, military courts, courts for labour disputes consideration, ecclesiastical courts, the Scottish Land Court, the **Scottish Solicitors' Discipline** Tribunal, transport and licence tribunals and tribunals in cases on rent vindication). At the same time, in Scotland, as well as in England, administrative tribunals are established. They consist of persons or representatives of institutions, which perform judicial or quasi-judicial functions. Herewith, there is no imperative about obligatoriness of justice administering by professional judges in these courts.

In the sphere of specialized jurisdiction in Scotland, as well as in England, Wales and Northern Ireland, there is ramified system of courts. Their subject jurisdiction covers land, military, labour, immigration cases, etc. The activity of the Scottish Land Court was very similar to functioning of the English Land Tribunal. The Scottish Land Court was established in 1949. In fact, the institution started its activity in 1971. The basic aim of its activity is solution of disputes in the sphere of land evaluation, amending or cancellation of special restrictions fixed on land territories, changing of conditions of their application, determination of size of compensation which has to be paid by territories owners (due to compulsory disposition and decrease of the land value), consideration of complaints on decisions, activity and inactivity of the state power bodies in the land sphere, etc. In case of the parties' will, the Land Tribunal may be an arbitrator in other land disputes, since it is considered to be specialized and independent judicial body.

It consists of the chief judge and three judges, who are specialists in corresponding sphere. Consideration of a land case in the tribunal is the same as in English judicial procedure, except for the fact that a case consideration is appointed only if the interested parties are ready to solve the dispute. It testifies basic concept of its activity – protection of claimant's and defendant's interests. Parties are often suggested to change court hearings into written procedure. However, it is possible only if the parties agree. This fact promotes the soonest consideration of a land case and time economy. Judgements of the Land Tribunal can be appealed in the Court of Sessions[1]. In return, disputes concerning fixing of borderlines between territories, land inheriting etc are solved in general order by Sheriff Courts and the Court of Session.

In case of disagreement with decision of the Land Tribunal made by one of judges, the person has right to apply complaint to this very court. Under such circumstances, the case is considered by three judges, except for the judge, who has considered it unilaterally. Later it can be applied in the Court of Session. It is considered that the Land Tribunal is an efficient specialized judicial institution, because lawyers, as well as specialists in corresponding sphere (agrarians) work in this court. Therefore, the percentage of submitted appeals and decisions cancellation is not significant[2].

Therefore, in our opinion, within the investigation, the essence of the above mentioned consists of the fact that functioning of specialized courts in Great Britain, as a component of legal system, depends on a range of fundamental features, which are primarily connected with the absence of law separation into public and private. This fact is based on results of the reception of Roman law; extensive use of such law forms as legal customs, traditions, precedents, legal doctrines; application of basic law, as well as a range of constitutional acts, judicial precedents, customs; absence of the constitutional jurisdiction courts; high level of optionality and competitiveness in judiciary.

[1] Lands Tribunal for Scotland [E-source]. – Access mode: http://www.lands-tribunal-scotland.org.uk

[2] Scottish Land Court [E-source]. – Access mode: http://www.scottish-land-court.org.uk

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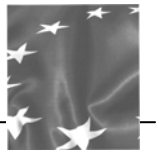

Some provisions of the international conventions relating to the criminal liability of the legal person for corruption offenses

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Abstract: The criminal liability of the legal person for corruption offenses is important for the protection of equal opportunities in the economic field, in terms of access to goods and services market, undifferentiated treatment of privates by the authorities, the protection of loyal competition, the freedom of trade. States are agreeing for the establishment of an adequate legislation and proper procedural measures adopted in Criminal Conventions regarding corruption.
Keywords: corruption, international conventions, legal person, offences

This form of liability which gives birth to a criminal legal relation of conflict, in which the legal person is conferred the status of an active subject, is an immediate consequence of the forms of fighting against criminality at global level, therefore, for protecting the society from the phenomenon of corruption - which constitutes a threat to the rule of law, to democracy and human rights by undermining the principles of good governance, equity, by preventing economic development[1] - the States give their agreement for establishing an appropriate legislation and adequate procedural measures resulting in a number of *international agreements*.

In what follows we try to analyze the implications of these agreements in relation to the criminal liability of the legal person,[2] in this way following the Romanian legislator's option and the doctrine alike.

1. THE CRIMINAL LAW CONVENTION RELATING TO CORRUPTION

The Criminal Law Convention relating to corruption, concluded in 1997 under the auspices of the OECD, is the first to lay the foundations of international cooperation in the fight against corruption in the States that have ratified it. So far, 36 of the countries that have signed the Convention adopted anti-corruption laws based on it, incriminating this form of illicit as crime.[3] The Convention, as we shall see below, sets a series of principles, some of them even considered revolutionary,[4] in the fight against corruption.[5]

[1] Refer to Premier Congres de la Section des jeunes pénalistes de l'association internationale de droit pénal, Noto, 14-20 juin 2001, La corruption, Revue de science criminelle et de droit pénal compare, nr. 4, 2001, p. 925; M. Delmas-Marty, S. Manacorda, La corruption, un défi pour L'Etat de droit et de la société démocratique, Revue de science criminel, 1997, p. 696; D.Mazilu, Preventing and Combating Corruption. Major requirements of trade expansion based on the principles and fundamental rules of international trade law, The Commercial Law Magazine, no.1, 2002, p. 107; S. Voigt, Economic growth, certainly in the law and juridical independence, in Global corruption report. Corruption in the juridical systems, Cambridge Publishing House, 2007, p. 25

[2] Refer to V. Paşca, Changes in the Criminal Code. Comments and Explanations, Hamangiu Publishing House, p.12; M. Basarab, V. Paşca, Gh. Mateuţ, C. Butiuc, Commented Criminal Code, Vol. I, General Aspects, Hamangiu Publishing House, Bucharest, 2007, p. 104-106

[3] Refer to C. Sambrook, The UN Convention against Corruption. One step forward in comparison with the OECD Convention? Pluses and minuses in comparative perspective, in The Romanian International Law Magazine, no. 2, 2006, p. 60; OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transaction: Ratification Status, http:/www.oecd.org/dataoecd; R. Şpan, P. Pitcovici, The Role of Information in the Fight against Corruption, Sitech Publishing House, Craiova, 2009, p. 61

[4] Refer to Ph. Montigny, L'entreprise face a la corruption internationale, Elipses Publishing House, Paris, 2006, p. 65

[5] In terms of the Convention, the concept of passive corruption means the willful act of a public official to request or to receive benefits of any kind whatsoever, either directly or through third parties, for himself or for a third party, or to accept a promise in this regard in exchange for performance or non-performance, contrary to his official duties, an act of his office or an act in the exercise of his office. Active corruption means the willful act of any person to promise or to give benefits of any kind whatsoever,

The first principle establishes the need for externally treating the phenomenon in an analogous way to the form established by the State jurisdiction. The consistency of the principle requires the signatory countries to incriminate the corruption of foreign public officials in the same manner as provided for the misconduct of national public officials.[1] The Convention incriminates and imposes punishment for corruption acts even though, in fact, the offense is committed in a country where such a practice is common. As the French doctrine identifies it, a French legal person can be prosecuted and eventually convicted for a crime that targeted a public official or person from abroad.[2]

The second principle is broadening the sense of the „illegal advantage" concept in respect of any benefit, whether pecuniary or of any kind. According to the definition in the Convention, it may also include benefits in kind such as gifts, excursions[3], etc. and, in a general manner, all that can be paid by a company to a public official or his family[4] (in example, children's education). The application of these two principles can be identified in a number of decisions[5] of American criminal courts, and a part will be presented to the end of this paper.

The public official's conduct regarding the exercise of its powers, subject to corruption offenses[6] is either designed as a duty or as an omission[7], thus instituting another principle of the Convention.

The fourth principle found in the Convention requires extending the definition of a public official. The term of public official includes all public clerks, policy makers, and all persons occupying key positions[8] for the State decisions.

Finally, the Convention requires liability broadening for the illegal actions performed by a specific foreign branch or subsidiary of the company or even by third parties[9] as well. The wording of *Article 1*,

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either directly or through third parties, to a public official, for himself or for a third party, in exchange for performance or non-performance, contrary to his official duties, an act of his office or an act in the exercise of his office. Refer to R. Carvajal, Large scale corruption : Definition, causes and cures system practice and action research, vol. 12, no. 4, 1999, p. 335 ; G Martyvonne, Social sciences and the evolving concept of corruption, Crime, Law & Social Change, no. 42, 2004, p. 15 ; A. Sajo, From corruption to extortion: Conceptualization of post-communist corruption, Crime, Law & Social Change, no. 40, 2003, p. 171

[1] Art.1 paragraph 2 of the Convention states: "The attempt to or the conspiracy to corruptly influence an international public official must be a crime"

[2] Refer to Ph. Montigny, L'entreprise face a la corruption internationale, Elipses Publishing House, Paris, 2006, p. 67

[3] SEC Litigation Release, no. 19107/03.01.2005: The company Titan Corp was sanctioned in 2005, amongst other crimes provided by FCPA, for paying a number of excursions to a public official with decision making rights as part of the negotiations for obtaining certain telecommunications contracts with Saudi Arabia

[4] A much more interesting case is the conviction of 05.25.2002 ruled by the US District Court for the District of Massachusetts, Department of Complaint for Permanent Injunction and Ancillary Relief, against the company Metcalf&Eddy because it paid for the travel of an Egyptian public official and of his family to the US, plus their US immigration expenses. The American court, in the explanatory statement, emphasized that there should not necessary be a clear relation between the gifts offered to the public official and the award of a Services Contract in value of USD 36.5 billion to the company, the material benefit offered being enough to acknowledge committing the crime. The sanction ordered by court was a fine set at USD 400,000

[5] The company Syncor International Corp, specialized in provision of medical equipment, was accused by the Security and Exchange Commission (SEC) for offering gifts to certain doctors from the hospitals in Luxembourg, France, and Belgium, where they were about to deliver specialized goods; the gifts were over USD 750 in value and consisted of personal computers, TV sets, travels abroad.

[6] The cases identified by the court to punish a person for an offense of corruption aimed at an abstaining from the public official in respect to his office duties are few at international level, and that is due to procedural and perhaps evidence difficulties, Refer to SEC, Accounting and Auditing Enforcement, Release no. 1972/03.10.2004, In Administrative Preceding File, no. 3-11427, the court acknowledged the act of corruption committed by BJ Services Company for offering an amount of money to an Argentine custom house officer for being able to introduce some equipment contrary to the customs provisions in force in that country

[7] Art.1 par. 1 of the Convention, "the public official does or refrains from doing"

[8] The accusation of the company Syncor International Corporation by SEC perfectly depicts what the OECD Convention aims at. The legal person made various payments to the doctors professing in the public hospitals from a number of countries where they recommended the acquisition of medical devices from this company. Those doctors did not have the status of public officials and moreover they were not nationals of the countries they worked in. What has been acknowledged in this case is that those people had the ability to influence the decision of the competent public procurement body, thus they were given the status of public officials, as the Convention provisions state

[9] Refer to S. Bogdan, Some considerations on the fight against corruption in the EU, Studia Babeş-Bolyai University, no. 2, 1999, p. 71; F. Răzvan, Law no. 304/2004 on international cooperation in criminal matters, Dreptul, no. 2, 2005, p. 5

„directly or through intermediaries", allows inclusion of the foreign branches controlled in majority or minority and the use of intermediaries outside the company.[1]

2. THE COUNCIL RECOMMENDATION IN RESPECT OF THE „TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS"

The Council Recommendation in respect of the „Tax Deductibility of Bribes to Foreign Public Officials" of April 1997 required countries such as Australia, Belgium, Denmark, Switzerland, France, Germany, Iceland, Luxembourg, Portugal, to abandon the tax deductibility of bribes paid to foreign public officials, although such an illegal act was prohibited if it targeted a national public official.

3. THE REVISED RECOMMENDATION ON COMBATING „BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS"

The Revised Recommendation on Combating „Bribery in International Business Transactions" of May 1997, an instrument of special valence in the fight against corruption, completes the provisions of the OECD Convention with a program to combat the phenomenon. This international instrument targets the following areas: taxation, public grants, government procurement and accounting rules applicable to the legal persons which may have a connotation in committing punishing corruption crimes.

4. THE CRIMINAL LAW CONVENTION ON CORRUPTION OF THE COUNCIL OF EUROPE

The Criminal Law Convention on Corruption of the Council of Europe (Strasbourg, January 27th 1999) in the wording of Article 18 provides the States' obligation to sanction the legal person if its members commit offenses of bribery, influence peddling[2], and money laundering.

The Convention also sets three conditions that must be cumulatively met to be able to employ such form of legal liability: a) the natural person acting illegally must be a member of the legal person according to the statutory functionality; b) the natural person must exercise a management prerogative; c) the natural person must legally represent the legal person under a power of attorney or under an authorization.

The legal nature of the liability imposed on the legal person by the Convention is left to the discretion of the States, being able to be criminal, administrative or civil, as appropriate.

The Convention clarifies the terminology it uses, to the same effect anticipating the subject's division in the two angles of corruption offenses as well, namely the active and passive angles, making in this respect an uniform treatment.

5. THE UNITED NATIONS' CONVENTION AGAINST CORRUPTION

The United Nations' Convention against Corruption[1], adopted by UN General Assembly by Resolution no. 58/4 of October 4th 2003,[2] is the first global legal instrument against corruption and the most comprehensive, with universal coverage, applicable to all Member States.

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[1] Refer to the case Accounting and Auditing Enforcement Release, no. 1444/ 12.09.2001, in Administrative Proceeding File, no. 3, p. 10572, whereby the company Baker Hugues Inc was convicted by SEC for turning to the Indonesian dealer to bribe an Indonesian public finances official to facilitate the import of certain products into that country; the company Titan Corporation was convicted by SEC to a fine of USD 28.5 million for paying a commission fee to the company agent in Saudi Arabia, money that were used in the electoral campaign for the country presidency, the court acknowledging that this commission fee, apparently legal and deductible for tax purposes for the payer, deliberately disguised a financial support given to the country's president in the electoral campaign

[2] Refer to Gh. Mateuţ, Theoretical and practical synthesis on the traffic of influence repression according to the current legislation and in perspective, Dreptul, no. 5, 2002, p. 163; V. Dabu, The New Criminal Code. The Traffic of Influence, Dreptul, no. 2, 2005, p. 108; I. Lascu, L.C. Lascu, Corruption Acts. New Incriminations, The Criminal Law Magazine, no.1, 2001, p. 62-63; E. Cherciu, op.cit., p. 16

The international legal instrument comes in support of the business community by balancing the opportunities in the international market, it „*levels the player field"* - phrase used in the U.S. after the adoption of the „*Foreign Corrupt Practices Act*" Law in 1977, which describes the frustration of Americans in relation to their European partners who still could offer bribes legally abroad to obtain economic benefits.[3]

Analyzing the provisions of this Convention and comparing them with the ones of the foregoing conventions, we do not consider it making a substantial[4] [20] legislative change of the phenomenon in the regulatory view of the signatory States, as the provisions lack thorough standards that must be implemented. For the signatory States, in the wording of the Convention we find „mandatory" tasks „where appropriate",[5] tasks that are „mandatory" to the extent they are compatible with the legislative system of the States,[6] duties to take the „appropriate" measures[7], „optional provisions", „unspecified but effective provisions", or others as „attempts" to adopt certain provisions.

We believe that in a first stage was intended a „careful treatment" of the national legal systems and legislative concepts of the States due to their diversity. It is difficult to assume a success of the Convention in globalization formulas, because it has to match the legal ideas promoted in various centers of civilization, with different concepts protecting traditions that are considered untouchable and which are reflected differently on the hierarchy of rule of law and democracy values.

6. OTHER AGREEMENTS

Alongside the major international joint actions which we discussed in the foregoing, there also are other international agreements of lesser importance, such as the United Nations Convention against Transnational Organized Crime[8] (Palermo 2000), the African Union Convention[9] (Maputo, 2003), the European Civil Law Convention on Corruption (1998),[10] the Agreement establishing the Group of States against Corruption (GRECO), EU Framework Decision on combating corruption in the private sector[11] (Council of Europe, 2003), the Convention against corruption involving officials of the European Communities or officials of Member States of the European Union[12], the Council Resolution on a global political campaign against corruption in the European Union (Council of Ministers, 2005), the Inter-American Convention against Corruption (1996).[13]

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[1] Refer to the wording of Transparency International Moldova Convention, Preventing and Combating Corruption: International Documents, Bons Offices Publishing House, Chişinău, 2005, p.11

[2] The Convention was drafted by the ad hoc committee for the negotiation of the Convention against corruption, based on a mandate detailed in Resolution no. 56/260 of 04.09.2002, the Convention being signed by 95 countries in the Conference in Merida, Mexico, December 9-11, 2003; the Convention was ratified by Romania by Law no. 365/2004, published in the Official Gazette no. 5 of October 2004; Refer to V. Dobrinoiu, M. Hotca, N. Neagu, M. Murea, C. Căşuneanu, op. cit., p. 61; R. Şpan, P. Pitcovici, The Role of Information in the Fight against Corruption, Sitech Publishing House, Craiova, 2009, p.60

[3] Refer to H.E. Sung, Between demand and supply. Bribery in international trade, Crime, Law and Social Change, no. 44, 2005, p. 118

[4] Refer to C. Sambrook, The UN Convention against Corruption. One step forward in comparison with the OECD Convention? Pluses and minuses in comparative perspective, in The Romanian International Law Magazine, no.2, 2006, p. 68

[5] Refer to art. 6 par. 1 and par. 4, art. 40 bis

[6] Refer to art. 5 par. 1; art. 6 par. 1

[7] Refer to art.19; art.37 and others

[8] The Convention setting a series of targets for organized cross-border crime with implications in corruption offenses as well

[9] Aimed at the transparency of participation in trade relations and the importance of legislative measures for repatriation of the amounts of money diverted by corruption acts

[10] Allowing the victims of corruption to seek remedy of the damages pursuant to joint international rules; the Convention has been ratified by Romania by Law no. 147/2002, published in the Official Gazette no. 260 of April 16th 2002; Refer to V. Dobrinoiu, M.A. Hotca, N. Neagu, M. Murea, C. Căşuneanu, op. cit., p. 65; Transparency international Moldova, Preventing and Combating Corruption: International Documents, Bons Offices Publishing House, Chişinău, 2005, p. 174

[11] Based on this decision of July 2003, up to June 2005 the Member States of the European Union must modify their national legislation in respect of incrimination of the corruption offenses (active or passive) regarding all employees of private companies acting according to their personal interest and not to the interest of the business;

[12] Aiming at sanctioning all corruption acts likely to harm the financial interests of the Union

[13] For an exhaustive presentation of these documents, refer to "Corruption, compendium of international legal instruments on corruption", UN Publishing House, Second Edition, 2005.

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Le droit international général et les installations nucléaires proches des frontières dans les années '80 en Europe occidentale

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Abstract: This short article recalls the bilateral or multilateral nuclear agreements concluded between the countries of Western Europe decades ago. Since the 80s there were established specific mechanisms of mutual consultation among stakeholders in the Western countries, interested in the implantation of new nuclear plants close to their borders, these taking both classical forms of nuclear agreements and the less formal ones like the memorandum, the exchange of letters, directives of cooperation, those mechanisms encouraging the exchange of information and consultations. These agreements provided precise mechanisms and procedures of mutual information in situations where new nuclear plants were built close to a state border. Despite their relative importance and their limits (especially regarding the issues of sovereignty), the bi- and multilateral agreements concluded in the last three decades of the last century have contributed to the positive development of nuclear cooperation in Europe, especially the exchange of information and specific consultations between the building countries of new nuclear facilities and their immediate neighbors - and in a complementary manner - relating to the OECD relative recommendations regarding the transboundary pollution.
Keywords: Nuclear energy, international cooperation, international law, nuclear law, institutional framework, nuclear installation close to the border, transboundary pollution, environment protection, consulting, national sovereignty, nuclear agreement, bilateral agreement, multilateral agreement.

IERE PARTIE: CARACTERISTIQUES ESSENTIELLES ET TRAITS COMMUNS DES ACCORDS NUCLEAIRES CONCLUS DANS LES ANNEES '80 DANS LES PAYS OCCIDENTAUX

La quasi-majorité des accords concernant expressément l'information et la consultation sur la création et l'exploitation d'installations nucléaires â proximité des frontières ont été conclus dans les années 80, dans la vague de „multilatéralisme" favorisée par l'Accord sur la Commission tripartite sur le Haut Rhin et par les „Directives" nordiques, avec tout de même une exception: l'Accord signé en 1982 par la Suisse et la R.F.A. Voyons donc, dans cette première partie de notre brève analyse, comment se dégagent les quelques caractères essentiels de la coopération internationale que nous paraissent ouvrir l'observation et l'analyse première des phénomènes liés à la structure et à la portée des divers accords conclus entre les Etats au sujet des installations nucléaires proches des frontières.

A. STRUCTURE ET PORTEE DES ACCORDS DE COOPERATION

Suite à la nécessité qui s'est fait sentir dans les années '80 d'instituer des mécanismes adéquats de consultation mutuelle entre les pays voisins au sujet des problèmes créés par les nouvelles implantations de centrales nucléaires à proximité des frontières, un certain nombre d'arrangements à cet effet a été mis sur pied.

Comme les arrangements évoqués ci-dessus empruntent des formes diverses, d'abord de caractère classique, donc de véritables accords bilatéraux ou multilatéraux de coopération dans ce domaine - ou d'un type moins formel comme ci-après : mémorandum, échange de lettres, directives de coopération, mécanismes d'échange d'informations et de consultation, l'existence d'un dénominateur commun n'est pas évidente, si ce n'est la définition même d'installation nucléaire, mais qui comporte des nuances et doit être précisée d'un cas à l'autre. Le mécanisme mis en place, donc le cadre institutionnel instauré, diffère également d'un accord à l'autre, il n'y a pas deux accords identiques, pour des raisons diverses - géographiques, économiques, techniques ou bien même politiques ou conjoncturelles.

Une installation nucléaire est définie, de façon concise et complète, par les „Directives" de la coopération nordique, comme suit:

1. les installations comportant un réacteur nucléaire à l'exception des navires â propulsion nucléaire;
2. les usines de production et de traitement des substances nucléaires;
3. les usines de séparation isotopique des combustibles nucléaires;
4. les usines pour le retraitement des combustibles irradies;
5. les installations de stockage de substances nucléaires ou de déchets radioactifs à l'exception des installation destinées à servir de lieu de stockage temporaire au cours d'un transport de telles substances;
6. toutes autres installations dans lesquelles se trouvent des combustibles nucléaires ou d'autres produits radioactifs déterminés par les autorités compétentes[1].

Mais la notion d',,installation nucléaire proche d'une frontière" peut être comprise de manière différente, en fonction du contexte géographique, culturel (perception du risque), démographique des zones et régions de frontière, mais surtout en fonction de la distance entre l'installation nucléaire et la frontière. Si dans la pratique interne des Etats, on retient – comme, par exemple en Grande Bretagne, une implantation nucléaire à 10 miles de distance d'agglomérations urbaines de plus de cent milles habitants - ou aux Etats-Unis à une distance de 20 miles[2], sur le continent, dans le cadre des accords vises, la distance entre les installations nucléaires à construire et la frontière varie de 20 à 30 km: dans l'Accord conclu entre la Suisse et la R.F.A. le 10 aout 1982 (entré en vigueur en 1983), l'échange des renseignements et documentation concerne les installations situées à l'intérieur des zones de 20 km - situés de part et d'autre de la frontière commune et seulement sur demande justifiée au-delà de 20 km[3]; or dans l'Accord signé le 4 juillet 1977 entre le Danemark et la R.F.A la distance prévue pour le choix d'un nouveau site, la construction et la mise en exploitation, est celle d'un rayon de 30 km à partir de la frontière: dans un rayon allant de 30 à 100 km, les parties se borneront à s'informer des installations existantes. Mais dans le cas de la centrale nucléaire française de Creys-Malville, située à quelques 80 km de Genève, les autorités suisses ont soutenu à un moment donné qu'il s'agissait d'une installation „proche de la frontière" étant donné la technologie nouvelle utilisée, considérée en Suisse comme particulièrement dangereuse[4]. II suffit de rappeler la jurisprudence française ou européenne relative aux travaux préparatoires de la centrale de Creys-Malville[5], ou relative à la centrale de Cattenom[6] situées en France - ou celle de Kalkar[7] en Allemagne, située à 70 km de Düsseldorf, non loin de la frontière hollandaise, pour bien apprécier l'impact psychologique que ces implantations ont eu sur les populations, de par leur proximité.

Les critères analysés concernant la notion d'installation proche de frontière et la distance entre les nouvelles implantations et la frontière, déterminent le champ des droits et des obligations des Etats participant à la coopération, droits et obligations prévus par les accords eux-mêmes, par les législations nationales ou par la coutume internationale. II s'agit, en général, dans la plupart des accords, d'obligations mutuelles de consultation et d'information avant le choix du site et le début des travaux d'emplacement, et d'obligations ultérieures d'assistance mutuelle en cas d'urgence ou d'accident.

Les installations visées sont présentées dans les divers accords de manière simplifiée, mais elles s'intègrent, en ligne générale, dans la définition initiale (selon l'Accord nordique) et il s'agit principalement d'installations qui sont utilisées pour: la production, la fabrication et 1e retraitement et la fission des combustibles nucléaires ou encore pour le stockage des déchets radioactifs.

Dans l'esprit de ces accords de coopération bi- ou multilatérale, chaque partie s'engage â prendre en considération les préoccupations de l'autre partie avant toute décision intéressant: le choix du site, la construction et l'entrée en exploitation d'une installation nucléaire située dans la zone frontalière. Ensuite, les parties assument généralement, selon la plupart des accords, d'autres obligations: assurer la sécurité des installations, la protection contre les radiations, la protection de la population environnante y compris

[1] Voir B.D.N. n° 19, p. 44.
[2] Cf. 9. *K*. S'HAPAR, conférence, texte non publié
[3] Voir B.D.N. n° 31 et 33.
[4] H. K. SHAPAR, conférence precitée.
[5] Voir B.D.N. n° 16, Référé T.G.I. de Bourgoin Jallieu
[6] B.D.N. n° 42, Arret C.J. des C.E. sur l'inst. de Cattenom
[7] Enerpresse, Paris, 19 mars 1991, "Le Projet de Kalkar..."

l'administration des preuves et la protection en cas d'alerte; la protection de l'environnement; ils doivent consulter à propos, non seulement de leurs plans de création de nouvelles installations et l'harmonisation de ces plans - mais également de la désaffectation des installations.

Il s'agit d'installations situées, selon l'Accord du 27 septembre 1977, entre la R.F.A. et les Pays-Bas, dans un rayon d'environ 30 km de chaque côté de la frontière, mais dans le cadre de l'Accord du 10 août 1982 conclu entre la Suisse et la R.F.A., la distance requise est seulement de 20 km; cependant cet accord prévoit, en outre, que les parties doivent se renseigner également sur les modifications importantes des dites autorisations[1].

Les accords étudiés ici prévoient souvent la mise en place d'un cadre institutionnel plus ou moins sophistiqué ou p1us ou moins complexe - selon les situations et les contextes spécifiques aux zones et régions proches des frontières. Ainsi, l'Accord tripartite entre la France, la Suisse et la R.F.A. du 4 juillet 1977, a institué une Commission intergouvernementale qui doit traiter: l'environnement, l'énergie, les implantations industrielles et l'entraide en cas d'urgence, donc y compris les installations nucléaires, même si le texte n'en parle pas explicitement[2] - pour faciliter l'étude et la solution des problèmes de voisinage dans les régions frontalières communes à ces trois pays. La Commission peut formuler des recommandations, préparer des projets d'accord et elle est tenue informée des décisions prises par les autorités régionales dans la limite de leurs compétences. Conformément à l'Accord du 10 aout 1982 entre la R.F.A. et la Suisse, une Commission germano-suisse pour la sécurité des installations nucléaires est instituée. Il est précisé que ses deux chefs, dont l'un est allemand et l'autre suisse, entretiennent des relations directes et peuvent prendre, dans le cadre de la dite commission, des décisions appropriées selon les situations et les contextes spécifiques aux zones de frontière respectives, quant aux procédures de consultations, notification et l'information du public. La commission s'est dotée d'un règlement, elle fixe les séances, la composition, les groupes de travail, la contribution des experts sur demande[3].

La coopération nordique prévoit également la mise en place de diverses commissions, qui parfois sont constituées de manière *ad hoc* ou moins formelle ; de même, dans leur coopération bilatérale, la R.F.A. et les Pays-Bas ont institué une commission germano-néerlandaise de planification régionale qui se réunit au moins une fois par an ou sur demande de l'une des Parties ; elle est habilitée à constituer des groupes de travail[4]. Enfin, la coopération entre l'Espagne et le Portugal a mis en place des groupes de travail pour renforcer et accélérer les échanges d'information[5].

Généralement les accords de coopération visés sont conclus pour une durée indéterminée, sauf quelques exceptions comme celle, par exemple de l'Accord entre l'Espagne et le Portugal conclu pour une durée de 5 ans – qui sera prorogée tacitement pour encore 5 ans, à moins que l'une des Parties ne communique son intention contraire avec un préavis d'un an. Donc tous ces pays entendent définir une politique à long terme à travers la consultation et les échanges d'informations tendant à la protection des populations respectives et de l'environnement.

B. LES PROCEDURES DE CONSULTATION, LA NOTIFICATION, L'INFORMATION ET LA PARTICIPATION DU PUBLIC

Dans le cadre de la coopération bilatérale ou multilatérale les parties contractantes se renseignent mutuellement sur les installations nucléaires proches de la frontière et mettent â disposition la documentation appropriée. Les autorités du pays constructeur notifieront chaque projet d'installation nucléaire aux autorités du pays voisin et joindront â cette notification la documentation appropriée relative à la localisation de l'installation. Dans la plupart des accords il en va de même pour les autorisations de construction et d'exploitation ainsi que pour toute modification des termes et conditions prévus dans l'autorisation.

[1] Voir B.D.N. n° 31 et 33
[2] Ibid.
[3] B.D.N. n°s 31 et 33.
[4] B.D.N. n° 22.
[5] B.D.N. n° 20.

Selon l'Accord de coopération nordique, les notifications, accompagnées de la documentation appropriée, doivent être envoyées suffisamment â l'avance pour permettre que d'éventuelles commentaires ou observations du pays voisin soient incorpores dans le dossier de demande d'autorisation, avant qu'une décision ne soit prise; le pays voisin doit â son tour examiner sans délai la documentation reçue[1] et fournir toutes les informations relatives â la répartition de la population, aux autres aspects qui peuvent être nécessaires â évaluer l'installation nucléaire en question. Il est évident que les autorités compétentes s'engagent, sur une base de réciprocité et dans la mesure permise par la législation du pays concerne, à respecter la confidentialité des documents, Les restrictions établies de part et d'autre au sujet de la diffusion et de la publication des informations et des documents fournis. La documentation doit 91re mise à disposition de manière continue, sauf les informations concernant la gestion de l'entreprise – qui ne sont pas échangées. En effet, les informations sont destinées à améliorer l'évaluation du site envisage pour l'installation et de son environnement, ainsi que la sécurité de l'installation projetée.

Ainsi, selon l'Accord conclu entre l'Espagne et le Portugal, les deux parties se sont engagés à tenir compte des observations et suggestions émises par l'une ou l'autre partie[2] et de renforcer et accélérer les échangés d'informations. Selon l'Accord germano-suisse et celui de la coopération nordique, cette information réciproque s'applique non seulement aux autorisation de site, de construction et d'exploitation, mais également aux modifications importantes desdites a autorisations, ainsi qu'â la désaffectation des installations nucléaires.

Selon l'Accord germano-suisse, l'information sur les installations nucléaires proches des frontières doit permettre à l'autre partie contractante de s'exprimer sur un projet. Toutefois, les procédures internes d'autorisation ou d'approbation ne sont pas touchées : l'Accord ne donne pas le droit aux signataires d'être partie à cette procédure ou d'y participer. L'information par document écrits intervient assez tôt pour permettre à l'autre partie contractante de se prononcer sur le projet avant l'octroi de l'autorisation, sans retarder la procédure.

Quant à l'information et à la consultation du public la situation est un peu plus délicate. Pour ainsi dire, dans aucun pays, ni même au niveau international, il ne semble y avoir de dispositions juridiques bilatérales ou multilatérales ou prévoyant, dans le cas d'installations nucléaires situées près de la frontière, une procédure institutionnalisée permettant la consultation des populations locales des pays voisins sur les risques susceptibles de découler de l'implantation des telles installations nucléaires dans une zone frontalière. Donc la possibilité d'une participation transfrontalière du public n'est pas reconnue[3]. Dans la vision des différentes législations nationales pourtant, la situation semble toute autre. Pour prendre quelques exemples d'une enquête internationale de l'Agence pour l'Energie Nucléaire (A.E.N.) et l'Agence Internationale de l'Energie Atomique[4], voyons las dispositions quelques législations nationales.

En France, il n'existe pas de dispositions légales spécifiques aux cas d'installations situées près des frontières. Quant à la pratique de la participation elle se résume à une enquête parlementaire.

En Belgique, les dispositions spécifiques s'appliquent en pratique aux territoires des pays voisins concernes, une enquête publique est menée par les autorités municipales des communes situées au-delà de la frontière.

Dans les pays nordiques la situation est plus souple en vertu de la coopération poussée entre ces pays, en principe tout citoyen d'un pays membre peut participer â la consultation dans le pays voisin - et d'une manière générale, l'absence de dispositions spécifiques ne paraît pas soulever de problème: dans les

[1] Voir les Directives relatives à la coopération nordique, B.D.N. n° 19, p. 43.

[2] Voir B. D. N. n° 20 et 25 à l'autre partie contractante de s'exprimer sur un projet. Toutefois, les procédures internes d'autorisation ou d'approbation ne sont pas touchées: l'Accord ne donne pas le droit aux signataires d'être partie â cette procédure ou d'y participer. L'information par documents écrits intervient assez tôt pour permettre â l'autre partie contractante de se prononcer sur le projet avant l'octroi de l'autorisation, sans retarder la procédure.

[3] Voir B.D.N. n° 14, p. 71. C'est aussi l'avis de D.Ecoffey et J.F. Freymond dans une enquête de l'AEN et de l'AIEA, non publiée.

[4] Enquête intitulée: "Dispositions juridiques et méthodes mises en œuvre en matière de participation du public au processus de décision concernant 1'installation et 1'exploitation d'installations nucléaires: résultats et conclusions d'une enquête internationale de l'A.E.N. et l'A.I.E.A." par Jean F. Freymond et Danielle Ecoffey, Centre d'études pratiques de la négociation internationale Genève, non publiée.

quatre pays Membres de l'Accord nordique une documentation adéquate est remise aux pays voisins, avant le début de la construction de toute installation nucléaire. En fait, la majorité des pays industrialisés tendent à traiter le problème de la participation du public de la même manière lorsqu'il s'agit de nationaux et d'étrangers. Ainsi, aux Etats-Unis la loi sur l'énergie atomique ne prévoit pas de restriction sur la participation des citoyens des pays voisins aux débats relatifs aux réacteurs nucléaires situes près des frontières du pays et la participation des étrangers se fait de la même manière que celle des citoyens du pays. En plus, en 1983 les Etats-Unis ont signé avec le Mexique un Accord-cadre sur la coopération en matière de protection et de mise en valeur de l'environnement le long de leur zone frontalière - pour prévenir et contrôler la contamination de la zone frontalière et pour fournir un cadre au développement d'un système d'alarme en cas de situation d'urgence.

En Suisse et en Allemagne les critères pour la participation à une procédure sont les mêmes pour les nationaux ou pour les étrangers; ils peuvent faire opposition à un projet. La Suisse, nous l'avons vu plus haut, est membre de deux commissions bilatérales: Suisse-France et Suisse-Allemagne qui portent sur l'information concernant des projets d'installations nucléaires proches des frontières. Au Luxembourg, la possibilité d'une participation transfrontalière du public existe, soutiennent les auteurs, les interventions du public étranger peuvent se faire par écrit ou oralement. Aux Pays-Bas, étant donné que „chacun" peut participer, les ressortissants d'autres pays peuvent également le faire: participation à des réunions, appels, etc. Au Royaume-Uni, il n'existe pas de disposition législative spécifique. Cependant, au cours d'une enquête publique les ressortissants d'un autre pays peuvent participer par l'intermédiaire d'un témoignage oral ou écrit.

Si les normes nationales ne semblent pas suffisantes pour garantir la protection transfrontière requise par le droit international public, nous tâcherons de nous employer dans notre seconde partie de ce travail à déceler la portée et les limites des accords bilatéraux de coopération en droit international général et par rapport aux recommandations de l'O.C.D.E. sur la protection de l'environnement.

IIEME PARTIE : PORTEE ET LIMITES DES ACCORDS SUR LES INSTALLATIONS NUCLEAIRES PROCHES DES FRONTIERES EN DROIT INTERNATIONAL GENERAL

S'agissant d'un domaine important relevant du pouvoir de souveraineté nationale, le régime d'autorisation applicable aux implantations nucléaires proches des frontières échappe encore, d'une certaine manière, à une véritable internationalisation.

Malgré leur portée relative les accords bilatéraux ou multilatéraux conclus ces dernières vingt années ont contribué â l'évolution positive des échanges d'informations et des consultations entre les pays constructeurs de nouvelles installations et leurs voisins — et de manière complémentaire, par rapport aux Recommandations de l'O.C.D.E. relatives à la pollution transfrontière, à la protection et l'amélioration de l'environnement des zones frontalières, qui ne couvrent pas les activités nucléaires.

A. QUELQUES PROBLEMES DE DROIT INTERNATIONAL SOULEVES PAR CETTE COOPERATION DANS LES ZONES DE FRONTIERE

Outre l'obligation de prendre en compte les intérêts des pays voisins et de leurs populations qui habitent dans les régions de frontière, la coopération internationale dans ce domaine devrait pouvoir imposer une autre obligation aux Etats celle de permettre la participation aux procédures d'autorisation des nouvelles imp1antations nucléaires dans les zones de frontière. Mais ce n'est pas du tout évident. La Commission des Communautés européennes, par exemple, semble reconnaître que selon les normes du droit international public classique, l'Etat constructeur est libre d'informer ou de consulter sa propre population et Les autorités régionales, locales. Le point de vue traditionnel c'est que l'Etat voisin n'aurait pas un droit de regard ou de „codécision". II s'agit en fait du vieux problème de la souveraineté absolue de l'Etat constructeur.

Les problèmes de droit international soulèves par la coopération sur les installations nucléaires proches des frontières sont divers et compliques : du fait de la proximité de ces installations de la frontière,

des conceptions sur la souveraineté, et de l'interdépendance accrue, incontournable dans le contexte contemporain.

L'emplacement et l'exploitation des installations des installations nucléaires, y compris celles situées à proximité d'une frontière, constituent des activités en principe autorisées en droit international général.

Cependant, il est difficile de réconcilier les principes de la souveraineté avec les aléas de souveraineté qu'impose le devoir de respecter les intérêts de l'Etat voisin, ceux des populations susceptibles d'être affectées par l'emplacement d'un nouveau site nucléaire – ou même l'obligation d'informer les voisins sur ses activités nucléaires â proximité des frontières, pour ne pas parler de codécision ou de participation aux procédures d'autorisation, restées tabou. En tout cas, les Etats sont obligés de faire preuve de bonne foi et de ne pas aller trop loin dans leurs prétentions pour obtenir un accord visiblement défavorable pour l'Etat voisin ou ses nationaux. Cela répond à un besoin d'équité. Le droit international reconnaît plusieurs formes de souveraineté, mais dans la pratique internationale elles comportent des aléas importants du fait de l'interdépendance accrue dans toutes Les phases de la coopération bilatérale surtout dans les régions de frontière et les Etats acceptent des limitations de souveraineté - qui sont par ailleurs des émanations de leur souveraineté. Ce fait est mis en évidence par les consultations périodiques dans le cadre de nos accords.

B. LES LIMITES, LES CARACTERES ET LA CONTRIBUTION DES ACCORDS ETUDIES A L'EVOLUTION DE LA COOPERATION

Ces quelques exemples particuliers de coopération bilatérale ou multilatérale en matière d'information et de consultation sur la construction et l'exploitation d[1]installations nucléaires proches des frontières, illustre très bien l'intérêt évident de tels mécanismes, mais si l'on considère comme d'habitude qu'ils touchent d'une certaine manière à l'un des domaines clés relevant du pouvoir de souveraineté nationale, on doit aussi considérer les aléas consentis et les limites de ces accords. Ceci n'empêche toutefois pas qu'ils puissent intervenir positivement, marne si de manière non contraignante, sur une base ad hoc ou seulement â l'échelon local - mais de façon complémentaire aux Recommandations de l'O.C.D.E. concernant l'environnement.

L'évolution progressive de la coopération internationale peut contribuer â définir une politique concertée à moyen et long terme tendant à la protection de l'environnement dans les zones susceptibles d'être affectées par la pollution transfrontière, d'origine radioactive ou autre.

Les Recommandations de l'O.C.D.E. constituent par rapport aux accords bilatéraux un cadre préexistant, somme des principes généraux qu'on ne peut pas éluder sans en subir les conséquences plus tard (environnement, ressources, etc.). Le caractère non-contraignant des accords peut être supplée par leur complémentarité avec les Recommandations, celles-ci ayant un caractère quasi-normatif et une large portée morale.

Encore en 1974, le Conseil de l'O.C.D.E. faisait des recommandations visant â intensifier la coopération et les actions des pays membres dans le domaine de la pollution transfrontière. Le Conseil recommande, entre autres, que les pays membres s'inspirent dans leur politique de l'environnement des principes relatifs â la pollution transfrontière et coopèrent pour développer le droit international applicable â la pollution transfrontière.

Ainsi, puisqu'on parle de solidarité internationale, les grands principes (non-discrimination, liberté d'accès, l'information et la consultation) ont été repris par les diverses législations nationale et sont devenus opérants également dans les instances internationales, dans les accords de coopération qui se rattachent, pour ainsi dire, de manière naturelle aux Recommandations de l'O.C.D.E. sur la pollution transfrontière.

Par ailleurs, les accords études dans ce cadre peuvent être regardés en parallèle avec ce qui est fait dans le domaine de l'environnement - et n'oublions pas que, par exemple, il y avait déjà une coopération nordique pour la protection de l'environnement avant la coopération nucléaire dans les zones de frontière. Et les exemples sont nombreux. En fait la liaison est très étroite entre les accords sur l'environnement et les accords sur les installations nucléaires proches des frontières, ils sont régis d'une certaine manière par les mêmes principes concernant l'information et la consultation sur l'impact, les conséquences d'une

pollution qui trouve son origine dans un pays et qui a des effets dans d'autres pays, or cela touche nos intérêts â nous tous - d'ou l'obligation morale pour les Etats de tout faire pour développer la coopération.

Les accords sur l'environnement semblent avoir une portée beaucoup plus grande, du moins les procédures de participation du public sont nettement plus cristallisées et accessibles aux simples citoyens des pays voisins. Les accords études ne sont pas très contraignants, sont non-assortis d'une peine, sans sanction „judiciaire", d'où parfois des difficultés d'application. Mais ils ont tout de même des caractéristiques juridiques, ils constituent une manifestation de la volonté des Etats de s'engager et à défaut de sanction ils sont contrôlés par les Commissions, les groupes de travail, les associations.

L'intérêt de ces mécanismes de coopération bilatéraux et multilatéraux analysés est considérable, même si les Etats gardent l'exclusivité du régime d'autorisation dans le nucléaire civil (y compris sur les installations proches des frontières) au nom des responsabilité qu'ils assument en matière de la sécurité du public et de la protection et de l'amélioration de l'environnement. Les éléments novateurs de cette coopération ont pu inspirer le développement du droit nucléaire et de l'environnement dans leur offensive contre la pollution transfrontière, d'où qu'elle vienne.

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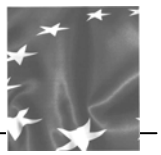

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