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Strategy for the Re-launching of the EU Internal Market in Response to the Economic Crisis, 2008–2010¹

Abstract: *The 2008–2010 economic crisis revealed many problems in the EU's real business market. Of course these resulted primarily from the troubles of financial institutions, but they also derived in part from deficiencies in the functioning of the EU internal market. In answer to these challenges, the Commission has presented the Single Market Act, which contains 12 initiatives directed at reviving the EU internal market. However, the strategy mapped out does not essentially provide for any substantial steps or actions which would, in the short term, improve the entrepreneurs' situation in the crisis-ridden EU. It constitutes a deepening of the current integration, a simplification of the current regulations, and elimination of the most critical – i.e. not all – barriers. The internal market should be perceived as a mechanism ensuring the effective conduct of business activity, simultaneously reducing unemployment and increasing consumer confidence. This would be a strategy for making an 'escape forward' from the crisis.*

Introduction

For the last two years it has been easy to observe an awakening of interest on the part of politicians in the functioning of the EU internal market.² This is not the first time that the functioning of the internal market has become the

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² The original provisions of the Treaty establishing the EEC included the term the 'common market', however, since 1993, the term 'internal market' has been used more and more frequently, which found some justification in the provisions of the Single European Act of 1987. It is only the Treaty of Lisbon which changed all the wordings of the treaties from the 'common market' to the 'internal market'. The term 'Single European Market' is used colloquially to better specify its location and direction of development, which should be clearer for the recipients.

central theme of the political discourse, nor the first time that it has been viewed as a way to save the EU from collapse and from 'eurosclerosis'. The reasons for such a sudden spike in interest can be found on several planes, taking into account historical experience as well.

First, there is a certain analogy in the history of the EU Member States' actions in the face of economic crises. Pursuant to Article 8 of the original version of the Treaty establishing the European Economic Community (of 1958), the common market was to be formed within 12 years from the establishment of the customs union. Taking into account the fact that the customs union was to start functioning by the beginning of 1970, the common market was thus planned for the end of 1982. However, in the early 1970s, two important events took place which led to a significant slow-down of the pace of integration within the European Communities: the collapse of the Bretton Woods System, and the oil crisis. This caused production to become more expensive and a corresponding decline in the competitiveness of European commodities in international markets. These events resulted in individual Member States striving to increase their influence on the functioning of market economies by providing public aid to entrepreneurs and certain trades, much in the same way as took place in the years 2008–2010.

The 1970s and 1980s brought about a gradual widening of the technological gap between the USA, Japan, and Europe, as well as the expanding of the Communities by the addition of new Member States, which usually had a lower level of economic development, bringing about a simultaneous halting of deeper economic integration. This created many additional socio-regional problems, manifested primarily in a high level of unemployment. It is hard to avoid the sense that we are presently dealing with a similar situation – that following the admission of significantly weaker states and in the face of the economic crisis the notion of interventionism has been resorted to once again. Therefore, it should come as no surprise that in the face of actions reversing the processes of integration in the EU in 2008–2010, the debate on the internal market as a remedy for the current socio-economic problems was reopened. Taking into account the fact that the EU does not conduct a uniform economic policy, only a policy coordinated in certain spheres, it is hard to find an instrument which would allow the EU to come out of the crisis and make an 'escape forward' other than through the harmonised internal market.

Secondly, so far, all macroeconomic instruments for improving economic growth have failed. The economic crisis of 2008–2010 had its origins mainly in the problems of financial institutions, and only later reached the real market economy sphere. During the first stage of the crisis, with rela-

tively little public aid being provided by the governments of the Member States, EU enterprises, relatively speaking, maintained their competitive position. As in the crisis period, the amount of public aid for the real economic sector did not significantly deviate from the aid to entrepreneurs in the pre-crisis period, hence European companies from the real sphere were forced to rely mainly on free-market mechanisms. The only condition of success was that entrepreneurs be provided with the free-market freedom of establishment. Bearing in mind the limited effects of monetary instruments, particularly within the Economic and Monetary Union (i.e. eurozone), politicians finally realised that it is the entrepreneurs, generating jobs and offering products, as well as the consumers, by creating a demand for these goods, who constitute the foundation of the growth and development of states. It has become clear that activities aimed at increasing the competitiveness of the EU internal market are the only effective actions which can be undertaken at the EU level. The Polish Presidency of the Council of the European Union, which presented the internal market as one of its priorities, perceived it to be not only the 'source' but even the 'driving force' behind the EU's economic growth.

Thirdly, the economic problems of certain states did not result only from badly managed public finances, but also from the fact that the market is malfunctioning due to the lack of effectively implemented EU legislation, which, in practice, has meant closing the economy to competition and protecting ineffective domestic entrepreneurs. So far, the regulation of the internal market has been carried out by means of directives, which require transposition to the national legal systems of the Member States. The negligence of governments and parliaments of Member States in this respect has resulted in the fragmentation of the internal market and the deterioration of the position of both domestic and foreign entities. This implementation deficit has been manifested by a limitation of competition, frequent protection of ineffective domestic entrepreneurs, and as a consequence, worsening macroeconomic results, not only in the given Member State but, as can be seen in the context of the latest events, in the entire internal market.

Taking the above into account, it seems essential to answer the question **whether the proposed initiatives under the internal market are elements of a long-term solution for coming out of the economic crisis and ensuring the future economic growth in the EU.** In trying to answer this question, the focus has been on analysis of the proposals of the European Commission concerning the revival of the internal market in light of its theoretical assumptions, past integration-related experiences, and the need for the EU to come out of the economic crisis.

1. New determinants of the development of the EU internal market

The internal market is a dynamic, ever-changing creation, a result of both political decisions of EU Member States and adjustments conditioned by the changing situation in the global world. **Taking into account the fact that new forms of mobility, new means of conducting business activity, and new forms of selling and buying appear every day, the process of its ‘creation’ will never end.**

Furthermore, the present functioning of the internal market is conditioned by processes taking place not only in the EU itself, but also in the international arena. In comparison to the 1980s, and especially to 1992 when the internal market was created, today the EU, the concepts of economic development, and the international climate are all entirely different.³ Naturally these issues must be taken into account in the search for those instruments of the internal market which would help in overcoming the current economic crisis. After almost twenty years of the functioning of the internal market, the European Commission decided to review its activities in order to identify the implementation-related gaps, superfluous regulations, and existence of potential barriers hampering the development of the internal market.

It is not only the structure and size of the European Union that has changed during the many years of its existence – the concept of economic development has been changing as well. At the end of the 20th century, economic development was deemed to be based on knowledge. One sign of partial despair over the knowledge-based approach was the modification of the Lisbon Strategy of 2005, reducing the emphasis on the role of knowledge in favour of innovation, i.e. the effective use of knowledge for economic development through innovative activities of entrepreneurs.⁴ Once again, particular emphasis was placed on the functioning of the internal market, starting a discussion on the so-called fifth freedom, i.e. free movement of knowledge, science and innovation, which would complement the traditional approach to the internal market. Essential elements of this approach are to include lowering

³ For more on this, see: the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for Citizens, Interim report to the 2007 Spring European Council*, Brussels, 21.02.2007, COM(2007) 60 final; and the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A single market for 21st century Europe*, Brussels, 20.11.2007, COM (2007) 724 final.

⁴ K. Piech, *Wiedza i innowacje w rozwoju gospodarczym: w kierunku pomiaru i współczesnej roli państwa (Knowledge and Innovation in Economic Development: Towards Measurement and the Modern Role of the State)*, Warsaw 2009, p. XI.

costs, increasing quality, and strengthening the legal reliability of the system of protecting intellectual property rights, as it is assumed that proper protection of intellectual and industrial property should encourage EU entrepreneurs to introduce innovative solutions.

Furthermore, it has been agreed that in the 21st century **the development of the EU should be sustainable**. Following the adopted doctrine of caring for citizens, the Commission has pointed out the need to take into account not only the economic dimension and the competitiveness of entrepreneurs in the international arena, but also environmental and social issues. This is an obvious redefinition of the approach adopted under the political pressure of some EU Member States. Without taking a position on whether these demands are justified, it should be noted that the introduction of new environmental requirements has significantly changed the conditions of operation for entrepreneurs, especially those from the Central and Eastern European states. On the other hand, this has provided the stimulus to discussions on the internal market of energy, including solidarity and diversification of supply, understood not only as diversification of the types of energy sources, but also the directions of their supply to the EU market.

The conditions of international competitiveness in which the entrepreneurs from the EU internal market have to operate are an entirely separate matter. At present, these conditions are defined by the phenomenon of globalisation, which provides many new possibilities by reducing, and in some cases erasing, the difference between the EU internal market and other world markets, but at the same time increases the competitive environment in which European enterprises have to cope.

2. The changed concept of the development of the EU internal market

In the years of the functioning of the internal market, entrepreneurs and consumers identified various barriers, while the economic and social benefits from integration convinced politicians of the need for further legislative actions. It is considered almost an axiom that only activities liberalising the free movement of goods, services, capital and people are conducted under the internal market. This is indeed true to a large extent, however, when analysing EU law it should be noted that the process of negative integration, as defined by Tinbergen, is also accompanied by positive integration, that is creating new supervisory institutions, introducing additional registration procedures, and increasing regulation as broadly understood. Contrary to appearances, these two processes – liberalisation and regulation – are not mutually exclusive. In

order to achieve liberalisation, for instance in the provision of telecommunications services, it was often necessary to regulate the market by establishing national regulators who would ensure relatively free competition between operators. In recent years, as a result of the ongoing integration processes, changes took place on two essential planes: the instruments used for creating the legal environment and the understanding of the main beneficiaries of the EU internal market.

The change in the type of most frequently adopted legislative acts seems to be an important issue in the context of the present functioning of the internal market. Directives, regulating the various issues connected with, for instance, technical harmonization, recognition of qualifications and diplomas, social security, transfer of short- and long-term capital, etc., were the most common form of lawgiving in the first period of operation of the internal market. This solution mainly helped balance the new competences of EU institutions in adopting (usually by a qualified majority of votes) legislative acts regulating the internal market. The aim was to have the directives, which were relatively easier to adopt at the EU level, outline the directions for further activities of the Member States, leaving it to them to choose the final form of the laws implementing the principles contained in the directives. However, there were two negative consequences to this process. Firstly, many Member States, consciously or unconsciously, implemented EU legislation improperly, which resulted in different conditions of operation for entrepreneurs and consumers in different EU Member States, and consequently in the continuing existence of barriers in the internal market. Secondly, there were no states which in fact fully implemented the entirety of legislation concerning the internal market. Efforts aimed at lowering the implementation deficit have been underway for several years now, but despite the declarations made at the summits of the European Council to lower the deficit to 1 per cent (currently there are even proposals to set the deficit level at 0.5 per cent), there are still several states in which this deficit exceeds 1.5 per cent.⁵ This creates significant impediments for potential beneficiaries and an actual fragmentation of the EU internal market.

Yet another change in the approach to the internal market is a revision in its developmental approach from pro-enterprise to pro-consumer and pro-citizen. Since the beginning of the functioning of the internal market, special emphasis was placed on entrepreneurs, which manifested itself, for instance, in eliminating barriers to their functioning, opening more and more new markets, and in the constant process of liberalisation. This was clearly

⁵ European Commission, Internal Market Scoreboard, *Together for new growth*, No. 23, September 2011.

a manifestation of liberal and neo-liberal concepts, under which consumers were to benefit from the effects of the internal market thanks to increased competitiveness between entrepreneurs. There is no doubt that the broader market, the lack of barriers in the movement of goods, elimination of restrictions in the provision of services, the free movement of workers and indeed all citizens of the EU, as well as the free transfer of capital have led to, among other benefits, a broader assortment of products being made available for consumers. The issue of prices remains controversial however, and in many cases the European Commission had to initiate regulations limiting the maximum prices for particular goods or services (e.g. roaming calls). This pro-business approach thus started to gradually evolve into a pro-consumer approach, since the European Commission noticed alarming tendencies in the negative opinions of EU citizens concerning the internal market, despite the fact that they were benefiting from its positive effects every day. These opinions could have resulted from both the obvious deficiencies and the increasing difficulties in the everyday functioning of citizens (e.g. regarding the recognition of qualifications and diplomas), but perhaps also from a lack of information about the positive results of the internal market.

Furthermore, **in the face of the economic crisis, the development of enterprise itself was no longer treated as the goal of internal market policy.** A watershed document in the discussion on the EU internal market was the report by Prof. Mario Monti *A new strategy for the Single Market at the service of Europe's economy and society*.⁶ In this document, it is demonstrated that **the internal market should be treated as an effective instrument for the EU to come out of the economic crisis.** In verifying his thesis, Monti points out the barriers in the development of the internal market, which he identifies in the three dimensions of sustainable development: social, environmental and business.

From the **point of view of society**, many Member States are trying, through their social policies, to financially compensate as much as possible the costs of the functioning of the EU internal market. However, this leads to a change in the conditions of competition throughout the market.

As far as the **social dimension** is concerned, Monti notes that an indirect consequence of the pro-ecological activities conducted in the EU, in the form of including environmental obligations of entrepreneurs in EU legislation, is an increase in the costs of conducting economic activity. Furthermore, very restrictive environmental regulations often make it difficult, if not impossible, to undertake certain requisite actions for the development of infrastructure.

⁶ M. Monti, *A new strategy for the Single Market at the service of Europe's economy and society*. Report for the President of the European Commission José Manuel Barroso, 09.05.2010.

The business dimension of policies concerning the EU market should, according to Monti, be aimed at strengthening the weaker position of small and medium size enterprises, which should be allowed to benefit to the highest degree from the elimination of obstacles to offering goods and services in the entire European market. The report also indicates that the position of EU entrepreneurs in general is often worse in comparison to the situation of companies from outside the EU, due to the restrictive *acquis* regarding **public aid**. This approach surely results from interventionist currents, particularly visible in the period of economic crisis. They are explicitly at variance with the fundamental principles of competition within the internal market and could constitute a consent for trade partners to subsidise exports to the EU market. Furthermore, because of their problems with public finance, many states are not be able to execute this kind of aid, which worsens the positions of their enterprises not only in the global market, but in the EU as well.

As the EU-27 is composed of different Member States, with different political and economic orientations, different state activities in the economy, different functioning of entrepreneurs and protection of social benefits, in his report Monti advocates a package deal for the internal market. The goal is to find a consensus between the following approaches:

- States with a traditional social market economy should accept further integration in the internal market with the observance of the rules of competition, if the Anglo-Saxon states show a willingness to take into account social issues, including tax-related co-ordination;
- New Member States from Central and Eastern Europe, which would gladly adopt a programme strengthening the internal market if it included the support of European funds for infrastructure and ensuring coherence, should in exchange be more open to various forms of tax-related co-ordination.

3. The political dimension of the development of the EU internal market

From the point of view of the European Commission **the internal market no longer has solely an economic dimension, but now has a political dimension as well**. On the one hand the market covers, to an equal degree, issues connected with social and regional policy with financial backup in the form of European funds, owing to which citizens in all the regions of the EU should have their share in the benefits resulting from the opening of the markets. On the other hand, according to the Commission, the internal market should become yet another symbol of the Member States' readiness to co-operate.

However, the facts were quite different for a long time. Politicians did not perceive the internal market as an important element of European integration and, as a consequence, the activities undertaken by the European Commission's Directorate General for Internal Market and Services (DG MARKT) were neither expected nor received with enthusiasm or interest. The best example of this is the economic strategy *Europe 2020*,⁷ adopted in June 2010 and considered a '*framework for the Union to mobilise all of its instruments and policies and for the Member States to take enhanced coordinated action (...) for jobs and smart, sustainable and inclusive growth*'. Having such aims, a broader reference to the internal market would seem obvious. In the Communication⁸ preceding the adopted strategy *Europe 2020*, the European Commission defined specific steps to be taken: creating a single, open market of services, improving the access of SMEs to the single market, and increasing consumer confidence in the commodities offered in the EU market. Furthermore, the Commission, although not pointing directly at the EU Member States, stressed the need to improve the implementation of legislation, continuing the programme of smart regulations, including the digital agenda in the laws, limiting the costs of agreements concluded with partners from outside the EU, as well as facilitating the execution of agreements and recognition of court verdicts in other EU states. It would seem natural that these principles should be reflected in the new strategy for the EU. However, the document *Europe 2020* contains only a reference to the report by Prof. Monti, prepared at the Commission's order, and neither defines the political significance of this initiative, nor indicates any priority actions.

Such a terse reference to an external document, as was M. Monti's report, could be the result, on the one hand, of the short period between its publication (May 2010) and the adoption of the *Europe 2020* document by the European Council (June 2010); yet on the other hand, in light of the observed commitment to the internal market, it would seem that even until mid-2010 EU decision-makers – both politicians from EU Member States and high officials of the European Commission – did not appreciate the significance of the initiative for the internal market.

While in mid-2010 there appears to have been no understanding among the heads of states and governments of EU Member States of the significance of the internal market to the economic crisis, the European Parliament did provide political support for activities concerning the internal market. In its res-

⁷ Conclusions of the European Council, 17.06.2010.

⁸ Communication from the Commission, *Europe 2020, A strategy for smart, sustainable and inclusive growth*, Brussels, 03.03.2010, COM(2010) 2020 final.

olution of 20 May 2010,⁹ that is only a few days after M. Monti's report was published, the European Parliament stated that '*a smoothly functioning single market is in the best interests of European citizens, consumers and SMEs*'. Furthermore, it was stressed in this resolution that '*notwithstanding the economic, technological and legislative weaknesses in its structure, the single European market, along with the eurozone, best illustrates the true meaning of EU economic integration and unity, and is certainly the most visible achievement of European integration for EU citizens*'. Thus it can be said without fear of contradiction that the European Parliament, following M. Monti's report and the earlier communications of the European Commission, treated the citizens of the EU – as the main beneficiaries of the internal market – in a special way.

Furthermore, it should be pointed out that in its resolution the Parliament referred to issues which are embarrassing for the governments of certain EU Member States. The Parliament noted with concern a return to economic protectionism at the state level during the 2008–2010 period of crisis, which inevitably started leading towards fragmentation of the internal market of the EU. These tendencies were becoming deeper as a result of the lack of confidence of the society as a whole in the internal market and a prevailing negative attitude towards it. The Parliament believed the reasons for this situation to lie in development-related inequalities originating in the economic systems of the particular Member States. At the same time, the Parliament decided that the revival of the internal market should not be dictated by the recent financial collapse, and must go beyond the scope of the basic conclusions resulting from the crisis.

A few months later (in October 2010), the Commission presented the Communication 'Towards a Single Market Act'.¹⁰ Quoting the previous positive effects of the internal market, as well as other already-mentioned arguments, the Commission proposed 50 new legislative and organisational actions, the aim of which would be a revival of the idea of the internal market. Adopting the European Parliament's recommendations on the joint responsibility of European institutions and Member States, the Commission attempted to find references to the internal market in the *Europe 2020* strategy. It acknowledged that a modernised single market is the common foundation of all projects implemented under the strategy and, at the same time, '*it is the tool*

⁹ European Parliament, *Resolution of 20 May 2010 on delivering a single market to consumers and citizens 2010/2011(INI)*, doc. ref. P7_TA (2010) 0186.

¹⁰ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act For a highly competitive social market economy 50 proposals for improving our work, business and exchanges with one another*, Brussels, 27.10.2010, COM (2010) 608 final.

that will help them create growth and employment and in so doing give new impetus to intelligent, sustainable and inclusive growth'. While it would be hard not to agree with the above, however as previously mentioned it is even harder to find a direct relation between the internal market and *Europe 2020*.

After a few months, the Council finally gave the Commission legitimisation for continuing its project by passing, in December 2010, its Council Conclusions on the 'Single Market Act'.¹¹ This document presented a slightly different approach to the internal market than the one adopted by the European Parliament. While not belittling the role of citizens and consumers, the Council focused its postulates mainly on improvement of the conditions for conducting business activity and further elimination of obstacles to entrepreneurs in the EU internal market, as there were representatives of Member State governments in the Council who, pressured by the crisis, had only a few months earlier publicly debated on state aid for their domestic entrepreneurs. Now, analysing the initiative of reviving the market, they once more directed their attention mainly towards the sphere of the real economy (the processing industry and services) as the sources of economic growth. It should also be noted that these conclusions were prepared under the Belgian Presidency in the Council, which slightly helped limit the references to social and environmental issues.

4. Premises of the strategy for reviving the internal market

Finally, after conducting a broad public consultation,¹² in April 2011 the European Commission presented the Single Market Act,¹³ which contains 12 initiatives directed at implementation of the idea of reviving the EU internal market. It should be noted that following the Council's conclusions, the Commission set itself the task of creating the possibility of developing the full potential of the EU internal market by both the citizens (which is a compliment

¹¹ Council Conclusions on the Single Market Act, Brussels, 10.12.2010, doc. ref. ST 17799/10.

¹² Commission Staff Working Paper, *Overview of responses to the public consultation on the Communication 'Towards a Single Market Act'*. Accompanying document to the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A Single Market Act. Twelve levers to boost growth and strengthen confidence, Working together to create new growth*, Brussels, 13.04.2011, SEC (2011) 467 final.

¹³ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act Twelve levers to boost growth and strengthen confidence, Working together to create new growth*, Brussels, 13.04.2011, COM (2011) 206 final.

to the European Parliament) and entrepreneurs (who are at the centre of interest of the governments). It is important to note that this document points out virtually no entirely new areas of activity under the internal market, but rather, on the basis of an analysis of the present situation, identifies those barriers still existing in the market. It was stressed that what needs to be done is *'putting an end to market fragmentation and eliminating barriers and obstacles to the movement of services, innovation and creativity'*.

Taking into account the expectations of the consulted parties and bearing in mind the need to have the presented proposals accepted by both the European Parliament and the Council, the Commission decided that **the idea underlying the internal market should be the concept of a strongly competitive social market economy**. Furthermore, the Commission attempted to find a balance between the progressing liberalisation and further elimination of administrative barriers for both consumers and workers, as well as the creation of appropriate conditions for the functioning of entrepreneurs, with special consideration of the weaker position of SMEs.

From the point of view of the Commission, many of the proposed activities should be executed by the end of 2012. It is now clear that the proposed schedule is not very realistic, as a quick legislative process on the Council's side is obstructed by the semi-annual change of the states holding Presidency, often inexperienced in playing the role of the co-ordinator of legislative works and in conducting an informal co-operation with the European Parliament. Secondly, you can also expect delays in the implementation of the schedule of actions for the internal market on the side of the European Parliament. This can result both from certain administrative and expertise-related limitations of this institution, and the more and more frequent negative voices speaking of an overly quick and non-transparent process of adopting legislative acts in first reading under the ordinary legislative procedure.

The Commission's twelve proposals can be divided into three groups of actions: for business, for consumers, and for workers.¹⁴ The analysis which follows below is based on factual material and identification of the barriers and failures of the internal market, presented chiefly in M. Monti's report *A new strategy for the Single Market*,¹⁵ the Commission paper *Overview of responses to the public consultation on the Communication 'Towards a Single*

¹⁴ Due to the volume and extent of the analysis, the present paper deals with those aspects of the proposal that seem the most important and which can potentially have the strongest impact on coming out of the current crisis and the EU's economic growth, and owing to space limitations leaves out the issues connected with infrastructure networks, social coherence, social enterprise, the regulatory environment of business and the public procurement market.

¹⁵ M. Monti, *op.cit.*

Market Act',¹⁶ as well as the Communication from the Commission 'Towards a Single Market Act...'.¹⁷ and the 'Single Market Act' itself.¹⁸

4.1. Actions for entrepreneurs

The economic crisis has fully revealed the deficiencies of the EU internal market, consisting in, among other things, **difficult access of small and medium size enterprises to capital**. This has resulted mainly from credit lines which have been limited or even completely halted by banks in light of the lack of mutual confidence in the financial market. Furthermore, large entrepreneurs can count on governmental support in the form of direct subsidies or recapitalisation, while the SME sector is virtually deprived of these particular types of assistance. Despite the fact that the Commission adopted a special provisional legal framework facilitating access to capital for SMEs,¹⁹ the situation has not been improved much. The entrepreneurs participating in the Commission's consultations considered the problem of insufficient financial instruments available to SMEs as the most important barrier in the functioning of the EU internal market.

It can hardly be gainsaid that access to capital is a decisive factor in making decisions concerning the introduction of new products onto the market, investing in new production tools, as well employment. Both **the lack of visibility of SMEs as significant economic partners and the disproportionately complicated requirements for being listed in capital markets** should be considered as limitations on SMEs' access to capital. In this context, the Commission declared that before the end of 2012 it would present a draft for revising the Transparency Directive, the Regulation implementing the Prospectus Directive, and the Market Abuse Directive '*in order to make the obligations applicable to listed SMEs more proportionate, whilst guaranteeing the same level of investor protection*'. Therefore, the goal is to allow SMEs to obtain financial assets through their presence on the stock market. This way, their position, strength, and innovativeness of solutions can be best and most quickly verified by potential investors. Of course, certain financial limitations in the period of a potential crisis have to be taken into account, but from the point of view of obtaining capital by SMEs, the Commission's proposal seems to be a very good one. Bearing in mind the fact that this sector is the quickest

¹⁶ Commission Staff Working Paper, *Overview of responses to the public consultation...*, op.cit.

¹⁷ Communication from the Commission, *Towards a Single Market Act...*, op.cit.

¹⁸ Communication from the Commission, *Single Market Act...*, op.cit.

¹⁹ Communication from the Commission, *Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis*, OJ C 83, 2009, p. 1.

at adapting to new conditions and at implementing innovations, access to capital through the stock exchange could be a very effective mechanism.

Furthermore, in the Single Market Act the Commission declared that it would present legislative proposals which should '*make it easier for venture capital funds established in a Member State to invest freely in any other Member State, without obstacles or additional requirements*'. This will, of course, result in increased competition in the market of financial institutions offering this type of services. Venture capital funds currently have significant difficulties with obtaining capital abroad and with conducting trans-border activity, due to the diversity of national legal systems and tax-related impediments. New, unified regulations in this regard should provide, first of all to SMEs, the possibility of choosing the optimum offer in the EU internal market. With the introduction of the single market for venture capital, SMEs' access to financial means will be easier, and the demand for the funds' services will be opened. This should bring about a lowering of costs for potential partners.

It should be noted that this proposal concerns a particular type of capital, most often connected with innovative solutions and new products, which is a part of the new philosophy of the EU's economic growth. Bearing this in mind, we can appreciate the initiative of the Commission, which did not limit itself to merely supporting SMEs' access to the capital necessary for normal functioning of the market, but went further and oriented the entrepreneurs' plans towards innovative solutions. Therefore, it would seem that this is not a short-term action with the objective to eliminate the current difficulties, but rather a long-term one, directed at the development of chiefly the SME sector.

The only sector treated given special treatment by the Single Market Act is the **services sector**. According to the report by M. Monti, the services sector provides more than 70 per cent of EU's GDP, is characterised by a constantly growing employment (2 per cent annually on average, while the same index amounts only to 1 per cent in the case of the whole economy), and constitutes an essential source of direct foreign investments. In 1998–2008, the EU's economic growth was 2.1 per cent per year on average, while the services sector had an average growth amounting to 2.8 per cent per year. These indexes could surely be higher if the share of trans-border services was greater, as currently they amount to only approximately 20 per cent. As a result, the difference in productivity between the USA and the eurozone remains at over 30 per cent.

The above problems have resulted from the limited opening of the Member States' markets to foreign contractors. In order to avoid such practices, in 2006 the Services Directive²⁰ was adopted, the main goal of which was to en-

²⁰ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36.

sure the freedom of providing services and observance of the right to establish enterprises in accordance with the provisions of the Treaties. The idea behind this was to ensure better conditions of functioning for competitive entrepreneurs providing services in the EU market, as well as better protection of consumers taking advantage of their offers. In the end, this Directive was passed in a less liberal form than was proposed by the Commission, with many exclusions introduced by the Member States. Despite that, the potential benefits resulting from the introduction of the Services Directive were assessed by the European Commission to amount to EUR 60–140 billion, which implies a growth potential amounting to 0.6–1.5 per cent of the EU's GDP.

As could be expected, protectionist tendencies became even more pronounced during the economic crisis. In its wake, the Member States transposed the Services Directive into their national legal systems rather slowly and incompletely. As a result, despite a relatively liberal EU law being in force, contractors operating in the EU internal market still encounter many administrative barriers connected with trans-border business activity.

The Commission, looking for a way out of the crisis, decided that the not yet fully open internal market was their best bet, believing that any tendencies toward closing limit development. Within the scope of its competences, the Commission intends to verify the correct implementation of the Services Directive, especially in relation to services for entrepreneurs, construction, tourism, and insurance. In the Single Market Act, the Commission has also proposed to extend the system of normalisation of services and to ensure that normalisation procedures are swifter and more effective, as the normalisation of services on the European level could provide the opportunity to take into account new technologies, in particular information and communication technologies, and facilitate the provision of services, especially by SMEs.

The European Commission's identification of services as one of the areas requiring further liberalization in light of the crisis seems absolutely correct. Services generate the relatively highest value added, at the same time hiring more and more employees. Furthermore, owing to the lack of full liberalization, the services market still has some unused reserve potential, which could make a significant contribution to coming out of the economic crisis. This is an important fact, as liberalization in this area could bring about immediate results which could limit the negative consequences of the crisis, while the proposals referring to normalisation of innovative services should, in the long term, ensure an increase in the competitiveness of this sector.

Apart from the actions in the sphere of services, another important challenge on behalf of the future of the internal market is taking into account new technologies, which lead to the development of new methods of co-operation, e.g. e-commerce. In consequence, the Commission's proposal devotes a key

document to **the digital sector**, 'A Digital Agenda for Europe'²¹ is considered one of the major levers of encouraging economic growth and increasing employment in the EU. In his report, M. Monti identified many barriers limiting the European industry's ability to generate value added, including the fragmentation of online markets, the fact that the provisions concerning intellectual property do not agree with reality, a lack of confidence of consumers in the security of payments and observance of their rights in trans-border transactions, a lack of confidence of purchasers regarding the safety and authenticity of products, as well as, from the point of view of retailers, differences in the regulations concerning consumer protection, VAT, and recycling fees.

According to the Commission's analysis, as a result of the above deficiencies, online trade constitutes only 5 per cent of overall retail sales and only 9 per cent of Europeans use this trade channel. On the basis of the conducted analysis, it has been estimated that by stimulating a quick development of the single digital market by 2020, the EU can gain 4 per cent of GDP, which would be a profit of almost EUR 500 million and constitute an income comparable with that achieved by introducing the internal market in 1992.

The need for regulations in this sphere was confirmed by the collation of the results of the consultations conducted, in which e-commerce was deemed one of the ten most important areas. It should be noted that for some specific groups this issue was particularly important (as most important, i.e. in 1st place among the issues ranked by Member States, 4th for industry associations, and 7th for consumer organisations).

In relation to the above, in the Single Market Act the Commission has declared identification of the existing barriers and elimination of any and all cases of unequal treatment connected with geographical location, nationality, or place of residence, in particular in online trade. Furthermore, the Commission has proposed introducing regulations ensuring the mutual recognition of electronic identification and authentication in the EU, regardless of the sector of activity. It is predicted that these regulations will treat all technologies equally and will cover all types of communications media, such as the Internet or mobile telephones.

In light of the economic crisis, the establishment of a single digital market seems like a very good solution. The services sector, in contrast to the manufacturing industry, is to a lesser degree subject to restrictive social or environmental requirements, which results in lower costs and, in consequence, allows for rapidly increasing the sector's competitiveness in world markets. From the

²¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, Brussels, 26.08.2010, COM (2010) 245 final/2.

point of view of the labour market, it should also be noted that the development of the digital market, having regard to the creation of new jobs in previously unknown areas of business activity, increases the demand for highly qualified workers.

Considering the present position of the EU as the leader in trade in services, the digital market should be treated as an 'escape forward'. Better availability of various services in electronic form (including those provided directly through the Internet) eliminates the travelling expenses for both the contractors and clients, and limits the expansion of transportation networks. The resulting reductions in paper use, employees' work time, and energy consumption are compliant with the principles of the pro-environmental economic strategies of many Member States. This means that new information technologies and the whole digital market should provide a real impetus for development of the EU in the next few years, just as railway did in the USA and Europe in the 19th century. It should be stressed that these actions do not constitute a short-term remedy for the crisis in the EU, but rather a long-term axis for Europe's future development. As a result investments, especially in the new Member States, should not be executed with an exclusive focus on road or railroad infrastructure, but rather with a focus on broadband Internet.

The scope of initiatives connected with innovation as broadly understood, the execution of which should revive the EU internal market, naturally raises to the forefront the issue of **intellectual property rights**. They are grounded not only in the Charter of Fundamental Rights, but are at the core of the programme basis in the flagship initiatives 'Innovation Union'²² and 'An Integrated Industrial Policy for the Globalisation Era',²³ as well as in economic practice. The current legal regime generates relatively high costs for innovative entrepreneurs, which are required to use patent protection in different Member States of the EU. It also contributes to delays in the introduction of innovations and sometimes discourages entrepreneurs from introducing new solutions. This results in delays in research and innovation activities in Europe, in comparison with other parts of the world.

The present system, despite its deficiencies (or perhaps because of them), is used primarily by large entrepreneurs, as they are able to afford the high costs in the first phase of a placing a product on the market in order to later

²² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Europe 2020 Flagship Initiative. Innovation Union*, Brussels, 06.10.2010, COM (2010) 546 final.

²³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Integrated Industrial Policy for the Globalisation Era. Putting Competitiveness and Sustainability at Centre Stage*, Brussels, 28.10.2010, COM (2010) 614 final.

obtain the economies of scale. The position of SMEs is much weaker, as for them the administrative burdens and the necessity to incur such steep costs are a barrier to their use of patent protection. As a consequence, they either limit the introduction of innovative processes and products, or their innovations wind up being taken over by large enterprises. The current situation, involving high costs and low effectiveness, results in a lack of legal certainty, and this does not improve the conditions for increasing the innovativeness of the European economy. Innovation requires and deserves legal protection. The Commission estimates that a uniform system of patent protection would lower the costs of securing the entrepreneurs' interests in this field by 80 per cent.

In relation to the protection of intellectual and industrial rights, in the Single Market Act the Commission also refers to simplification and ensuring transparency of the present system of issuing copyright licences for legal online offers. The objective is to provide the possibility to create new commercial models which will make it possible to orient appropriate products towards more mobile consumers. The conception underlying these proposals is closely connected with the proposals of the Commission regarding the previously discussed development of the market of innovative electronic services. The above-mentioned initiatives are to be complimented by actions connected with the trademark in Europe in order to simplify procedures, lower the costs, and make better and more efficient use of new technologies. An essential issue, also addressed in the Single Market Act, is piracy and counterfeiting, which cost the European economy EUR 188 billion a year.

Discussions on the protection of intellectual property, and especially on the introduction of an EU patent, have been underway for several decades now. It seems that the reasons for the delays and obstructions in the decision-taking process lie in economic practice. The number of applications from only a few EU Member States (Germany, France, the UK) constitutes approximately 80 per cent of all patent applications in the whole EU, which indicates the stronger position of entrepreneurs from these countries and significantly weaker possibilities of others. In this context, doubts could arise regarding the issue of which enterprises would benefit the most from the new system, which must be non-discriminatory. Furthermore, it is worth noting that patenting a given product by one company forecloses other companies from developing the technology protected by patent without incurring additional costs. As a consequence, it is up to the patent holder to decide when and to what extent they will permit the conduct of further innovation activities. Without negating the necessity of protection of intellectual and industrial rights, such a situation can give rise to justified doubts whether patent protection really is an ally to innovation in Europe.

Despite the doubts mentioned above, one should consider the proposed actions overall to be stimulating for the internal market in the long run, as they

complement the postulates of ensuring competitiveness of the European economy through offering innovative goods and services, including those provided in the single digital market.

A critical element in conducting any business is **tax policy**. Due to the high level of its political, social, and economic sensitivity, this area belongs to the exclusive competence of the EU Member States. As a result, despite some harmonisation the Member States still use 27 different sets of tax regulations, which results in significant costs related to their observance and creates significant administrative burdens for citizens and entrepreneurs conducting trans-border activities.

From the point of view of macroeconomics, the lack of unification regarding taxes means that for now, this powerful instrument for influencing the competitive position of entrepreneurs and the situation of national public finances, remains in the hands of national politicians. As a consequence, there is tax-related competition surrounding programmes and activities aimed at improving the attractiveness of investment in particular Member States. This is illustrated by the drop in the EU-15 average corporate income tax rate from 50 per cent in 1985 to 30 per cent in 2009, while the average rate in the EU-12 new Member States amounts to 20 per cent, according to M. Monti's report.

Full national autonomy in fiscal policy affects not only the attractiveness of the EU Member States, but also their public finances. In the period of the 2008–2010 economic crisis it turned out that state aid to the banking sector resulted in significant gaps in the budgets of various Member States. The crumbling economies were not providing the necessary incomes, which negatively affected public finances, especially as regards government debt. Reduction of the government debt in particular states will almost certainly require raising the tax rates. This will surely change the situation in the market and, as a result, capital could move out of such states and there could be a delocalization (accompanied by a relocation) of enterprises, which will have negative effects on the economic growth and budget incomes of those states which businesses move out from.

The above-mentioned post-crisis problems naturally present the concept of co-ordination of the tax policy in a new light. In his report, M. Monti points out that the tax burden in the EU Member States is shifting to an increasingly greater degree from more mobile tax bases (capital income and corporate income) towards less mobile ones – work-related income. The result of this are higher labour costs and growing unemployment. This problem became particularly important in the period of the economic crisis, when entrepreneurs began to reduce and/or limit their costs, in particular by rationalization of employment. Any trend toward increased labour costs is at variance with the principle of increasing the competitiveness of European entrepreneurs on the glob-

al markets. Taking into account the results of studies on the hierarchy of factors of the attractiveness of investment in various regions, it turns out that the rate of corporate income tax is not always the most important issue for entrepreneurs, as more often it is the quality of the business environment, and workforce skills, and costs of labour that are of top priority.²⁴

In his report, M. Monti notes that the functioning of the single market, combined with the advancing process of globalisation, constitutes a growing challenge to the national tax systems and, in the long run, could weaken their ability to generate income. Furthermore, in light of an almost full liberalisation of the movement of goods, services, capital and workers and the right of establishment, it is doubtful whether it will be possible to achieve a full unification of the conditions of conducting business activity in the EU internal market without providing at least co-ordination, and probably ultimately unification, of the tax system.

In response to these long-term challenges, in the Single Market Act the Commission proposes the establishment of a common uniform tax basis for corporate entities in order to unify the rules of calculating revenue subject to tax, so that enterprises are subject to the same regulations regarding income regardless of the Member State in which they operate. The establishment of a single tax point could also facilitate contacts between the entrepreneurs and tax institutions, as well as institutions managing the administrative co-operation of the EU Member States. According to the research performed for the Commission, a common tax basis could allow EU enterprises to save almost EUR 2 billion. This initiative is a proposal, the effects of which could become visible in the long run as a result of increasing the legal and tax certainty of entrepreneurs. This proposal should not be perceived as a short-term instrument for dealing with the crisis, but rather a tool ensuring increased competitiveness and stability of business activity in the future in the EU internal market.

Another fiscal barrier for entrepreneurs operating in the EU internal market are the diverse rates and the different methods of calculating Value Added Tax (VAT). The process of its harmonization began as early as in the 1970s, resulting in the establishment of, among other things, minimum VAT rates. However, the complicated system of exemptions, exceptions, and options available to the Member States, as well as the specific regulations regarding trans-border transactions, significantly hinders the proper functioning of the EU internal market. This situation also threatens the competitiveness in the internal market of European enterprises, which incur significant costs related to

²⁴ Cf. A.A. Ambroziak, *Krajowa pomoc regionalna w specjalnych strefach ekonomicznych w Polsce (Domestic Regional Assistance in Special Economic Zones in Poland)*, Warsaw 2009.

observing regulations, especially those companies conducting their business activity in several EU Member States.

During the consultation conducted by the Commission on reviving the internal market, entrepreneurs ranked problems with the VAT system in sixth place among the most significant barriers to effective business activity in the EU. The Commission found out that one of the main barriers in this field are the enterprises' obligations related to reports and the manner of collecting VAT, which favours cheating and causes losses to national budgets if approximately 12 per cent of the value of VAT-related revenues.

In the end, the European Commission has not presented any detailed proposals in this regard, believing that in a period of crisis, the Member States should have greater freedom to make autonomous decisions suited to the needs of their particular markets. In this context, it would be reasonable to follow M. Monti's suggestion concerning the raising of standard VAT rates or, what seems an even better solution, to limit the application of lowered VAT rates. The period of crisis has forced some states to take quick actions aimed at protecting their public finances, which consist of raising the applicable VAT rates. This short-term action improved to a certain extent the budget situation of certain Member States, without worsening the position of companies, as would be the case of direct taxes on operations.

4.2. Actions for workers

The economic crisis of 2008–2010 deeply affected the sphere of the real market economy, which had a severe negative impact on employment. With demand collapsing, in order to limit their operating costs entrepreneurs were forced to reduce employment, or at least shorten working time. In this context, it is worth examining the **economic dimension of the free movement of workers**. Without negating the positive effects of mobility for the migrating workers (gaining experience, new skills, etc.), it should be noted that from the macroeconomic point of view, the aim of free movement of workers is to ensure a better allocation of the factor of production – labour. This mechanism should lead to a relative lowering of wages, and consequently the labour costs in the host country. The regulations pertaining to the prohibition of nationality-based worker discrimination in the employment process seem to protect the right of EU citizens to equal remuneration, but at the same time what is equally important and often overlooked, they limit competition in labour costs between the employers in the given states. Of course, the state to which workers emigrate should be able to offer potentially better conditions to the remaining workers, which should raise their relative standard of living and the structure of reported demand. However, such a process results in an increase of labour costs in the state *from which* workers migrate as well.

Despite the fact that EU legislation concerning the movement of workers has been constantly developing since the inception of the EEC, according to the reports of M. Monti and the Commission itself, **the percentage of workers moving within the internal market is estimated at only 2.3 per cent of all people employed in the EU internal market.** This rate is low in comparison to, for instance, the situation in the USA, where the percentage is three times higher. However, it should be noted that there are many limitations in the European Union which do not exist in the USA. **In his report, M. Monti identified not only difficulties resulting from language-related factors, but also cultural ones, types of family relations, the structure of the housing market, and the most significant, as it would seem, barriers related to recognition of education, qualifications and diplomas, as well as social security.** These problems especially affect temporary (seasonal) workers, as in this case imposing any barriers practically makes it impossible for them to start working in any other EU Member State in a short time.

The European Commission is aware of the significance and scale of the problem, as according to its analyses there are 4600 regulated professions in the EU, while automatic recognition of qualifications is applied only in relation to 800 of them. As a result, many workers must go through long and arduous procedures before their qualifications will be recognised in other EU member states. This has been confirmed by the results of consultations conducted by the Commission, in which the problem of recognition of qualifications and diplomas was deemed one of the major barriers (3rd by government agendas, 7th by the citizens, 9th by Member State governments, 10th by trade unions).

As a result, the European Commission proposed a modernisation of the regulations concerning the recognition of professional qualifications, executed under the lead initiative 'An Agenda for new skills and jobs'.²⁵ The main objectives are simplification of the procedures of mutual recognition of qualifications of mobile workers and a review of the legislation concerning regulated professions, so as to broaden the extent of automatic recognition of qualifications for new professions to encompass new sectors, especially, as M. Monti pointed out in his report, to new professions needed in the environmental and digital sectors, which would result in facilitating the mobility of highly qualified workers.

²⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An Agenda for new skills and jobs: A European contribution towards full employment*, Strasbourg, 23.11.2010, COM(2010) 682 final.

Furthermore, in the Commission's view, the establishment of the European Skills Passport, which could contain the data concerning the qualifications and skills acquired throughout one's lifetime, should support the mobility of specialists and ensure co-operation between the governments of interested states. These actions are to be complemented by facilitating the mobility of young people, especially those who finished their education without obtaining specific qualifications.

It is worth noting that with regard to the field of worker mobility, and connected with the freedom to provide services, the Commission has decided **not to include** several important initiatives in the Single Market Act, even though they were among the initial 50 proposals: **first of all, the agenda with the aim to improve the implementation of the directive concerning the posting of workers.**²⁶ The Commission's proposal was to explain the use of fundamental social rights in the context of economic freedoms of the single market. On the one hand, it was supported by states having a surplus of relatively cheaper but well qualified workers, and criticised by the host states, determined to protect their labour markets from competition. This way, despite the announced facilitations in enforcement of the freedom to provide services, entrepreneurs posting their employees will still encounter problems of double taxation or other administrative requirements.

The freedom of movement of workers is the most strongly contested, and as a result the least used, of the four freedoms. As shown by the debates concerning the expansion and ratification of the Constitutional Treaty and the Treaty of Lisbon, a large portion of European public opinion is concerned that employment-related migration results in the lowering of wages and loss of jobs, and also constitutes a burden for the social security system. Undoubtedly however, the mobility of properly qualified workers is a key factor of economic growth. It should ensure optimum usage of the production-labour factor, in accordance with the qualifications and skills of workers. Closed labour markets or trades protected from competition will neither ensure higher employment, nor quicker economic growth. The Commission's proposals in this respect should, therefore, be appreciated as a plan of long-term actions aimed at improved allocation of the workforce in the EU. A mobile, flexible workforce, well prepared in terms of qualifications and competence, should be able to easier adjust to changing conditions and employers' expectations. In this sense, the crisis forced entrepreneurs to undertake actions aimed at creating

²⁶ Directive 96/71/WE of the European parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.01.1997, p. 31.

new and better jobs, and workers to increase their flexibility and improve and adjust their qualifications to market needs.

4.3. Actions for consumers

The EU internal market involves both benefits and challenges for consumers. Certainly a larger and open market provides consumers with access to a broader range of products and possibilities of choosing them according to expectations, needs, quality and price. For entrepreneurs, this facilitates easier access to potential consumers. At the same time, it is much more difficult for consumers to find out where a given commodity was produced or from what country a given service, e.g. a digital one, is provided. The knowledge that a foreign entity could be responsible for a given commodity or service sometimes results in a negative approach to, or lack of confidence in, the EU internal market.

Furthermore, consumers often do not have the information which would allow them to choose the best price or to make a conscious choice of products, as this information can be presented in an ambiguous way or in a manner making it difficult to compare price, quality, etc. Once more, this is especially the case with trans-border offers. In his report, M. Monti stated that **a broader choice of goods and services and a stronger competition ensured by the single market should be beneficial for consumers taking into account the increased transparency of the market and the possibility to make comparisons**. Still, there is a need for progress in developing regulations regarding the activities of independent middlemen, such as websites with price comparisons or tests of products, guaranteeing to consumers the possibility to choose the best offers in terms of price and quality from the broadest range of products and services available.

Out of the assumptions of M. Monti's report and the communications of the Commission, a concept has emerged for a mechanism that could commend and promote the most innovative and effective enterprises, whose offers would be chosen consciously by consumers. The objective is to improve the consumer's position with respect to entrepreneurs. A perfectly competitive market, to which the Commission aspires and refers in its agendas, is a market in which both the sellers and the buyers believe their individual actions do not influence the level of market prices. A free-competition market must, therefore, include many buyers and many sellers. The 500 million customer EU internal market surely provides a significant number of potential retailers and consumers. However, the consumers' knowledge remains problematic, as in a perfect competition they should have full information on the products sold and believe that the products of various enterprises working in the perfectly competitive market are truly identical.

The European Commission has estimated consumers' losses resulting from the improper functioning of the internal market at 0.16 per cent of the EU's GDP, while the potential gains from increased e-commerce alone have been estimated at 0.02 per cent of the EU's GDP, i.e. EUR 2.5 billion. According to M. Monti's report, a stronger pro-consumer orientation will once more mean directing attention to market integration and competition, an extended collections of laws, safeguards and redress measures, and better access to basic services.

It is also worth pointing out that over the years consumers' awareness concerning their rights has significantly grown. This is reflected in the dynamic development of consumer policy, elements of which could not have failed to be included in the Single Market Act, all the more so as these issues were deemed, during the consultations conducted by the Commission, as the most important by, as might be expected, consumer organisations. In the Single Market Act, the Commission proposes **introducing, first of all, regulations concerning alternative methods of settling disputes**, the aim of which is the establishment of extrajudicial procedures which will allow for quick and easy resolutions of disputes, not involving excessive costs to consumers.

In addition, in order to strengthen consumer confidence in the single market, the Commission intends to **introduce changes to the Directive on general product safety**²⁷ and prepare a **long-term action plan concerning the supervision of the market**. The objective is, among others, to co-operate with the customs services and market supervision authorities of the EU Member States. Additionally, within the framework of improving the environmental awareness of citizens and consumers in the EU internal market, the Commission proposes the **initiative 'Environmental footprint of products'**, the aim of which is to provide consumers with relevant information on the environmental friendliness of products.

The actions regarding consumer protection proposed by the Commission should not be viewed as initiatives aimed at short-term goals. Rather, they seem to constitute concepts for ensuring a proper long-term balance between entrepreneurs and consumers. It is also hard to state that these initiatives constitute a revision of the internal market policy from pro-entrepreneur to pro-consumer, as was becoming the case before the economic crisis. Problems in the sphere of the real economy in the years 2008–2010 exposed the entrepreneurs' weak position regarding competitiveness. This is probably why the proposed changes in the sphere of consumer policy seem to be actions more aimed

²⁷ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.01.2002, p. 4.

at creating the right conditions for demand growth than at the protection of buyers in the narrow sense.

Conclusions

The 2008–2010 economic crisis revealed many problems in the EU's real market sphere. Of course, these resulted primarily from the troubles of financial institutions, but the deficiencies in the functioning of the EU internal market played a role as well. They resulted both from the failure of some Member States to implement parts of the legislation concerning the internal market, as well as some of the legislation being ill-suited to the new needs connected with the changing EU, global competition, and the new conceptions of sustainable, innovative economic growth.

In answer to these challenges, already in 2007 the Commission started working on a strategy concerning stimulation of the internal market, a fact which confirms that the Single Market Act is not directly connected with the consequences of the economic crisis in 2008–2010. However, it was the crisis that provided the incentive to accelerate the discussion on modernisation of the internal market and take concrete action.

On the basis of the analysis conducted in this article, it can be stated that in its strategy for reviving the internal market, the European Commission has proposed **maintaining the social market economy**, stressing the co-existence of an open, competitive market and high standards regarding social care, environmental protection and healthcare. Even during the economic crisis, EU Member States were forced to introduce pro-social solutions at a relatively high cost to their budgets. Also, support in the form of state aid provided by EU Member States to entrepreneurs in the real sphere was granted to those companies which had the most employees. Such actions were, of course, aimed at the reduction of possible social tensions.

The Commission's strategy for reviving the internal market does essentially not provide for any substantial steps or actions which would, in the short term, improve the entrepreneurs' position in the crisis-ridden EU. The crisis, as M. Monti's report and the Commission's communications suggest, gave an impetus of sorts for the discussion of the future of the internal market. The above-mentioned strategy includes proposals for actions oriented not only towards businesses, but also extending to workers and consumers as well.

A far as proposals dedicated to entrepreneurs are concerned, the major issues are to facilitate access for SMEs to financial markets, especially to venture capital, freeing up the potential in particular of the services sector and the

establishment of a single digital market, which together with the proper protection of intellectual and industrial rights should ensure the innovative development of the EU. These are evident pro-growth and pro-development actions aimed at achieving long-term effects. They do not include quick fix solutions for coming out of the crisis. This is also the case with the co-ordination of tax policy, the consequences of which would be significant only in the long run.

The situation is similar in the case of initiatives for the mobility of workers and consumer protection. The introduction of both the qualifications and skills passport and the institution of extrajudicial settlement of disputes requires time, and the effects will not be immediate. The activities, both in the sphere of worker mobility and consumer policy, are rather aimed at creating proper conditions for the functioning of the internal market over the long term and enabling it to make full usage of its potential.

The analysis conducted confirms the thesis presented in the introduction, that the proposed actions under the Single Market Act are **a strategy for making an 'escape forward' from the crisis, and not a schedule of short-term actions aimed at a quick fix for coming out of the crisis.** However, it should be stressed that the strategy outlined does not include any radical or watershed structural reforms. It rather constitutes a deepening of the current integration, a simplification of the current regulations and elimination of the most damaging – i.e. not all – barriers. The internal market should be perceived as a mechanism ensuring the effective conduct of business activity, while reducing unemployment and increasing consumer trust. One example of such an action is the latest initiative of Germany, presented during the meeting of the Competitiveness Council on 29 September 2011, providing for special co-operation between German companies and Greek enterprises.

The schedule of the Commission's proposed actions should also be noted. Now that the Polish presidency has ended, the majority of them will be processed by the Danish, Cypriot and Irish presidencies of the Council. **The success of this undertaking will thus depend on the effectiveness of their actions, and their skills in conducting negotiations in the Council and in the European Parliament.** However, it is not clear if the rotation schedule will yield positive effects. In the near future, the Presidency of the Council will be held by a state which is an experienced member of the EU but does not participate in all the areas of European integration, a new and inexperienced state, and a state struggling with huge problems as regards its public finance. As a consequence, despite their political declarations, it is not certain that they will make the restructuring of the internal market their priority.

It can hardly be denied that full implementation of the current and future legal solutions contained in the Single Market Act would assist the

Member States in the coming out of the crisis. However, the difficulties in their implementation may make achieving the desired results problematical. It is worth noting that, paradoxically, any signs of a returning crisis might cause the Member States to start contesting certain EU solutions, as was the case in the 1970s and in 2008–2010. As a consequence, **protectionist tendencies may result in the introduction of limitations in the movement of workers and services, which are the chief driving forces behind further integration within the EU internal market.**

Jadwiga Urban-Kozłowska*

‘Bailouts’ – Revision of the EU State Aid Policy

Abstract: *The current global financial crisis has both challenged and changed the European Commission’s interpretation of EU State aid law. In the first phase of the economic meltdown, the Commission systematically relied on the established EU State aid rules, notably the Guidelines on rescue and restructuring aid for firms in difficulty. As the crisis unfolded, the Commission recognised that those rules were insufficient and decided that tailor-made measures should be envisaged in order to fully address the problems faced by the banking sector. This article analyses the evolution in the Commission’s approach to State aid measures granted to ailing financial institutions. It is argued in conclusion that the revision of the State aid policy was a necessary step forward.*

Introduction

When the financial crisis broke in the late summer of 2007, the perilous condition of the US mortgage market and the excessively risky strategies of individual banks were widely regarded as the root causes of the crisis.¹ Although it was clear that the problems faced by the US banking sector would have an impact on the functioning of financial institutions² in the European Union, the European policymakers at that time still perceived the crisis primarily as a liquidity problem of particular individual banks. During that initial phase, concerns over the solvency of financial institutions as a whole also

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¹ For more information about the causes of the financial crisis, see generally: W. Szymański, *Kryzys globalny. Pierwsze przybliżenie (Global crisis. A closer look)*, Warszawa 2009, p. 13–118; J.B. Taylor, *Zrozumieć kryzys finansowy. Przyczyny. Skutki. Interpretacje (Getting Off Track: How Government Actions and Interventions Caused, Prolonged, and Worsened the Financial Crisis)*, Warszawa 2010, p. 23–40.

² Hereinafter also ‘credit institutions’ and ‘banks’.

emerged, but a systemic collapse was deemed unlikely.³ Moreover, a number of prominent experts shared the belief that the European economy, unlike the US economy, would be largely immune to the financial turbulence. As a result, until the late summer of 2008 the European Commission (hereinafter ‘Commission’), when examining the rescue measures granted to ailing financial institutions, systematically relied on the long-established EU rules for assessing State aid to firms in difficulty.

This perception of the situation changed dramatically with the bankruptcy of Lehman Brothers in September 2008. The financial crisis intensified markedly, both in scale and in scope. The pervasive uncertainty about the true value of banks’ assets and the vulnerability of credit institutions to the deteriorating economic market conditions led to a general erosion of confidence within the banking sector. The interbank lending market froze, making access to liquidity progressively more difficult for financial institutions. Furthermore, as the crisis unfolded it became clear that its adverse effects would not be restricted only to those financial institutions which, due to their structural solvency problems (inefficiencies, poor asset-liabilities management and/or risky investment strategy),⁴ were considered to be the ‘authors’ of the then-current credit crunch. The striking feature of the re-assessed financial crisis was the fact that fundamentally sound banks also faced refinancing problems.⁵ Due to the high degree of integration and interdependence of the European financial markets, as well as the waning confidence of retail clients in the banking sector, the risk of a systemic crisis emerged.

Awakened to the nature and the magnitude of the crisis, the Commission decided to adapt its State aid enforcement policy. The Commission acknowledged that the aid measures undertaken by the Member States for the benefit of ailing financial institutions might be considered compatible with the common market rules, as their objective was to ‘remedy a serious disturbance in

³ See also: Speech by L. Papademos, *The financial market turmoil, the European economy, and the role of the European Central Bank*, New York, 27 September 2007, http://www.ecb.int/press/key/date/2007/html/sp070927_1.en.html

⁴ The less-performing financial institutions are often called ‘ailing’ or ‘distressed’. They are likely to be particularly affected by losses stemming from inefficiencies, poor asset-liability management or risky strategies. See: *Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current financial crisis* (hereinafter ‘Banking Communication’), OJ C 270, 25.10.2008, p. 8–14, point 14.

⁵ A financial institution is considered to be fundamentally sound if the viability problems it may face are inherently exogenous and they result from the extreme situation in the financial market rather than from inefficiency or excessive risk-taking. See: Banking Communication, point 14. See also: R. Luja, *State Aid and the Financial Crisis: Overview of the Crisis Framework*, “European State Aid Law Quarterly” No. 2/2009, p. 146–147.

the economy of a Member State' under what is now Article 107(3)(b) TFEU,⁶ which at that time was Article 87(3)(b) TEC.⁷

In order to preserve financial stability and provide legal certainty in the application of the, until then rarely-used Article 87(3)(b) TEC, the Commission adopted four official Communications between October 2008 and July 2009, indicating how State aid rules would be applied to national support measures for financial institutions in distress. This new legal framework comprised various kinds of aid measures, such as guarantees, recapitalisation, impaired asset relief, restructuring, and controlled winding-up.

The main focus of this article is to review the evolution of the Commission's approach to the State aid measures granted to assist the ailing financial institutions.⁸ It begins with an analysis of the established State aid rules used at the beginning of the crisis, and moves on to examine the special legal framework adopted by the Commission during the second phase of the economic downturn. This overview will demonstrate the size, shape and complexity of the changes involved, and enables identification of their directions and effects. Furthermore, throughout the analysis of the relevant provisions, examples of their practical application are provided.

This article consists of two parts, corresponding to the two approaches pursued by the Commission so far during the current financial crisis. The first part takes a comprehensive look at the application of the established State aid rules to the support measures granted to ailing financial institutions during the first phase of the crisis. In order to provide an introduction to this subject, the scope and content of the Article 107 TFEU (ex-Article 87 TEC) is succinctly described. It should be highlighted that during the first phase the Commission allowed support measures only on the basis of Article 107(3)(c) TFEU (formerly Article 87(3)(c) TEC). The second part illustrates how the Community guidelines on State aid for rescuing and restructuring firms in difficulty (hereinafter 'R&R Guidelines')⁹ have been applied in cases of State aid measures granted to financial institutions. The criteria applicable to rescue aid and aid for restructuring of firms in difficulty is spelt out.

⁶ Due to the amendment introduced by the Treaty of Lisbon, the former Treaty establishing the European Community was transformed into the Treaty on the Functioning of the European Union (hereinafter 'TFEU').

⁷ The Treaty establishing the European Community (hereinafter 'TEC').

⁸ It is unfortunately beyond the scope of this article to comment on a set of rules adopted by the Commission in order to foster the undisturbed flow of credit to the real economy during the current financial crisis.

⁹ *Community guidelines on State aid for rescuing and restructuring firms in difficulty*; OJ C 244, 01.10.2004, p. 2–17, (hereinafter 'R&R Guidelines').

The second part also provides a forum for discussion of the various measures encompassed by the special State aid framework for ailing financial institutions adopted by the Commission under Article 107(3)(b) TFEU (formerly Article 87(3)(b) TEC). These measures include: guarantees of liabilities, recapitalisation, asset relief, and restructuring of the beneficiary firm.¹⁰ The second part is divided into four subchapters, with each subchapter presenting the conditions and safeguards concerning each of the above-mentioned types of government assistance.

The final section of the article contains a review and conclusions, ultimately arguing that the changes which were introduced by the Commission in respect of State measures granted to ailing financial institutions were a step in the right direction. The additional guidance issued by the Commission during the second phase of the global financial crisis provided an element of legal certainty in the application of the State aid rules. The special features of the financial market are outlined in the conclusions, and the arguments for and against the approach taken by the Commission during the current economic crisis are examined. Finally, some recommendations for the future application of State aid rules are proposed.

1. Phase I: The subprime crisis

The first phase of the ongoing financial crisis, over the period from September 2007 to September 2008, was triggered by the subprime mortgage crisis in the United States and is referred to as the ‘subprime crisis’, which spread throughout the world as global securities backed by subprime mortgages suffered significant, and in some cases total, losses in value. During this time the European Commission systematically assessed all support measures granted to ailing credit institutions according to the established EU State aid rules. This means that all economic advantages granted to banking sector companies were first assessed by the Commission under Article 87(1) TEC (now Article 107(1) TFEU). If the aid was characterised as State aid, possible grounds for justification were then considered (subchapter one). In this respect, the R&R Guidelines, issued on the basis of Article 87(3) TEC (now Article 107(3) TFEU), played an important role (subchapter two).

¹⁰ The Commission also set out rules for controlled winding-ups of insolvent financial institutions. This controlled liquidation is also, however, outside the scope of this article, which is limited to discussion of those measures aimed at the restoration of the long-term viability of beneficiary banks.

1.1. Treaty provisions

As stated above, every alleged subsidy was first of all examined under Article 87(1) TEC (now Article 107(1) TFEU) in order to ascertain whether it constituted State aid. Provided that the four cumulative criteria¹¹ stipulated therein were fulfilled, the measure at issue would then be put to the compatibility test to verify whether it could be deemed consistent with the common market. This is because the general prohibition against granting State aid, embodied in Article 87(1) TEC (now Article 107(1) TFEU), is not absolute. It is in fact subject to two sets of exceptions. Article 87(2) TEC (now Article 107(2) TFEU) lists three grounds which automatically entitle the aid to be granted if it falls within the categories defined (the so-called ‘mandatory exemptions’).¹² Article 87(3) TEC (now Article 107(3) TFEU) provides, in turn, certain types of cases in which the grant of financial support may be justified if the Commission considers it appropriate (the so-called ‘discretionary exemptions’).¹³

Given the exceptional situation of the financial sector at that time, the scope of the emergency measures adopted by the Member States, as well as the high risks involved, it is not surprising that most of the measures assessed were characterised as State aid. To this end, the Commission relied systematically on the well-established ‘market economy investor’ test.¹⁴

¹¹ According to Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the internal market.

¹² The following shall be compatible with the internal market: (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (b) aid to make good the damage caused by natural disasters or exceptional occurrences; (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany.

¹³ The following may be considered to be compatible with the internal market: (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation; (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State; (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect the trading conditions to an extent contrary to the common interest; (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent contrary to the common interest; (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

¹⁴ See: *WestLB riskshield* (Case ex CP 15/08) Commission Decision NN 25/2008 [2008] OJ C 189/03, par. 33–35; *Roskilde Bank A/S* Commission Decision NN 36/2008 [2008] OJ C 238/5, par. 34–38; *Sachsen LB* Case C 9/2008 (ex NN 8/2008, CP 244/2007) Commission Decision 2009/341/EC [2009] OJ L 104/34, par. 81–85. For more information on the principle of the market economy investor, see generally: Y. Simon, *The Application of the Market Economy Investor Principle in the German Landesbanken cases*, “European State Aid Law Quarterly” No 3/2007, p. 499.

As indicated above, there are several grounds for authorising State aid measures. However, it should be noted that during the first phase of financial crisis, Article 87(3)(c) TEC (now Article 107(3)(c) TFEU) was considered by the Commission as the only legal basis capable of providing a viable exemption from the general prohibition against granting State aid. In all its decisions adopted over subprime crisis period, the Commission refused to admit that subsidies provided to ailing financial institutions could be viewed as measures necessary to ‘remedy a serious disturbance in the economy of a Member State’, and as a consequence obtain a discretionary exemption under Article 87(3)(b) TEC (now Article 107(3)(b) TFEU).¹⁵ Following the opinion expressed in the *Crédit Lyonnais* decision,¹⁶ the Commission stated that Article 87(3)(b) TEC (now Article 107(3)(b) TFEU) ‘needs to be applied restrictively so that aid cannot be benefiting only one company or one sector but must tackle a disturbance in the entire economy of a Member State’.¹⁷ As regards the difficult situations faced by particular financial institutions, the Commission took the view that they resulted from individual problems encountered by these companies and that they could be addressed by tailor-made remedies under the rules for firms in difficulty.¹⁸ In this respect, it is important to note that, in a limited number of previous cases, the Commission had permitted the invocation of Article 87(3)(b) TEC (now Article 107(3)(b) TFEU) as a viable ground for justification.¹⁹ It can thus be argued that Commission did not fully recognise, at that time, the severity of the liquidity problems faced by the banking sector, problems which could lead not only to the insolvency

¹⁵ In those cases the Commission expressly refused to consider the compatibility of the relevant State aid measures with the exemption provided in Article 87(3)(b) TEC (now Article 107(3)(b) TFEU), e.g. *Rescue aid to Northern Rock* (Case ex. CP 269/07) Commission Decision NN 70/2007 [2008] OJ C 43/1, par. 38; *WestLB riskshield*, op.cit., par. 42; *Sachsen LB*, op.cit., par. 95. In the two decisions taken in September 2008, the Commission presented a slightly different opinion and stated that since the relevant State aid measures were found compatible on the basis of Article 87(3)(c) TEC, it was not necessary to assess whether Article 87(3)(b) TEC could, in the given case, be applied, see: *Rescue aid to Bradford & Bingley* Commission Decision NN 41/2008 [2008] OJ C 290/2, par. 52; *Rescue aid for Hypo Real Estate* Commission Decision NN 44/2008 [2008] OJ C 293/1, par. 32.

¹⁶ *Crédit Lyonnais group* Commission Decision 98/490/EC [1998] OJ L 221/28.

¹⁷ See: *WestLB riskshield*, op.cit., par. 41.

¹⁸ See: *WestLB riskshield*, op.cit., par. 42; *Sachsen LB*, op.cit., par. 95.

¹⁹ See: Editorial Comments, *Weathering through the credit crisis. Is the Community equipped to deal with it?*, CML Rev Vol. 46/2009, p. 9. The Commission rejected the arguments of the Member States in favour of the application of Article 87(3)(b) to the banking sector in the following cases: *Crédit Lyonnais* Commission Decision 95/547/EC [1995] OJ L 308/92, par. 7.1; *Crédit Foncier de France* Commission Decision 2001/89/EC [2001] OJ L 34/36, par. 68–70; *BAWAG-PSK* (Case C 50/2006 (ex NN 68/2006, CP 102/2006)) Commission Decision 2008/263/EC [2008] OJ L 83/7, par. 164–165.

of some financial institutions, but more generally trigger an unprecedented global crisis.

1.2. Rescue and restructuring (R&R) guidelines

The notion of aid aimed at facilitating the development of certain economic activities embraces, *inter alia*, emergency State measures for financial institutions facing liquidity problems. With a view to providing more specific guidance on the application of Article 87(3)(c) TEC (now Article 107(3)(c) TFEU), the Commission issued special guidelines on what was termed ‘rescue and restructuring aid’ for firms in difficulty. Although each guideline (including the one in question) belongs to the realm of soft law,²⁰ and consequently is not binding in the legal sense, one should not underestimate the role played by these instruments in the context of EU law. The main advantage of these guidelines is that they give an insight into Commission’s way of thinking and articulate its understanding of the relevant provisions of EU law. In other words, the Commission makes some sort of commitment that it will comply with the principles, as well as the way of interpretation, stipulated in its Guidelines.²¹ Hence the relevance of here taking a closer look at the substantive provisions of the R&R Guidelines.

While State aid measures are inherently selective in terms of recipients,²² nonetheless rescue aid as well as aid for restructuring are especially destined for a particular category of firms, i.e. so-called ‘firms in difficulty’. Within the meaning of the R&R Guidelines, a firm is considered as being in difficulty when it is unable to stem losses which, without the outside intervention of public authorities, will ‘almost certainly condemn it to going out of business in the short or medium term’.²³ The wording of this notion is rather general and vague, bringing about as a result the necessity to conduct an economic evaluation of the prospects of a company in distress in order to ascertain whether the losses it is incurring may result in its bankruptcy.²⁴ Beneficiaries eligible for R&R aid are limited to undertakings operating on a particular mar-

²⁰ For more information about soft law instruments in EU law: J. Klabbers, *Informal Instruments before the European Court of Justice*, “Common Market Law Review” Vol. 31/1994, p. 997.

²¹ See: T-214/95 *Het Vlaamse Gewest (Flemish Region) v. Commission* [1998] ECR II-717, par. 79; T-187/99 *Agrana Zucker und Stärke AG v. Commission* [2001] ECR II-1587, par. 56; T-17/03 *Schmitz-Gotha Fahrzeugwerke GmbH v. Commission* [2006] ECR II-1139, par. 42; T-369/06 *Holland Malt BV v. Commission* [2009] ECR II-3313, par. 93.

²² See: Article 107(1) TFEU.

²³ See: R&R Guidelines, point 9.

²⁴ M. Szydło, *Pomoc państwa na ratowanie i restrukturyzację przedsiębiorstw zagrożonych w prawie wspólnotowym (Rescue and Restructuring State Aid for firms in difficulty in European Community Law)*, “Przegląd Ustawodawstwa Gospodarczego” No. 2/2006, p. 3.

ket segment for at least three years. As a result, all newly created firms, as well as those which emerged from the liquidation of a previous firm or merely took over such firm's assets, are expressly excluded.²⁵ Some restrictions are also imposed on companies belonging to or being taken over by a larger business group.²⁶

As indicated above, the firm in difficulty is characterised by two distinctive features: (i) the firm is incurring losses which cannot be stemmed using its own resources, including the funds it is able to obtain from its owner/shareholders or creditors;²⁷ and (ii) due to the total amount of losses incurred the failure of the firm is almost certain.²⁸ This will particularly be the case when the company concerned fulfils, under its applicable domestic law, the criterion for being the subject of collective insolvency proceedings.²⁹ A bank should also be qualified as being 'in difficulty' if its total capital ratio is so low that it may fall below the minimum levels required under the applicable national banking law.³⁰

As regards the material scope of the R&R Guidelines, there are two kinds of aid that may be provided to firms in difficulty: (i) rescue aid; or (ii) aid for restructuring of the business company. The term 'rescue aid' is generally understood to mean temporary and reversible liquidity assistance designed to keep an ailing firm afloat for the time necessary to enable it to draw up a restructuring or liquidation plan.³¹ Restructuring aid, on the other hand, is aimed at restoring a firm's long-term viability.³² The restructuring of a business company should be viewed as a twofold process. In order to achieve the best results, capital injections and other forms of liquidity assistance (so-called financial restructuring) should be timed to coincide with the reorganisation and rationalisation of the firm's activities (so-called physical restructuring).³³ What is more, restructuring aid should not consist of financial support de-

²⁵ See: R&R Guidelines, point 12.

²⁶ See: R&R Guidelines, point 13. For more information on the scope and effects of restrictions on granting rescue and restructuring aid to companies, see: P. Nicolaidis, M. Kekelekis, *When do Firms in Trouble Escape from State Aid Rules?*, "European State Aid Law Quarterly" No. 1/2005, p. 19–20.

²⁷ To find out more about the exact meaning of the first condition see: *Bankgesellschaft Berlin AG* Commission Decision 2005/345/EC [2005] OJ L 116/1, par. 157–158.

²⁸ To find out more about the precise meaning of the second condition see: *Infineon Technologies* Commission Decision 2005/373/EC [2005] OJ L 120/5, par. 34–37.

²⁹ *Northern Rock*, op.cit., par.41; *Sachsen LB*, op.cit., par. 96.

³⁰ *Bradford & Bingley*, op.cit., par. 38.

³¹ See: R&R Guidelines, point 15.

³² See: R&R Guidelines, point 17.

³³ See: P. Anestis, S. Mavroghenis, S. Drakakakis, *Rescue and Restructuring Aid. A Brief Assessment of the Principal Provisions of the Guidelines*, "European State Aid Law Quarterly" No. 1/2004, p. 30.

signed to make good past losses unless it simultaneously tackles the reasons for those losses.³⁴ It is worth mentioning that both forms of aid are subject to strict conditions, as well as certain requirements that rely principally on economically sound foundations.³⁵

Pursuant to point 25 of the R&R Guidelines, State aid for rescuing a firm in difficulty must, in order to be deemed compatible with the common market, satisfy five cumulative criteria. Analysis of these requirements in this article is accompanied by examples of their practical application in cases concerning the granting of State aid measures to ailing financial institutions during the subprime crisis.

First, the aid must consist of liquidity support in the form of loan guarantees or loans granted at a market-based interest rates for a maximum period of six months after the disbursement of the first instalment to the firm at issue. With regard to rescue aid in the banking sector, the R&R Guidelines provide for the possibility to broaden the scope of liquidity assistance in order to enable the relevant credit institutions to temporarily carry on their banking business in accordance with the prudential legislation in force. During the first phase of the financial crisis, a number of particular measures were qualified by the Commission as rescue aid, notably: (i) a guarantee on deposits;³⁶ (ii) a working capital facility;³⁷ (iii) the acquisition of ‘toxic’ commercial paper, providing that the associated risks were still incurred by the previous owner;³⁸ (iv) a default guarantee for the repayment of liquidity lines.³⁹ In the *Bradford & Bingley* decision, the Commission confirmed that a measure of a structural nature, which needed to be implemented immediately so as to halt a worsening of the financial situation of a company, might exceptionally be undertaken by a grant of rescue aid.⁴⁰ The Commission also showed some flexibility concerning the maximum duration of the rescue aid, by allowing the interest payment of a relevant grant facility to be deferred for five years.⁴¹

Second, the aid must be warranted on the grounds of serious social difficulties and have no unduly adverse spill-over effects on other Member States. The requirement that a measure be justified on the grounds of serious social

³⁴ A comparison between rescue aid and aid for restructuring of a company is carried out in: M. Szydło, *op.cit.*, p. 6.

³⁵ For a more in-depth economic analysis of provisions of the R&R Guidelines, see: P. Nicolaidis, M. Kekelelis, *An Economic Analysis of EC Guidelines on State Aid for the Rescue and Restructuring of Companies in Difficulty*, “*Intereconomics*” No. 39/2004, p. 204–212.

³⁶ *Northern Rock*, *op.cit.*, par. 44.

³⁷ *Bradford & Bingley*, *op.cit.*, par. 43–45.

³⁸ *Sachsen LB*, *op.cit.*, par. 99.

³⁹ *Hypo Real Estate*, *op.cit.*, par. 27.

⁴⁰ *Bradford & Bingley*, *op.cit.*, par. 46.

⁴¹ *Northern Rock*, *op.cit.*, par. 46.

difficulties is met, notably, when: (i) provision of the measure protects depositors of the bank in question and helps to maintain confidence in the relevant national financial system;⁴² (ii) denial of granting the rescue aid would lead to the bankruptcy of the relevant bank and, as a consequence, would cause a series of employee redundancies.⁴³ In the Commission's view, the negative spill-over effects are eliminated when, for example: (i) the beneficiary bank receives only the cash needed for a week in advance, and consequently cannot behave aggressively on the market;⁴⁴ (ii) the main recipient of the aid is being wound up.⁴⁵

Third, the Member State concerned must undertake to submit to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan, or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated.⁴⁶ In the case of non-notified aid, the six-month period should be counted from the day when the first implementation of a rescue aid measure takes place.

Fourthly, the amount of aid must be proportional, which means that it should be restricted to the minimum amount necessary to keep an ailing firm in business for the period during which the aid is authorised. This will be the case, for instance, when the amount of the rescue measure corresponds to that portion of the company's liquidity requirements that cannot be financed using its own resources, and the amount of aid is based on a liquidity forecast that is deemed plausible.⁴⁷ The exact amount of aid should be based on the liquidity needs of the relevant company, covering the costs of salaries and routine supplies. In order to facilitate the correct calculation of the permissible amount of aid, a special formula has been drawn up by the Commission in the form of an annex to the R&R Guidelines.

Lastly, the rescue aid should, as a matter of principle, constitute a one-off operation.⁴⁸ This requirement is known as the 'one time, last time' principle. This means that the repeated provision of rescue aid in order to keep an inefficient and unviable firm artificially alive in the market is not permitted.⁴⁹

⁴² *Bradford & Bingley*, op.cit., par. 47.

⁴³ *Northern Rock*, op.cit., par.49; *WestLB riskshield*, op.cit., par. 33–35; *Roskilde Bank A/S*, op. cit., par. 56; *Sachsen LB*, op.cit., par. 103.

⁴⁴ *Northern Rock*, op.cit., par. 49.

⁴⁵ *Bradford & Bingley*, op.cit., par. 47.

⁴⁶ *Hypo Real Estate*, op.cit., par. 29.

⁴⁷ *Ibidem*, par. 30.

⁴⁸ See: *Aid scheme implemented by Portugal in favour of the pigfarming sector* Commission Decision 2001/86/EC [2001] OJ L 29/49, par. 43; *Hilados y Tejidos Puigneró SA* Commission decision 2003/876/EC [2003] OJ L 337/14, par. 138.

⁴⁹ See: *Thüringer Motorenwerke GmbH* Commission Decision 98/664/EC [1998] OJ L 316/20, par. VI (b).

Moreover, if less than ten years have elapsed since the last rescue aid was granted, no further rescue or restructuring aid is allowed unless there exists exceptional and unforeseeable circumstances for which the company receiving aid was not responsible.⁵⁰

Following our review of the conditions accompanying aid to a firm in difficulty, the next issue is the criteria set forth in the R&R Guidelines for granting restructuring aid to a firm qualified as a firm in difficulty. First, the provision of the aid must be subject to the implementation of a restructuring plan capable of restoring the long-term viability of the relevant company within a reasonable timeframe and on the basis of realistic assumptions as to future operating conditions.⁵¹ The restructuring plan must, *inter alia*, describe the circumstances that led to the company's difficulties and include a market survey. The future prospects of the relevant firm are appraised on the basis of at least three different scenarios, reflecting best-case, worst-case, and intermediate assumptions. The objective of the R&R Guidelines' provisions is to create, after completion of the restructuring plan, a firm that will not only be able to cover all its costs, including depreciation and financial charges, but will also generate enough capital to compete in the marketplace using its own resources.⁵²

Second, appropriate compensatory measures must be envisaged in order to reduce, as far as possible, any adverse effects on competitors of the aid granted.⁵³ These measures may include, in particular, the divestment of assets, reductions in capacity or market presence, and the reduction of entry barriers on the relevant market.⁵⁴ The compensatory measures must, however, be in proportion to the distortive effects of the aid. Each grant of restructuring aid should be assessed on a case-by-case basis, taking into due account all the relevant information at the disposal of the Commission, including that supplied by interested outside parties.⁵⁵

Third, the amount and intensity of the aid must be limited to the strict minimum required to enable the restructuring to be undertaken in light of the existing financial resources of the company, its shareholders, or the business group to which it belongs.⁵⁶ It is important to note that, when assessing the

⁵⁰ See: R&R Guidelines, point 73. During the first phase of the global economic crisis the Commission systematically applied the 'one time, last time' principle to rescue measures granted to financial institutions. See e.g. *Northern Rock*, op.cit., par. 52; *WestLB riskshield*, op.cit., par. 57.

⁵¹ See: R&R Guidelines, point 35.

⁵² See: R&R Guidelines, point 37.

⁵³ For more information on compensatory measures, see: P.Nicolaides, M.Kekelekis, *When do Firms in Trouble...*, op.cit., p. 20–21.

⁵⁴ For more examples of compensatory measures, see: P. Anestis, S. Mavroghenis, S. Drakakakis, op.cit., p. 31.

⁵⁵ See: R&R Guidelines, point 40.

⁵⁶ See: R&R Guidelines, point 43.

relevant restructuring aid, the Commission takes into account any rescue aid granted beforehand. What is more, the R&R Guidelines impose an obligation on the beneficiary company to make a significant and real contribution to the restructuring plan from its own resources, including the sale of assets that are not essential to the firm's survival, or using external financing at market conditions. As far as 'significant contribution' is concerned, the R&R Guidelines set out thresholds, which can be reduced only in exceptional circumstances.⁵⁷ The Commission endeavors to ring-fence the dangers associated with possible competition distortions by verifying that the amount of the aid or the form in which it is granted is such as to avoid providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.⁵⁸

Lastly, the beneficiary must undertake to adhere to the restructuring plan endorsed by the Commission, and the Member State granting the aid must commit itself to assure the submission of regular detailed reports to enable the Commission to verify whether the restructuring plan is being implemented properly.⁵⁹

During the subprime period of the financial crisis, only one final decision concerning the restructuring aid was adopted by the Commission, being a decision of conditional approval in the case of Landesbank Sachsen Girozentrale (hereinafter 'Sachsen LB'). In its assessment of the restructuring aid, the Commission followed the above-mentioned criteria. First of all, the abandonment of the loss-generating activities and the refocusing of Sachsen LB on corporate clients and wealthy private clients was evaluated positively by the Commission. In addition, the restructuring plan was accompanied by a market study and based on sound financial projections, which convinced the Commission that the firm would restore its long-term viability.⁶⁰ The restructuring plan comprised the sale of certain assets, the closure of Sachsen LB's Irish subsidiary, undisclosed divestitures, and the termination of Sachsen LB's proprietary trading and international real estate activities. The Commission viewed these measures as sufficient to justify the aid granted.⁶¹ Finally,

⁵⁷ The Commission will normally require the following contributions: at least 25 per cent in the case of small enterprises, at least 40 per cent for medium-sized enterprises and at least 50 per cent for large firms. See: Guidelines, point 44. It should be noted that the Commission's previous practice shows that in certain circumstances the contribution of as little as 11 per cent may be regarded as significant. See: *KHK Verbindetechnik GmbH Brotterode* Commission Decision 2002/71/EC [2002] OJ L 31/80, par. 61–64.

⁵⁸ See: R&R Guidelines, point 45.

⁵⁹ See: R&R Guidelines, point 49.

⁶⁰ See: *Sachsen LB*, op.cit., par. 106–109.

⁶¹ *Ibidem*, par. 120–125.

a change of the Sachsen LB management was considered a ‘valuable signal against moral hazard’.⁶²

2. Phase II: ‘systemic crisis’

After the collapse of Lehman Brothers in September 2008, the global economy entered into a severe recession. The intensification of the crisis and the reluctance of banks to lend to each other made access to liquidity progressively more difficult.

In the light of the seriousness of the ongoing financial crisis and the special characteristics of the financial markets, the Commission acknowledged that the crisis had reached a dimension to qualify as ‘a serious disturbance of the economy of a Member State’ under Article 87(3)(b) TEC (now Article 107(3)(b) TFEU). With a view to providing legal certainty, the Commission adopted and proclaimed four Communications:

- Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis (hereinafter ‘Banking Communication’);⁶³
- Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition (hereinafter ‘Recapitalisation Communication’);⁶⁴
- Communication on the treatment of impaired assets in the Community banking sector (hereinafter ‘Impaired Assets Communication’);⁶⁵
- Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under State aid rules (hereinafter ‘Restructuring Communication’)⁶⁶.

The first three communications set out the prerequisites for the compatibility with EU law of the main types of assistance granted by Member States to financial institutions, i.e. guarantees on liabilities, recapitalisation and asset relief measures. The fourth Communication details the special features that a restructuring plan (or a viability plan) should display in the context of the current global financial crisis. These measures will be discussed individually in the following subchapters.

⁶² *Ibidem*, par. 126.

⁶³ OJ C 270, 25.10.2008, p. 8–14.

⁶⁴ OJ C 10, 15.1.2009, p. 2–10.

⁶⁵ OJ C 72, 26.3.2009, p. 1–22.

⁶⁶ OJ C 195, 19.8.2009, p. 9–20.

2.1. Guarantees

The Banking Communication provides guidance on the underlying standards and safeguards in relation to one of the most important State measures, i.e. guarantees. As far as general guarantee schemes are concerned, the Commission underscores that their eligibility criteria should be objective and non-discriminatory.⁶⁷ In other words, guarantee measures must be available to all financial institutions incorporated in a given Member State, including subsidiaries and branches of foreign banks, on the condition that they have significant activities there.⁶⁸ In order to address the bottleneck limiting access to liquidity, the guarantee may protect not only retail deposits but also certain types of wholesale deposits and even short-term and medium-term debt instruments.⁶⁹ However, subordinated debt should, in principle, be excluded from coverage by the guarantee scheme.⁷⁰ According to the Banking Communication, a guarantee may be approved for up to two-year period, provided that a system of regular review (i.e. every six months) is safeguarded.⁷¹ In some cases, however, longer coverage of debt has been allowed, subject to additional safeguards,⁷² due to the exceptional circumstances of a relevant Member State⁷³.

In order to minimise the amount of aid, the Banking Communication requires a significant contribution from the beneficiaries and/or the sector to the cost of the guarantee and the cost of State intervention in the event the guarantee should become activated.⁷⁴ It is worth emphasising that, unlike in the

⁶⁷ See: Banking Communication, point 18. See also: *Guarantee scheme for banks in Denmark* Commission decision NN 51/2008 [2008] OJ C 273/2, par.6; *Rescue package for credit institutions in Germany* Commission decision N 512/2008 [2008] OJ C 293/2, par. 5–7.

⁶⁸ See: Commission press release MEMO/08/615, 12.10.2008, ‘State aid: Commission welcomes revised Irish guarantee scheme’. In the first version of the Irish guarantee scheme eligibility was limited to domestic financial institutions. In response to the Commission’s critical assessment of this criterion, the scheme was amended by Ireland on 12 October 2008 in order to comply with the principle of non-discrimination.

⁶⁹ See: Banking Communication, points 19–21.

⁷⁰ See: Banking Communication, point 23. See also: A. Arora, *The 2007–2009 Banking Crisis and the EU’s Regulatory Response*, “European Business Law Review” Vol. 21/2010, p.608–609.

⁷¹ See: Banking Communication, point 24.

⁷² *Financial Support Measures to the Banking Industry in the UK* Commission decision N 507/2008 [2008] OJ C 290/4, par.60; *Rescue package for credit institutions in Germany*, op.cit, par. 65; *Support scheme for banks’ funding in Poland* Commission decision N 208/2009 [2009] OJ C 250/1, par. 11.

⁷³ *Support measures for the banking industry in Sweden* Commission decision N 533/2008 [2008] OJ C 308/6, par. 44; *Guarantee scheme for banks’ funding in Finland* Commission decision N 567/2008 [2008] OJ C 309/7, par. 39–40.

⁷⁴ See: Banking Communication, point 25.

R&R Guidelines, no exact thresholds are set forth in the Communication.⁷⁵ This solution should be evaluated positively in the light of aggravating market conditions in the banking sector, as it makes the use of guarantee schemes more flexible. The Commission also points out that the fees charged for the provision of the guarantee schemes should be as close to the market price as possible. If the relevant beneficiary cannot afford to pay the totality of the calculated recompensation, the respective Member State may condition the provision of the guarantee upon the introduction of a claw-back mechanism or 'better fortunes' clauses.⁷⁶ Furthermore, the pricing mechanisms should take account of the degree of risk and the beneficiaries' respective credit profiles and needs.⁷⁷

The Banking Communication lays particular emphasis on guarding against negative effects for non-beneficiary banks, since those who benefit from the government guarantee may be considered as less susceptible to the deteriorating market conditions and, consequently, attract more investors or retail customers. The Commission thus suggests that behavioural constraints must be envisaged so as to avoid the undue distortions of competition.⁷⁸

The same standards and safeguards are applied when it comes to granting a guarantee to an individual financial institution. One remark is necessary, however. When a guarantee is called upon, the beneficiary bank has to undertake to submit a restructuring or liquidation plan, which will be then separately assessed by the Commission as to its compliance with the State aid rules.⁷⁹

2.2. Recapitalisation of financial institutions

With respect to recapitalisation, the Banking Communication sets out a number of conditions. The overriding goal of providing public funds to strengthen the capital base of banks, either directly or through the injection of

⁷⁵ See: R&R Guidelines, point 44.

⁷⁶ See: *Guarantee scheme for banks in Ireland* Commission decision NN 48/2008 [2008] OJ C 312/2, par. 23.

⁷⁷ For example, the remuneration for the guarantee under the German scheme should, in some cases, include a risk premium corresponding to the individual financial institution's credit default swap spread. See: *Rescue package for credit institutions in Germany*, op.cit., par. 22. Similarly: *Financial Support Measures to the Banking Industry in the UK*, op.cit., par. 15. An extensive list of the various factors that should be considered when setting the appropriate guarantee fee has been outlined in the Irish guarantee scheme, see: *Guarantee scheme for banks in Ireland*, op.cit., par. 22.

⁷⁸ See: Banking Communication, point 27. The German guarantee scheme prohibited marketing the State guarantee as a commercial advantage, see: *Rescue package for credit institutions in Germany*, op.cit., par. 23. Limitations on the size of the balance sheet of the beneficiary institutions has been proposed in the Finnish guarantee scheme, see: *Guarantee scheme for banks' funding in Finland*, op.cit., par. 14.

⁷⁹ See: Banking Communication, point 30. See also: *State aid to Banco Privado Português-BPP* Commission Decision NN 71/2008 [2009] OJ C 174/1, par. 14.

private capital, is to prevent 'negative systemic spillovers'.⁸⁰ As with guarantees, the recapitalisation schemes must: (i) contain objective and non-discriminatory criteria for eligibility;⁸¹ and (ii) be limited to the minimum necessary.⁸² In order to be deemed proportional, the relevant Member State should, in principle, receive shares of a value corresponding to the amount of public funds provided to the beneficiary of the recapitalisation. In addition, the Commission opts for the use of preferred shares or, alternatively, the introduction of claw-back mechanisms or better fortunes clauses. Due to the irreversible nature of the capital injections, the Commission points out the need to include appropriate *ex ante* behavioural safeguards and mechanisms to monitor their implementation.⁸³

The main difficulties that have appeared in relation to recapitalisation schemes involve the lack of precise rules on calculation of the proper remuneration rate. In order to provide further guidance in this respect, the Commission decided to issue a new Communication, the so-called 'Recapitalisation Communication'. Pursuant to point 19 of the Recapitalisation Communication, there are two key elements that should be borne in mind when setting the remuneration rate of capital injections: (i) closeness to market prices; and (ii) exit incentives. What is more, the Commission introduced a distinction between fundamentally sound banks, on the one hand, and distressed, less-performing banks, on the other hand.⁸⁴ This distinction is of great importance, as the remuneration rate should reflect, *inter alia*, the current risk profile of each beneficiary.⁸⁵

As regards the fundamentally sound banks, the Commission is willing to accept below-market remunerations in order to enhance the stability of the banking sector and ensure lending to the real economy.⁸⁶ Based on the Eurosystem recommendations, the price of capital injections should consist of a base rate, to which a risk premium is added.⁸⁷ The latter reflects, in particular, the type of capital used, the individual risk profile of the beneficiary bank, and the nature of safeguards against abuse of public funding linked to the recapitalisation measure. The Recapitalisation Communication pays particular attention to exit incentives, which should encourage the redemption of State

⁸⁰ See: Banking Communication, point 34.

⁸¹ See: Banking Communication, point 37.

⁸² See: Banking Communication, point 38.

⁸³ *Financial Support Measures to the Banking Industry in the UK*. op.cit., par. 51.

⁸⁴ See: Recapitalisation Communication, point 12.

⁸⁵ See: Recapitalisation Communication, point 23.

⁸⁶ See: Recapitalisation Communication, point 24.

⁸⁷ Recommendations of the ECB Governing Council on the pricing of recapitalisations, 20.11.2008.

capital. The Commission suggests redemption clauses, a restrictive dividend policy, the use of increasing remuneration over time, or mechanisms that encourage the raising of private capital.⁸⁸ Furthermore, behavioural safeguards may be required so as to limit the potential adverse effects on competition.⁸⁹ The approval of capital injections to ailing financial institutions is conditional on two additional requirements: (i) a higher remuneration; and (ii) an obligation to draw up a thorough and far-reaching restructuring plan or carry out a winding-up of the beneficiary.⁹⁰

The recapitalisation should be subject to regular review. The first report on the implementation of the measures undertaken must be communicated to the Commission within six months from the provision of the relevant capital injection. The Commission will assess, *inter alia*, the long-term viability of the recipient of the aid and the steps aimed at limiting the distortions of competition.⁹¹

2.3. Treatment of impaired assets

The announcement and implementation of rescue measures adopted by Member States beginning in October 2008 played an important role initially in avoiding a meltdown of the EU financial system. Unfortunately, by early 2009 the envisioned evolution in lending to the real market economy still lagged far below expectations. The perpetual uncertainty about the value and location of impaired assets seemed to be the key reason for the insufficient flow of credit. On 25 February 2009, after careful deliberation and numerous discussions with the Member States, the Commission adopted the Impaired Assets Communication.

The main objective of this Communication is to provide guidance on state intervention with respect to the removal of impaired or toxic assets from the balance sheets of banks. As regards the assets eligible for relief, it is for Member States to decide which categories of assets ('baskets') will be covered by their national asset relief schemes.⁹² Although there is no common definition

⁸⁸ See: *Anglo-Irish Bank* Commission decision N 9/2009 [2009] OJ C 177/1, par. 67–68; *Allied Irish Bank* Commission decision N 241/2009 [2009] OJ C 223/2, par. 79.

⁸⁹ For example, the Mortgage and Land Bank of Latvia pledged to: (i) abstain from entering into any new commercial lending activities; and (ii) keep limited business relations with its existing customers. See: *Recapitalization of "The Mortgage and Land Bank of Latvia"* Commission decision NN 60/2009 [2009] OJ C 323/5, par. 57. In some cases prohibitions against mass marketing of the measure is included. See: *Anglo-Irish Bank*, op.cit., par. 69.

⁹⁰ See: Recapitalisation Communication, points 43–45. But see: *Further recapitalisation of Hypo Real Estate* Commission decision N 161/2010 [2010] OJ C 190/7, par. 36–37.

⁹¹ See: *State Aid to Aegon N.V.* Commission decision N 569/2008 [2009] OJ C 9/3, par. 58.

⁹² More detailed guidance on the definition of those categories is provided in Annex III, which is attached to the Impaired Assets Communication.

of impaired assets, the Commission points out that this notion should encompass, in particular, assets that have either a much-reduced value or no value at all in comparison with their book values. Furthermore, the asset relief measure may take several forms, such as: asset purchase, asset insurance, asset swap, or hybrid systems.⁹³ It is relevant to note that all asset relief schemes should have an enrolment window not exceeding six months from the launch of the particular programme. The objective of this requirement is to limit speculation about the level of relief.

The Impaired Assets Communication formulates a number of principles that every asset relief measure must satisfy: (i) full *ex ante* transparency and disclosure of the impairments; (ii) correct valuation of assets; (iii) adequate burden-sharing of the costs between the State and the beneficiary. First of all, the full *ex ante* disclosure of risks on assets from which the potential beneficiary bank wishes to relieve itself is required.⁹⁴ What is more, the bank seeking to benefit from such relief is under an obligation to submit all available information in order to assess its capital adequacy and its prospects for future viability.⁹⁵ With reference to the valuation of assets, the current market value should, whenever possible, be considered a suitable benchmark. The Commission is, however, willing to accept the real economic value with a view to achieving the relief effect.⁹⁶ In addition, the valuation of covered assets should be certified by recognised independent experts and validated by the relevant supervisory authority.⁹⁷

As Luja points out, the provision of asset relief ‘should not be a burden only to the state that steps in’.⁹⁸ In order to minimise moral hazard and avoid excessive aid, the Commission expects Member States to bear the losses associated with impaired assets to the maximum extent. If the upfront beneficiary contribution is deemed insufficient, it may be complemented by the inclusion of claw-back clauses or, in the case of insurance schemes, by a clause of ‘first loss’ and a clause of ‘residual loss sharing’.⁹⁹

⁹³ See: Impaired Assets Communication, point 11.

⁹⁴ See: *Germany German asset relief scheme* Commission decision N 314/2009 [2009] OJ C 199/3, par. 46.

⁹⁵ See: *Establishment of a National Asset Management Agency (NAMA)* Commission decision N 725/2009 [2010] OJ C 94/10, par. 130.

⁹⁶ When setting the correct valuation of assets eligible for relief, the Commission refers to a transfer value reflecting the underlying long-term economic value of the assets on the basis of underlying cash flows and broader time horizons. See: Impaired Assets Communication, point 40.

⁹⁷ See: *Restructuring of Royal Bank of Scotland and participation in the Asset Protection Scheme* Commission decision N 422/2009 and N 621/2009 [2010] OJ C 119/1, par. 150–151.

⁹⁸ R. Luja, *op.cit.*, p. 152.

⁹⁹ See: Impaired Assets Communication, point 24. See: *Germany German asset relief scheme*, *op.cit.*, par. 54.

If the beneficiary bank does not fulfil the above-mentioned conditions, the Commission may impose compensatory measures, such as: (i) downsizing or divestment of profitable business units and subsidiaries; or (ii) limitation of commercial expansion.¹⁰⁰ Finally, the Commission underlines the importance of assuring the long-term viability of the financial institutions granted aid. In order to achieve this goal, restructuring may be deemed necessary, especially in the case of a bank that has already benefited from other forms of State aid.¹⁰¹

2.4. Restructuring of ailing financial institutions

The final step towards the resolution of the current financial crisis involves the restructuring of those credit institutions which have received significant amounts of financial support from the respective Member States. On 22 June 2009 the Commission adopted the Restructuring Communication.¹⁰² Together with the three previous Communications, these rules form a body of guidance for assessing various types of financial support measures granted to banks during the ongoing economic crisis.¹⁰³

The Restructuring Communication sets out the rules that will be applied by the Commission when assessing the restructuring of financial institutions in the current crisis. It should be highlighted, however, that fundamentally sound banks are exempted from the obligation to devise a restructuring plan. In such cases, the submission of a viability plan will suffice.¹⁰⁴ The conditions and specific circumstances which trigger the necessity to submit a restructuring plan have been explained in the Banking Communication, the Recapitalisation Communication, and the Impaired Assets Communication.¹⁰⁵ As an example, a restructuring plan should be presented in the case of a distressed bank that has been recapitalised by a Member State, or when a bank which has already received State support applies for asset relief.

¹⁰⁰ See: Impaired Assets Communication, point 57–59. See also: *Restructuring of Royal Bank of Scotland and participation in the Asset Protection Scheme*, op.cit., par. 106, 108–109.

¹⁰¹ See: Impaired Assets Communication, points 53–56.

¹⁰² The Restructuring Communication stipulated an expiration date of 31 December 2010. However, its application has been extended to restructuring aids notified by 31 December 2011. See: *Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis*; OJ C 329, 7.12.2010, p. 7–10, point 7.

¹⁰³ See: R. Monstad, K. Van de Castele, *State aid: main developments between 1 May and 31 August 2009*, “Competition Policy Newsletter” No. 3/2009, p. 61.

¹⁰⁴ The principles outlined in section 2 of the Restructuring Communication apply by analogy to beneficiary financial institutions that are under an obligation to demonstrate viability.

¹⁰⁵ For an illustration of situations when a beneficiary bank needs to devise and submit a restructuring plan, see: A. Bomhoff, A. Jarosz-Friis, N. Pesarei, *Restructuring banks in crisis – overview of applicable State aid rules*, “Competition Policy Newsletter” No. 3/2009, p. 5–6.

In order to be deemed compatible with the internal market under Article 107(3)(b) TFEU, the restructuring of a financial institution must comply with three principles. First, the restructuring plan has to lead, within a maximum of five years, to the restoration of long-term viability of the relevant financial institution without the recurrent need for government intervention.¹⁰⁶ ‘Long-term viability’ means that a bank is able to cover all its costs, including depreciation and financial charges, and generate an appropriate return on equity.¹⁰⁷ From the Commission’s point of view, the liquidity, solvency and profitability of the beneficiary bank are the main indicators of its viability.¹⁰⁸ The restructuring plan needs to be thorough, based on rigorous stress testing of the bank’s business model in order to demonstrate strategies to achieve viability also under adverse economic conditions.¹⁰⁹ Furthermore, the causes of the difficulties faced by the financial institution must be identified.¹¹⁰ If a financial institution cannot be restored to viability, the restructuring plan should indicate how it can be orderly wound-up.

Second, State restructuring aid must be kept to the minimum and the beneficiary financial institutions should first use their own resources to finance their restructuring, for instance, by absorbing losses with available capital.¹¹¹ In other words, each financial institution must make an appropriate ‘own contribution’ to restructuring costs, to be provided by the former shareholders and capital holders of the aided bank within the framework of the restructuring process. This objective is achieved through: (i) fixing an appropriate price; (ii) temporary restrictions on payment of dividends and coupons on hybrid capital by banks operating at a loss; and (iii) various behavioural commitments.¹¹² The Restructuring Communication indicates that the restructuring aid must be limited to covering only those costs which are necessary in order to restore viability.¹¹³ It should be emphasised that the requirement of burden-sharing plays an important role in ensuring that competition distortions are effectively limited (see below) and moral hazards adequately addressed.

¹⁰⁶ See: Restructuring Communication, points 9 and 15.

¹⁰⁷ See: Restructuring Communication, point 13.

¹⁰⁸ See: *Restructuring of Kommunalkredit Austria AG* Commission decision SA.32745 (2011/NN) [2011] OJ C 239/2, par. 64.

¹⁰⁹ See: *Restructuring of Sparkasse KölnBonn* Commission decision C 32/2009 (ex NN 50/2009) [2011] OJ L 235/1, par. 83; *Restructuring of CajaSur* Commission decision N 392/2010 [2010] OJ C 357/13, par. 72.

¹¹⁰ See: *Restructuring aid to Ethias SA* Commission decision N 256/2009 [2010] OJ C 252/5, par. 106–109.

¹¹¹ See: *Restructuring of Sparkasse KölnBonn*, op.cit., par. 88–91; *Restructuring of CajaSur*, op.cit., par. 80.

¹¹² See: *Restructuring of Kommunalkredit Austria AG*, op.cit., par. 87–89.

¹¹³ See: Restructuring Communication, point 23.

Third, the restructuring plan should include effective and proportionate measures limiting distortions of competition and ensuring a competitive banking sector. The Restructuring Communication indicates that the Commission, when approving a restructuring plan, has to take into account in its assessment: (i) the amount of aid as well as the conditions and circumstances under which that aid was granted; and (ii) the size, scale and scope of activities that the aided bank will have on the market after the restructuring.¹¹⁴ Moreover, the restructuring plan should contain sufficient measures to ensure that the State aid is not used to the detriment of competitors which did not receive similar public support. In other words, a level playing field needs to be maintained between banks which benefit from State aid and those operating without it. In order to minimise competition distortion, the beneficiary banks may be subject to: (i) structural measures, such as the obligation to divest itself of subsidiaries or branches and specific portfolios of customers or business units; and/or (ii) behavioural safeguards.¹¹⁵ Such a plan must include steps to insure that a situation is not created whereby the State support weakens incentives for non-beneficiaries to compete, invest, and innovate, and that it does not create entry barriers.¹¹⁶

The restructuring plan must be followed by regular reports in order to allow the Commission to verify that it is being implemented properly.¹¹⁷ In this respect, a Member State may appoint a monitoring trustee, who will provide semi-annual monitoring reports.¹¹⁸

Conclusions

The financial crisis has been, for the last four years, the most challenging issue faced by political and economic leaders across Europe and the world. The volume and scope of aid approved by the Commission during that period has been unprecedented.¹¹⁹ It should be recalled that until the beginning of October 2008 all State measures were assessed by the Commission under Article

¹¹⁴ See: Restructuring Communication, point 30. See also: *Restructuring of Kommunalkredit Austria AG*, op.cit., par. 93–100.

¹¹⁵ See: *Restructuring of Sparkasse KölnBonn*, op.cit., par. 95–100; *Agricultural Bank of Greece* Commission decision SA.31154 (N 429/10) [2011] OJ C 317/5, par. 85–91.

¹¹⁶ See: Restructuring Communication, point 28.

¹¹⁷ See: Restructuring Communication, point 46.

¹¹⁸ See: Restructuring Communication, point 30. See also: *Restructuring of Kommunalkredit Austria AG*, op.cit., par. 106.

¹¹⁹ Until 2010 the total volume of State support granted to financial institutions in the context of the economic crisis amounted to EUR 4,588.90 billion, see: http://ec.europa.eu/competition/state_aid/studies_reports/ws7_1.xls

87(3)(c) TEC (now Article 107(3)(c) TFEU). In the light of the deteriorating financial market conditions and the risk of a systemic crisis, the Commission adopted its State aid policy. In effect, since that time the Commission has relied exclusively on Article 107(3)(b) TFEU (formerly Article 87(3)(b) TEC) and the four Communications it issued and published.

It could be argued that exceptional circumstances call for exceptional responses. The analysis of the Commission's approach towards the assessment of State aid measures in favour of financial institutions raises, however, several questions. The fundamental issue is to determine the reasons and consequences of the Commission's change of justification grounds for State support granted to ailing financial institutions. Was this a much needed step forward, an indispensable adjustment or maybe a harmful U-turn from previous deliberative State aid law and policy? Will this change actually contribute to the rapid recovery of the banking sector, paving the way for a long-awaited return to normal market conditions?

First of all, it should be observed that the financial market differs from non-financial markets in a number of dimensions.¹²⁰ Commercial banks play an important role, as they provide capital to the wider economy. The high degree of integration and interdependence of European financial markets make them unique and unlike any other sector. What is more, the R&R Guidelines are based on the premise that the exit of inefficient firms is a normal part of the functioning of the market and, consequently, it cannot be the norm that a company which gets into financial difficulties is rescued by the State.¹²¹ While in most goods and service markets the failure of an individual firm represents an opportunity for its competitors to increase their market share, the collapse of a major financial institution is liable to propagate and amplify shocks throughout the entire banking sector. The reason for such drastic repercussions of the potential bankruptcy of a financial institution results from the fact that commercial banks' business models are built on trust. When even a limited number of depositors lose confidence in their bank's stability, this may cause not only a run on this particular bank but is liable to trigger a widespread panic that could lead to a crisis of confidence in the entire financial system.¹²²

Second, it should be observed that the four Communications adopted by the Commission between October 2008 and July 2009 provided additional

¹²⁰ For an extended comparison of financial markets and non-financial markets, see: C. Savvides, D. Antoniou, *Ailing Financial Institutions: EC State Aid Policy Revisited*, "World Competition" No. 3/2009, p. 360–365.

¹²¹ See: R&R Guidelines, point 4.

¹²² See: J. Frédéric, *The Economic and Financial Crisis, Regulation and Competition*, "Word Competition" No. 4/2009, p. 449.

flexibility as to the nature and duration of State aid measures. To illustrate, the provision of recapitalisation to financial institutions in distress could be approved for up to five years and enabled the enhancement of the soundness and stability of the banking sector, as banks were able to maintain higher capital adequacy ratios. Due to the introduction of asset relief measures, the beneficiary banks could be relieved of assets that had much-reduced values or none at all. This in turn contributed to the restoration of confidence within the banking sector. The adoption of the Communications gave the Commission the opportunity to explain how State aid rules would be applied to national support measures regarding ailing financial institutions. The determination of conditions and safeguards concerning State aid measures in favour of credit institutions provided legal certainty.¹²³ Moreover, it is worth underscoring that the new State aid framework did not come out of nowhere. All communications that were published by the Commission during the systemic phase of the current financial crisis were based on well-known principles of State aid policy.¹²⁴

Third, it is relevant to note that in the absence of guidance from the Commission, there existed the possibility that Member States would make recourse to Article 108(2) TFEU (formerly Article 88(2) TEC) in order to approve certain State aid measures without the Commission's involvement. In this respect, Luja rightly points out that the Commission's central role in assessing State support measures is essential to the prevention of free rider policies.¹²⁵

Fourth, account needs to be taken of the unprecedented scale of the liquidity problems faced by the financial institutions. One must not underestimate how far the financial market conditions had deteriorated in September 2008. In the light of the protracted global recession and the increasing number of crisis-hit financial institutions that followed, the restoration of stability in the banking sector was further away than ever before.

For the reasons described above, this author is of the opinion that the current financial crisis has reached a dimension to qualify as a serious disturbance of the economy of Member States under Article 107(3)(b) TFEU. But some questions remain: When was the right moment to have a recourse to this provision for the first time? Should the Commission have approved all State aid

¹²³ From the Board, *The Credit Crisis and Its Aftermath*, "Legal Issues of Economic Integration", No. 4/2009, p. 282.

¹²⁴ According to the Banking Communication all measures should comply with the general principles underlying the State aid rules of the Treaty. In other words, the State support measures must be well-targeted, proportionate and non-discriminatory, but also designed in such a way as to minimise competition distortions. See: Banking Communication, point 15–16. But see: R.M. D'Sa, *'Instant' State Aid Law in a Financial Crisis – A U-Turn?*, "European State Aid Law Quarterly" No. 2/2009, p. 142.

¹²⁵ R. Luja, *op.cit.*, p. 146–147.

measures under this provision from the very beginning of the financial turmoil? It is impossible to indicate a precise date when it should have been acknowledged that State support granted to ailing financial institutions should be considered as measures to 'remedy a serious disturbance in the economy of a Member State' under Article 107(3)(b) TFEU. The Commission's initial refusal to assess government assistance under this provision should be evaluated positively. It should be recalled that the R&R Guidelines apply to firms in all sectors, not only just financial institutions. Consequently, the Commission's reliance on this document was a standard procedure. What is strongly positive is that the Commission adapted its policy to the changing conditions in the financial market.

There are several advantages to the approach taken by the Commission with respect to State aid measures granted to financial institutions in distress. First of all, from the end of 2008 on the Commission has shown itself to be adaptive and flexible in dealing with the challenges posed by the ongoing economic crisis. Second, the Commission has been able to ensure, through the adoption of four Communications, that all State support measures would comply with the established principles of necessity, proportionality, and limitation of competition distortions.¹²⁶ Third, the coherent and predictable enforcement of State aid rules has played an important role in the response to the crisis. This co-ordination of actions has served as a useful tool to fend off protectionism and ensure a level playing field.¹²⁷ Fourth, the Commission has approved a large number of Member States' schemes at a record speed, which it deemed necessary in order to avoid the insolvency of financial institutions and meltdown of the banking system.¹²⁸ On the other hand, it can be argued that these 'fast track' approvals limited the time needed for appropriate scrutiny. Fifth, the significant use of the adopted special framework may indicate that it should be considered as the appropriate instrument to face the repercussions of the crisis on the banking sector.

Nevertheless, the Commission's policy is not without weaknesses. It could be argued that the Commission's insistence on structural compensatory measures in the midst of the financial crisis was not the best approach. A further

¹²⁶ See: D. Gerard, *EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles*, "Concurrences" No. 1/2009, p. 58.

¹²⁷ See: Editorial comment, *From rescue to restructuring: The role of State aid control for the financial sector*, "Common Market Law Review" Vol. 47/2010, p. 316; *Economic Crisis in Europe: Causes, Consequences and Responses*; "European Economy" No. 7/2009, p. 6, http://eu.europa.eu/economy_finance/publications/publication15887_en.pdf

¹²⁸ For more information on the actual speed of approving the State aid measures to ailing financial institutions, see: D. Gerard, *op.cit.*, p. 56–57; Editorial comments, *Weathering through the credit crisis...*, *op.cit.*, p. 8.

common criticism is the lack of specification of consequences in the case of breach of the contract by the beneficiary bank.¹²⁹ As regards the argument that the use of Article 107(3)(b) TFEU may have had the effect of rewarding inefficient and inept banks, this point of view is not without grounds.¹³⁰ Nevertheless, the provision of State support was necessary in order to protect the stability of financial sector, underpin lending to the real economy, and avoid harmful subsidy wars among the Member States.

With hindsight, the way the Commission has responded to the crisis should be adjudged overall as successful. It is possible however to make some recommendations for the future changes. Given the significant volume of approved State aid measures, a co-ordinated approach is necessary to ensure an orderly exit of crisis control policies.¹³¹ It must be further assured that the special framework adopted is applied only for as long as the extraordinary circumstances are still in place. Moreover, the restructuring of the distressed financial institutions and the obligation to redeem the State aid as soon as market circumstances allow seem to be the two key elements of the path to the long-awaited return to normal market conditions.

¹²⁹ See: C.A. Russo, *Bail Out Plans: Do They Really Envision State Exit and Bank Repayments? A View from a Competitive Assessment Perspective*, "European Business Law Review" No. 4/2010, p. 514.

¹³⁰ See: R.M. D'Sa, *op.cit.*, p. 143.

¹³¹ See: *Economic Crisis in Europe: Causes, Consequences and Responses...*, *op.cit.*, p. 85. See: *Communication from the Commission on the application, from 1 January 2011, of State aid rules to support measures in favour of banks in the context of the financial crisis*; OJ C 329, 7.12.2010, p. 7–10, points 9–11.



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The Search for a New Global Order

Abstract: *This article proposes a 'hybrid' approach to the issue of global order, mixing theoretical and practical issues in the analysis carried out. From the theoretical point of view, it focuses on crucial ideas important in the normative, liberal (institutional) and neo-realistic schools of thinking on global affairs and global order. The analysis leads to the conclusion that, in the normative sense, there is currently a mess and nobody is ready and able to propose the kind of 'global code' (Z.Bauman) necessary and appropriate for a globalised world of 'network societies' (M.Castells). In the institutional sense, today we are witness to a series of new phenomena, like the G-20, BRICS or the Shanghai Cooperation Organization, as well as the further deepening of the process of European integration following the Treaty of Lisbon, which is not yet theoretically absorbed. Finally, in world of geopolitics one can observe an important power shift from the Atlantic to the Pacific, at least in the economic sphere. According to the Author, as stated in his final conclusions, there are two major challenges ahead of the world: deeply mixed transnationalisation (i.e. the diminishing of the role of nation states, including major powers), and the rapidly growing consciousness of real global challenges (proliferation of nuclear arms, climate change, shrinking of raw materials and energy sources, environmental issues, etc.). Thus, in the author's opinion, experts in security issues and scholars specialising in international relations should prepare a kind of 'cooperative order' idea – an idea, which, however, for the first time in decades and maybe even centuries, should be proposed not by the West alone. This is the essence of the new global order which has been emerging after the collapse of the global (Western) markets in September 2008. It is still too early to judge if this particular moment is a true fault line leading to the creation of a new global order, but there are many signs leading to such a conclusion.*

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Introduction

The ‘International Order’, like many terms in contemporary social sciences (in this particular case in the discipline of international relations¹) is the subject of different opinions, proposals, suggestions, and even visions. Janusz Stefanowicz, who studied this issue in a separate work, singled out three such visions: utopian, realist, and systemic. The utopian vision, closely connected with liberal interpretations, calls for harmonious and peaceful international cooperation. It was deemed ‘naive’ by the author, while the systemic vision, close to structuralist concepts, while categorised as ‘intellectually charming’ was also considered insufficient due to its ‘high degree of abstraction’. As a result, Stefanowicz sympathised with the historically-proven realist school, and he is not an isolated case at all.²

Naturally, these various visions and interpretations continue to clash with each other. At the present stage, there is nothing to indicate that the different schools of thought will find a plan based on common ground in these debates. Some point to norms (both legal and moral) as fundamental to any ordering of the world; others stress the power factor; and still others the role of institutions.³ Thus, Roman Kuźniar is absolutely right to declare: ‘*there is no one theory of international order which could be the starting point for formulating a coherent model of a future order and the process for reaching it*’.⁴

However this state of affairs, which may be described as a certain theoretical helplessness, does not mean that the issue of the presently existing order – or the lack thereof – in today’s world should not be seriously studied. On the contrary, there are many signs indicating that, since the outbreak of the world economic/market crisis in September 2008, this issue has become more important than ever and in need of a new, fresh approach. The dynamics

¹ It should be stressed that ‘International Relations’ appeared as an independent discipline of social sciences immediately after World War I, i.e. after the collapse of the previous Order. L.J. Kiss, *Globalizálódás és külpolitika (Globalisation and Foreign Policy)*, Budapest 2003, p. 9, 10.

² J. Stefanowicz, *Ład międzynarodowy. Doświadczenie i przyszłość (The International Order. Past Experience and the Future)*, Warszawa 1996, p. 23. Cf. S.P. Sałajczyk, *Wizje rzeczywistości międzynarodowej (Visions of the International Reality)* in: *Stosunki międzynarodowe. Geneza, struktura, dynamika (International Relations. Genesis, Structure, Dynamics)*, ed. E. Haliżak, R. Kuźniar, Warszawa 2000, p. 33–62.

³ On the paradigms of the realist, liberal and normative international order, see the studies by T. Łoś-Nowak, E. Haliżak and J. Symonides in: *Porządek międzynarodowy u progu XXI wieku (The International Order on the Verge of the 21st Century)*, ed. R. Kuźniar, Warszawa 2005, p. 21–107.

⁴ R. Kuźniar, *Kształt porządku międzynarodowego – między postulatami a ograniczeniami (The Shape of the International Order – Between Postulates and Limitations)* in: *Świat wobec współczesnych wyzwań i zagrożeń (The World in the face of Contemporary Challenges and Threats)*, ed. J. Symonides, Warszawa 2010, p. 61.

of the changes taking place in the international arena since the beginning of the crisis have been particularly distinctive and, at the same time, there are many signs that we are dealing with much deeper changes than anyone could have expected or anticipated. For the current centres of power – including especially the USA, which has been at the centre since the collapse of the bilateral order and end of the Cold War – have been subject to a certain erosion, while simultaneously new, dynamic ones on the periphery (which, it should be noted, are not really new from the historical perspective) are emerging. These include China, India, and the whole group of states categorised as ‘emerging markets’.

In the existing definitions of the international order – which, it must be kept in mind greatly differ from each other – we can identify at least one constant feature, namely the fact that every order implies a balancing of powers and, in an optimal solution, strives to attain an equilibrium. There is order when the activities of states and non-governmental actors in the international arena reach a state that allows for harmonious cooperation and, at the same time, prevent an outbreak of new conflicts on a larger scale.⁵ Yet the post-Cold War period has lacked such a legal, treaty-based organisation of the international order, and it has seemed that the only ‘ordering power’ was the power and might of the United States of America, which has taken on the role of global hegemonic leader in the sense attributed to this notion in the works of Max Weber. But there has been no legitimisation of this monopoly in a legal, treaty-based sense. Following the end of the Cold War and the collapse of the Soviet Union, no treaties were signed which would establish a new order. Attempts were made back in the early 1990s by then-President of the United States George H.W. Bush, who repeatedly used the term ‘new international order’ in his speeches, obviously meaning one dominated by the USA. His visions, however, remained nothing more than verbal declarations.⁶ While an actual change consisted in the fact that the former two poles or centres of

⁵ As an example, compare the following two definitions: W. Malendowski’s: ‘*the political order consists in the equilibrium of certain relations on the global scale, convergence and balancing out of the positions of states, as well as a state of good organisation in international co-existence*’ in: *Stosunki międzynarodowe (International Relations)*, ed. W. Malendowski, Cz. Mojsiewicz, Wrocław 2004, p. 544. A. Nowak, in turn, points out that the international (peaceful) order consists of a certain ‘*state in which there are functioning institutional, legal, political, economic and military safeguards preventing the use of violence, in which there is stabilization of the financial situation, and in which legal agreements are observed*’. in: *Współczesne stosunki międzynarodowe (Contemporary international Relations)*, ed. T. Łoś-Nowak, Wrocław 1997, p. 159.

⁶ L. Pastusiak, *Nowy ład światowy (The New Global Order)* in: *Współczesne stosunki międzynarodowe. Praca zbiorowa (Contemporary International Relations. A Joint Publication)*, Warszawa 2008, p. 109.

power were replaced by just one, the logic of the existing order did not undergo any significant change in the practical dimension. However, in the theoretical sense there was a change, insofar as the neo-realist current, which was the dominant school of thought during 1989–91, became temporarily dominated by neoliberal concepts.⁷

The USA's domination on the international stage immediately after the collapse of the bipolar order was initially real and unquestioned. However, now that this 'unipolar moment' of the USA as a dominant and hegemonic global leader has passed,⁸ an entirely new situation arises, which requires sorting out, both in the theoretical and, especially, in the practical political sense, in order to prevent future potential crises. What is more, due to the increasing global challenges and changes, this 'sorting out' is necessary not only in relations between sovereign states, as was the case in the 'post-Westphalian' age,⁹ but also taking into account non-state actors, which are constantly growing in power, as well as supranational state actors like the European Union. Moreover, these calculations also need to incorporate responses to phenomena which are threatening – for the first time in history – the entire human race. By this is meant issues such as the proliferation of nuclear weapons, global terrorism, destruction of the environment, climate change, and the shrinking supplies of natural resources (including even clean air and water). In this sense, **the shaping of a new international order in the early 21st century is and will be, both in the theoretical and practical sense, much more complicated than it has ever been since 1648, when the**

⁷ L.J. Kiss, *Globalizálódás...*, op.cit., p. 51. According to the leading American economist and scholar Dani Rodrik, free market economics was in ascendancy since the 1980s, 'producing what has been variously called the Washington Consensus, market fundamentalism, or neoliberalism. Whatever the appellation, this belief system combined excessive optimism about what markets could achieve on their own with a very bleak view of the capacity of governments to act in socially desirable ways'. D. Rodrik, *The Globalization Paradox. Democracy and the Future of the World Economy*, New York–London 2011, p. 77.

⁸ Already after the emergence of this single American pole, one of the most interesting modern theoreticians of international relations, Kenneth Waltz, prophetically predicted that sooner or later this will result in a coalition against this uni-polar structure and, consequently, a new multipolar order will be created, in the name of a realistic formula leading to a balance of power. See: K. Waltz, *Structural Realism after the Cold War*, "International Security" Vol. 25/1/2000, p. 39, 40. Available on the Internet at: http://www.columbia.edu/itc/sipa/U6800/readings-sm/Waltz_Structural%20Realism.pdf; N. Ferguson also reached similar conclusions, stating (in 2004) that: 'as Europe united and China grew richer, so the world would revert to a "multipolarity" not seen since before the Second World War', N. Ferguson, *Colossus. The Rise and Fall of America's Empire*, New York 2004, p. 17.

⁹ As regards the Westphalian Model and its consequences for the meaning of Sovereignty and International Order, see the excellent study by Daniel Philipott: *Revolutions in Sovereignty. How Ideas Shaped Modern International Relations*, Princeton 2001.

first international order in history, called the Westphalian Order, was created.¹⁰

This article proposes a ‘hybrid’ solution, i.e. looking at the issue of international order at the beginning of the second decade of the 21st century in three specific dimensions: normative, institutional, and the actual configuration of powers. Thus, from the theoretical point of view, this article uses all three paradigms to study this issue: normative; liberal (institutions); and realistic (configuration of powers). At the same time, these analyses are accompanied by a practical analysis of the current configuration of powers in the international arena, which, as already mentioned, has been undergoing dynamic changes recently.

1. The normative sphere

The previous international orders were the results of major conflicts and the treaties which concluded them. However, nothing like this occurred after the Cold War, which inclined Zbigniew Brzeziński to the observation that, in the normative sense, following the collapse of the bi-polar system the world has become uncontrolled by anyone, which is reflected in the title of one of his books, *Out of control*. Brzeziński characterised this new era as the ‘collapse [...] of almost all fixed values’.¹¹ Moreover, according to him, ‘the world resembles an airplane on autopilot which is constantly accelerating, but has no designated destination’.¹²

As we know, at the same time – in the early 1990s – Francis Fukuyama had a very different opinion on this issue, as presented in his highly optimistic study on the ‘end of history’.¹³ Fukuyama predicted, in contrast to the ‘pessimist’ Brzeziński, a triumph of Western liberal democracy and, among other phenomena, a new era of universal happiness. Now, just two decades later, we can see that this prophecy was not fulfilled. A symbol of the collapse of Fukuyama’s vision is the book by Robert Kagan under the telling title *Return of History and the End of Dreams*.¹⁴ In this work, published in 2008, Kagan states frankly that the assumptions that both China and Russia (states on which

¹⁰ In the almost unanimous opinion of scholars, the next crucial moments were: the Congress of Vienna (1815), the Congress of Versailles and the League of Nations (1919), the United Nations System created in 1945, followed almost immediately by the Cold War Order, or domination of two superpowers – the USA and the USSR.

¹¹ Z. Brzeziński, *Bezład (Out of Order)*, Warszawa 1994, p. 10.

¹² *Ibidem*, p. 13 (translated from the Polish edition).

¹³ The Author, quoting Hegel, directly stated that ‘there were no alternative principles or forms of social and political organization that were superior to liberalism’, F. Fukuyama, *The End of History and the Last Man*, London 1992, p. 64.

¹⁴ R. Kagan, *The Return of History and the End of Dreams*, New York 2008.

he particularly focuses) would follow the path of liberal democracy proved to be nothing but a pipe-dream and an illusion. Although Fukuyama, citing Seymour Martin Lipset, claimed that there is a high level of correlation between a stable democracy and a high level of economic development,¹⁵ the example of China in the last two decades seems to indicate that in terms of economic productivity, this thesis is not entirely true. In other words, predictions that the entire world would copy the Western, mainly American, model of politics and economic development proved to be wrong. Consequently, the 'pessimist' Brzeziński was closer to the truth than the 'optimist' Fukuyama, who, as a matter of fact, in his later works retracted his earlier theses. Indeed, under the influence of the events of 11 September 2001, he even risked a thesis which could be considered as almost heretic coming from a convinced liberal like himself, stating that: *'For individual societies and for the global community, the withering away of the state is not a prelude to utopia but to disaster'*.¹⁶

In accordance with the normative theory of international relations, the international order is a sum of three constituents: the norms (legal), the underlying system of values, and certain institutions and relations conditioning the existence of international society.¹⁷ Today, at the beginning of the 21st century, the main problem is that the existing institutions, starting with the United Nations (UN) as the sole universal repository of global order, are weakened and do not fully reflect the existing configuration of powers.¹⁸ Another concern is the fact that, under pressure from globalisation forces, the nation-state is eroding, losing many of the characteristics and assets of its sovereignty. The essence of this issue was most succinctly presented by the sociologist Zygmunt Bauman, who stated: *'In order to actually exist, the nation-state has to control three fundamental autarkies: violence, culture and the economy. Nowadays, no state can pride itself on control over any of these autarkies... Production, finances, knowledge, crime – they either ignore the state or actively fight it, acting in the global space. The power is there. Politics, in turn, has remained as it was. Local, territorial, closed off in the legal and mental limitations of the nation-state'*.¹⁹

¹⁵ F. Fukuyama, *The End of History...*, op.cit., p. 109.

¹⁶ F. Fukuyama, *State Building. Governance and the World Order in the Twenty-First Century*, New York 2004, p. 120; translated from the Polish version: *Budowanie państwa. Władza i ład międzynarodowy w XXI wieku*, Poznań 2005, p. 137.

¹⁷ J. Symonides following J. Gilas in: *Porządek międzynarodowy...*, op.cit., p. 85.

¹⁸ It much rather reflects the configuration of powers from immediate post-World War II period, which is proven by the fact that Japan and Germany, at that time the defeated parties but now among the strongest economies in the world, are still applying for permanent membership in the UN Security Council.

¹⁹ *Nowy nieład światowy (New World Disorder)*, Z. Bauman in an interview with J. Żakowski, "Polityka" No. 51, 18.12.2010, p. 32.

Thus, states and institutions are weakened and the existing system of values is not at all universal. Proof of this can be seen in the alleged Asian values²⁰ and the tensions in relations between the USA and China. The controversy surrounding the 2010 Nobel Peace Prize awarded to the Chinese dissident Liu Xiaobo constitutes a symbolic manifestation of this state of affairs. The controversy centred around the different approaches taken by China and the 'West' to many fundamental issues – human rights, individual freedom, the role of the state, etc.²¹ Consequently, we are facing a situation in which, in the normative sense, almost all fundamental elements constituting the understanding of international order in this paradigm are either weakened or undermined, if not subject to active dispute or controversy. In this context, we can understand Z. Bauman's appeal for the elaboration of some 'global code', not entirely defined yet, but without which – in Bauman's view – 'we will all go under'.²²

The fundamental problem is: Who will have the power or authority to enforce such a code? It is beyond dispute that the UN is not fulfilling this role. After a brief 'unipolar moment',²³ which lasted less than one generation, the United States has ceased to play the role of hegemonic leader. Today, in contrast to the predictions made two decades ago, no one speaks about the *Pax Americana* any longer. However, other centres of power are neither pronounced enough nor strong enough to independently impose anything on anyone, while ideas of *global governance* have not gone beyond the phase of academic speculation.²⁴ It would seem that all the most recent academic conceptions heralding a new world order have suffered a similar fate. For instance Andrew Hurrell, the well-known representative of the British school studying international relations – liberal in spirit and structuralist in form – rightly describes the 'importance of seeking to build institutions around the idea of common interests and common values' to be the prerequisite for a new global order.²⁵ However, what does he perceive to be the very essence of the

²⁰ See e.g. K. Gawlikowski, *Problem „wartości azjatyckich”. Uwagi o koncepcjach Mahathira bin Mohamada (On the 'Asian values'. Remarks on Mahathir bin Mohamad's concepts)*, „Azja-Pacyfik” Vol. II/1999, Toruń 1999, p. 192–237.

²¹ See: *Award Ceremony Speech* Thorbjørn Jagland, Chairman of the Norwegian Nobel Committee, Oslo, 10.12.2010, at: http://nobelprize.org/nobel_prizes/peace/laureates/2010/presentation-speech.html Chinese reactions to this award: *Who is Liu Xiaobo?* at: http://news.xinhuanet.com/english2010/indepth/2010-10/28/c_13579766.html

²² *Nowy wiek światowy*, op.cit.

²³ This term was introduced by the well-known columnist Charles Krauthammer.

²⁴ One of the most interesting works on this topic is *Governance in a Globalising World*, ed. J.S. Nye, J.D. Donahue, Washington 2000.

²⁵ A. Hurrell, *On Global Order: Power, Values, and the Constitution of International Society*, New York 2009, p. 55.

'new constitution of international society' which he calls for? He points to 'liberal solidarity'.²⁶ In other words, he believes that a new order can only be built upon the individualistic system of values developed in the West. However, the changes currently taking place in the global arena – which is the main subject of this study – seem to indicate that we have now arrived at a point where the system of values common for the entire planet will have to be developed in co-operation with non-Western powers (superpowers?).²⁷

The situation – already difficult – becomes even more complicated when we consider the phenomenon emphasised by Janusz Symonides: '*The specificity of the international community, the lack of a central executive power, legislative power and compulsory judicature, leads to the questioning of the current character or effectiveness of norms of international law in the science of international relations*'.²⁸ Such a phenomenon, by the way, can be noticed not only in political science, but also in political practice, where the dispute over values has just flared up, mainly in the context of the alternative development model presented in recent years by China and symbolised by the departure from, if not substitution of, the liberal Washington Consensus in many countries with an anti-liberal, statist-market Beijing Consensus.²⁹ This is an

²⁶ Ibidem, p. 20, 296.

²⁷ This is the thesis strongly underlined by Charles Kupchan in his interview given to the Polish monthly *Europa – miesięcznik idei* (*Europe – A Monthly Journal of Ideas*). According to him: '*The ideological supremacy of the West is, however, not independent from its economic and military position. Following the decline in both of those dimensions, the Western ideological hegemony will also come to the end... The world in the twenty-first century will be not only multilateral, but also pluralistic; i.e. we will see co-existence of different political and economic models. One of them, no doubt, will be the Western model, the other will come from China as authoritarian capitalism*', „Europa” No. 7/2011, p. 12,13.

²⁸ J. Symonides, *Normatywne teorie ładu międzynarodowego po zimnej wojnie* (*Normative Theories of the Post-Cold War International Order*) in: *Porządek międzynarodowy...*, op.cit., p. 85.

²⁹ On the Washington Consensus in Polish literature, see: E. Haliżak *Ideowe podstawy globalnego ładu liberalnego w gospodarce światowej – rola i znaczenie Washington Consensus* (*The Ideological Basis of the Global Liberal Order in World Economy – the Role and Significance of the Washington Consensus*) in: *Globalizacja a stosunki międzynarodowe* (*Globalization and International Relations*), ed. E. Haliżak, R. Kuźniar, J. Symonides, Bydgoszcz–Warszawa 2004, p. 12–30. The term '*Beijing Consensus*' was coined in 2004 by Joshua Cooper Ramo in the paper *The Beijing Consensus*, The Foreign Policy Center, London May 2004. For more on the Chinese development model see: B. Góralczyk *The Role of China in a Globalised World*, "Yearbook of Polish European Studies" No. 13/2010. The Washington Consensus involved, among other things, privatisation, liberalisation of markets and trade, and weakening of the public sector. The neo-authoritarian Beijing Consensus involves quite the opposite – a strong and active role of the state, next to the market, as well as the rule 'market before democracy'. For the most prominent criticism of the neo-liberal order and the American policy after the Cold War, particularly as pursued by the administration of G.W. Bush, see: N. Klein, *The Shock Doctrine. The Rise of Disaster Capitalism*, New York 2007.

opinion shared by, among others, such renowned scholars as Dani Rodrik, Charles Kupchan, and Fareed Zakaria, as well as authors who are dealing with this issue directly, such as Stephan Halper³⁰ or Kishore Mahbubani.³¹ Not surprisingly, this point is even more strongly underscored by some Chinese authors, like Liu Mingfu in his work – famous in China – entitled *China Dream* (an obvious echo of the ‘American Dream’),³² as well as by the collaborative authors of another popular volume on Mainland China in recent years, which interestingly says directly: ‘*China is not happy*’.³³

Consequently, we are in serious trouble in the normative sense, in both its theoretical and practical aspects. There is a shortage of universal values, the institutional system (UN) is ailing, and there are simply no central executive or legislative powers on a broad, global scale. Meanwhile, in the globalised world – in which there has been a ‘compression of the space-time continuum’³⁴ and consequently the sense of living in a single place is growing – the concept of the world as a single community is gaining importance, but in the normative sense there is no single, commonly accepted normative model for this world, and in addition there are no centralised powers able to impose their will on others. Put succinctly, in the normative sense the contemporary world is not in the most fortunate moment in its history. It lacks fundamental answers to the key global challenges mentioned above, while at the same time the new scientific and technological revolution, called the information revolution,

³⁰ S. Halper, *The Beijing Consensus. How China’s Authoritarian Model Will Dominate the Twenty-First Century*, New York 2010. The author is quoting the top Chinese legislator Wu Bangguo, who said openly that the Chinese system ‘*shall never simply copy the system of Western countries or introduce a system of multiple parties holding office in rotation, a system with the separation of the three powers or a bicameral system*’, p. 147. Importantly, even the Chinese political-scientist and theoretician of democracy who is most well-known in the West, professor Yu Keping from Beijing University, does not believe that China should move toward an American-style system based on a tripartite division between the executive, legislative, and judicial branches of government. See: Cheng Li in Introduction to: Yu Keping, *Democracy is a Good Thing. Essays on Politics, Society, and Culture in Contemporary China*, Washington 2009, p. XX.

³¹ K. Mahbubani, *The New Asian Hemisphere. The Irresistible Shift of Global Power to the East*, New York 2008.

³² Liu Mingfu, *Zhongguo Meng (China Dream)*, Beijing 2010. The author predicts that in the ‘post-American world’, which we are already in, China will emerge as a new kind of world leader, coordinating efforts with others (*wang dao*) rather than dominating others (*ba quan*) as the Americans were doing, p. 133. As a colonel of the Chinese Army, he also stresses the important role of a strong Chinese Armed Forces, p. 267.

³³ *Zhongguo bu gaoxing*, Nanjing 2009. The authors of this volume are: Wang Xiaodong, Liu Yang, Song Xiaojun, Song Qiang, and Huang Jisu.

³⁴ A term used by M. Pietras, after M. Kempny, in the article *Paradygmata globalizacji in statu nascendi (The Paradigm of Globalization In Statu Nascendi)* in: *Porządek międzynarodowy...*, op.cit., p. 152.

squeezes time and space even tighter and has brought about a fundamental change in the global arena, perceptively designated by the sociologist Manuel Castells the 'network society'.³⁵

Moreover, as the well-known theoretician of international relations James N. Rosenau has aptly pointed out, with globalisation mankind has entered an era of dramatically increasing interactions, leading to unprecedented 'turbulences' on a mass scale. He groups them into five types: unexpected technological surge of the post-industrial era; emergence of completely new global challenges (HIV, environmental pollution, global terror, global financial crises and the emergence of the global economy); disaggregation of the powers of nation-states; which is combined with and interacting with the increased aggregation of the roles of non-state players; and growing interdependence, vitiating territorial boundaries.³⁶ The present era is different not only in degree but in kind when compared with the earlier times. This 'new' world is almost totally different from the 'old' one, i.e. the one preceding the present phase of globalisation.

While the 'classical' society was a community of sovereign states, the 'network society' is characterised by: (i) a global economy, i.e. the ability to act in real-time at any point on the planet, with the financial markets also having a global character instead of a regional or national one (money, and even capitals, have freed themselves from control of the states); (ii) unprecedented internationalization of production, with the economic centre (and, to a certain extent, the technical centre as well) of the entire globe moving to the Asia-Pacific region; and (iii) information (carried by new inventions, such as the Internet, mobile telephone networks, satellite television) freed from the control of states. Such a state of affairs quite rightly induced Castells to propose the thesis that in the early 21st century, the world not only exists in an era of 'turbulences', as James Rosenau claimed two decades ago, but even in a 'condition of structural schizophrenia'.³⁷ **Therefore, now more than ever before it is paramount to conduct a normative and institutional ordering of these many dimensions of the new world, but there is a lack of a uniform, consistent vision of such an order, as well as of the institutions and centres of power which would be able to put a vision of a new normative order and universal values into practice.**

³⁵ Castells thus defined it in the trilogy *The Information Age: Economy, Society, and Culture* (Vol. 1. *The Rise of the Network Society*, Vol. 2. *The Power of Identity*, Vol. 3. *End of Millennium*), published by Oxford University Press since 1998 (with many revised versions).

³⁶ J.N. Rosenau, *Turbulence in World Politics. A Theory of Change and Continuity*, Princeton 1990, p. 22, 33.

³⁷ M. Castells, *The Rise of the Network Society*, 2nd edition, Wiley-Blackwell 2010, p. 3.

2. The institutional framework

Just as in the normative sense we are dealing with an obvious shortage of ideas, so too in the institutional sense the 2008 crisis in the world markets (considered in this article to be an important turning point, although we are still lacking the necessary historical perspective to produce a more balanced evaluation on this issue) has brought about significant and clearly visible changes. There is no doubt that until the crisis broke out, important decisions in the global arena were taken in informal meetings, primarily those of the G7 established in 1975 (after Russia joined the Group in the 1990s, its name was changed to the G8).³⁸ Already as early as in June 1999, at the summit in Cologne, the Group put forward the proposal to establish a broader body, the G20, an idea however which remained in a state of hibernation for nearly a decade.³⁹ The crisis of September 2008 became the catalyst for the establishment of this body in practice, which took place as early as in November 2008 at the first G20 Summit in Washington. This meeting of world leaders, and the others which followed it – in London (April 2009), Pittsburgh (September 2009), Toronto (June 2010) and Seoul (November 2010) – and the agreements reached thereat proved that, **at least in the economic (and financial) dimension, we are already dealing with a new quality in the international arena.** The following phenomena both constitute and reflect this new quality:⁴⁰

- The replacement in practice of the G7 (G8) by the G20, which is proof of the relative drop in importance in the international economic arena of the western countries, including in particular the USA, but also the major centres of power in the EU as well;
- The composition of the G20 is proof of a tremendous rise in importance in the international arena of the so-called emerging markets, starting with the three largest, China, India, and Brazil, which have recently shown high rates of across-the-board growth;
- The G20 is taking over, to an increasingly larger extent, the tasks of the main institutional mechanism governing the global economic

³⁸ The idea came from the French President of that time, Valéry Giscard d'Estaing, and it received strong support of the Prime Minister of the United Kingdom, Margaret Thatcher. Members of the G7 were: the USA, Canada, the United Kingdom, France, Italy, Germany and Japan. For more see at: <http://www.investopedia.com/terms/g/g7.asp>

³⁹ For more see: <http://www.g20.org/index.aspx>

⁴⁰ What follows is based on communiqués from the Summits available on the abovementioned website, as well as: A. Gradziuk, M. Koczor, *Wyniki szczytu G20 w Toronto (The Results of the G20 Summit in Toronto)*, "Biuletyn PISM" (Bulletin of the Polish Institute of International Affairs) No. 100, 1.07.2010; *In-depth coverage of G20 from the Financial Times*, at: <http://www.ft.com/indepth/g20>

arena, which was – and still remains, although in weakened form – the Bretton Woods System,⁴¹ a system consisting primarily of the International Monetary Fund (IMF) and the World Bank. This G20 is now transforming itself into the main forum for international economic cooperation;

- The G20 has set for itself the task of pulling the world out of the global crisis, as proven by the programme it adopted at the Summit in Pittsburgh Framework for Strong, Sustainable, and Balanced Growth”, and the fact that it is discussing changes within the IMF and the World Bank;
- The G20 also monitors the commitments undertaken within the World Trade Organization (WTO), the OECD, and the UNCTAD, which seems to confirm its superior role over the other existing institutions of the global economic order;
- **The composition of the G20, and its programmes and tasks, give rise to the critical conclusion that, at least in the economic sense, the world has once more become multipolar** and that states previously considered ‘developing’, ‘third world’ or ‘post-colonial’ have become significant centres of power in their own right in this new order. This is an entirely new qualitative state of affairs for the ‘West’ as broadly understood. It has still not mentally come to terms with this change, and the fact that, from now on, signals coming from Beijing, New Delhi, Moscow or Brazil should be watched as carefully as those coming from Washington, London or Berlin, as was the case in the not-very- recent past.

Apart from the G20, in June 2009 another body emerged with aspirations to be an institution ordering the world markets. The date of its establishment, the formulation of its activities, and its stated aims should be considered symbolic. This body is known as BRIC, based on the acronym of a group consisting of the largest ‘emerging markets’ – Brazil, Russia, India and China. At its first summit Yekaterinburg (subsequent summits were held in April 2010 in Brazil, and in April 2011 in China),⁴² BRIC set three major tasks for itself:

⁴¹ Officially, apart from the IMF and the WB (IBRD), this system includes the International Finance Cooperation (IFC, established in 1956) and the International Development Association (IDA, established in 1961). For more on the tasks and role of the Bretton Woods System see: B.J. Cohen *Bretton Woods System*, at: <http://www.polsci.ucsb.edu/faculty/cohen/inpress/bretton.html> and the analysis *The Bretton Woods System* at: <http://www2.econ.iastate.edu/classes/econ355/choi/bre.html>

⁴² For a review of the summits and tasks of BRICS see: <http://en.wikipedia.org/wiki/BRIC>.

- Reform of the UN system;
- Increasing the role of developing states in world financial institutions (i.e.: increasing the weighted votes in the Bretton Woods system, which is already incrementally taking place);
- Creation of a new monetary system. It should be noted that it is not entirely clear what this means; whether the creation of a single global currency, as was proposed by China at the G20 Summit in London, or the diversification of markets, taking into account the weakening of the US dollar, which is one of the pillars of the Bretton Woods system.

As proof of the dynamic character of this organisation, one need look no further than the fact that South Africa was invited to the third BRIC Summit (held in April 2011 in China) and that it became a permanent member of the organisation, the name of which was thus changed to BRICS.⁴³ With this move, another dynamic market, the strongest in Africa, has been included in the organisation and the role of South Africa as an important actor in the international arena has been confirmed – a fact which was made quite evident during the Copenhagen Climate Summit in 2009. It should be recalled that during this summit the main voice of the ‘emerging markets’, i.e. China, asked South Africa to co-present their common views to the West, which resulted in a fiasco of the entire Summit, as the two parties thus defined were not able to find a common language or programme.⁴⁴ There is no doubt that China is the driving force behind BRICS.⁴⁵ If China continues to have the same growth rate as over the last three decades, i.e. an annual growth rate of about 10 per cent, in the not-too-distant future it will almost certainly become the world’s leading economic power,⁴⁶ which would obviously have enormous consequences, both economic and other, in the global arena.

⁴³ *Building BRICS*, at: http://news.xinhuanet.com/english2010/indepth/2010-12/31/c_13671704.html. It was stressed in this article that the five BRICS member states currently contribute more than 60 per cent of world economic growth.

⁴⁴ A detailed journalist analysis of the clash of the Western states with BRIC was presented by “Der Spiegel”. The weekly cited President Nicolas Sarkozy, who said that ‘*China will soon be the biggest economic power in the world*’: *How China and India Sabotaged the UN Climate Summit*, at: <http://www.spiegel.de/international/world/0,1518,692861,00.html>

⁴⁵ D. Rothkopf, *What BRIC would be without China...* According to the author: ‘*Without China, the BRIC is just the BRI, a bland, soft cheese that is primarily known for the wine that goes with it. China is the muscle of the group and the Chinese know it. They have effective veto power over any BRIC initiative, because without them, who cares really? They are the one with the big reserves. They are the biggest potential market*’ at: <http://rothkopf.foreignpolicy.com/posts/2009/06/15> (last visited 08.15.2011).

⁴⁶ According to the Chinese strategist and economist Professor Hu Angang: ‘*I want to project that China would become a superpower by 2020 – politically, militarily, and in terms of soft science and technology – in pure economic terms*’. Hu Angang, *China in 2020. A New Type of Superpower*, Washington 2011, p. 11.

China – along with Russia – is also the main actor in yet another organisation, the importance of which also seems to be continually growing. This is the Shanghai Cooperation Organisation (SCO). The SCO was established in 2001 on the basis of the previously developed Chinese-Russian dialogue.⁴⁷ The SCO is a political group, an economic bloc, a military alliance, and even an organisation specialising in combating terrorism (with its seat in Tashkent). The existence of the SCO has made possible something which would have been completely out of the question even just a few years earlier, namely military manoeuvres with the participation of Russian troops in China and vice versa. The SCO points its sword at the West to an even larger extent than BRICS does. It is, therefore, no surprise that American analysts are beginning to view this organisation as a ‘Warsaw Pact 2’ or an ‘anti-NATO’.⁴⁸

The documents adopted at the tenth summit of Heads of SCO States in June 2010 in Tashkent indicate that among the ‘*profound changes and fundamental transformations taking place in today’s dynamically developing world*’ the SCO States particularly value the return to multi-polarity. The heads of these states declared that they ‘*are united in their assessment of changes happening in the world, which involve not only new challenges and threats, but also provide opportunities for progress towards a more just political and economic world order (not defined, however – B.G.) based on the rule of international law, equal and mutually beneficial cooperation of all countries in accordance with the purposes and principles of the UN Charter*’. They also noted the growing role of the SCO, and with regard to this fact, supported the aims of the so called ‘Tashkent initiative’ of 2004, which put forward the main goal of strengthening the cooperation of countries in the Asia-Pacific region.⁴⁹ Proof of the determination behind the objectives set and actions taken can be seen in the fact that all these theses were repeated a year later at the meeting commemorating the 10th anniversary of the SCO.⁵⁰

The dynamic growth of the biggest economies in the group of ‘emerging markets’, of which the most important, China and India, are located in Asia, has led some analysts and scholars to the conclusion that the economic centre of the world – and with it the political and technological centre, etc. – will

⁴⁷ Details on the webpage of that organisation at: <http://www.sectSCO.org/> The following states are members of this group: China, Russia, Kazakhstan, Kirgizstan, Uzbekistan and Tajikistan, while India, Iran, Pakistan and Mongolia have the status of observers.

⁴⁸ R. Kagan, *The Return of History...*, op.cit., p. 74.

⁴⁹ *Declaration of the Tenth Meeting of the Council of the Heads of the Member States of the Shanghai Cooperation Organisation*, Tashkent, 11.06.2010, at: <http://www.sectSCO.org/EN/show.asp?id=225> (last visited 08.15.2011).

⁵⁰ See: *Joint Communiqué of meeting of the Council of the Heads of the Member States of the Shanghai Cooperation Organisation commemorating the 10th anniversary of the SCO*, Astana, 14–15.06.2011, at: <http://www.sectSCO.org/EN/show.asp?id=293> (last visited 08.15.2011).

shift from the Atlantic to the Asia-Pacific region.⁵¹ The available statistical figures indicate this has already happened in the economic dimension.⁵² In many studies, for example in the well-known volumes by Kishore Mahbubani,⁵³ Parag Khanna,⁵⁴ or Fareed Zakaria,⁵⁵ there are theses indicating that we are already dealing with a new quality in the international arena, as – according to them – the emerging markets are dynamically gaining power, the ‘twilight of America’ is taking place and the hegemony of the USA has reached its end, and Asia is not only modernising itself but also competing in the high technology markets. Meanwhile China has proposed an alternative development model to the world, a model that undermines many of the political and economic theories which, until now, were considered sacrosanct, and not only in the West. This new strategic dynamism introduces a mechanism based on opposition – ‘old America, new Asia’.⁵⁶

In the context of a potential ‘twilight of the West’,⁵⁷ another phenomenon is being examined, one which is, next to those discussed above, of utmost importance in the contemporary world in the institutional sense. This is the unprecedented process of European integration, heading towards the creation of

⁵¹ K. Mahbubani, *The New Asian Hemisphere...* op.cit.

⁵² The breakthrough achievement in studying this phenomenon, together with the necessary statistics, factual material and statistical data, is the volume edited by David Shambaugh, *Power Shift. China and Asia's New Dynamics*, Berkeley and Los Angeles 2005.

⁵³ K. Mahbubani, *The New Asian Hemisphere...* op.cit. However, an earlier work by this experienced diplomat, currently one of the major intellectuals and strategists of Singapore, is also important: *Can Asians Think?*, 4th edition, Singapore 2009. In this work the author proposes, among other things, the following interesting thesis: ‘if we wanted to hear the best geopolitical discussions, we should go to Washington, DC, or New York. However, if we wanted to see the best geopolitical performance, we should go to Beijing’, p. 199.

⁵⁴ P. Khanna, *The Second World. How Emerging Powers Are Redefining Global Competition in the Twenty-first Century*, New York 2009.

⁵⁵ F. Zakaria, *The Post American World*, New York 2008. Zakaria sees China as a major challenger of the US and the whole West. He claimed, much earlier than others, that China ‘has become the second most important country of the world’, p. 93.

⁵⁶ Such a thesis was proposed in the debate on the book by K. Mahbubani, *The New Asian Hemisphere*, op.cit. in “Asia Policy”, No. 8/2009, p. 163.

⁵⁷ Spectacularly visible during the last G20 summit meeting in French Cannes in November 2011, when everyone was talking about the crisis in Greece, Italy and the whole Eurozone, while the host, French President Nicholas Sarkozy, was openly asking China for financial assistance and received the following significant answer from his Chinese counterpart, President Hu Jintao: ‘It has to be dependent mainly on Europe to resolve the European debt problem’. See: *Hu meets Sarkozy ahead G20 summit at*: <http://www.ecns.cn/2011/11-03/3511.shtml> (last visited 11.06.2011). See also: *All eyes will be on Hu Jintao at G20 summit in Cannes*, “China Times”, 30.10.2011; *Europe must resolve debt crisis, China tells France*, France24, 03.11.2011, see at: <http://www.france24.com/en/20111103-europe-must-resolve-debt-crisis-china-tells-france-hu-jintao-sarkozy-g20>

the first supranational body in history, the European Union (EU).⁵⁸ With the entry into force of the Lisbon Treaty on 1 December 2009, the EU entered its next stage of integration, consisting in appointing a President of the Council of the EU (the informal head of state) and the High Representative of the Union for Foreign Affairs and Security Policy (the informal head of diplomacy), as well as in the commencement of the creation of a joint EU diplomatic corps, i.e. the European External Action Service (EEAS).⁵⁹ Even though the fiasco of the referendums in France and the Netherlands (whose citizens rejected the bold idea of implementing a new European Constitution) slowed down the process of deepening EU integration, its logic still leads – in a sense, in accordance with the neo-functional theory⁶⁰ – to one logical culmination: the functioning of a consciously established supranational federalist entity which, under the Lisbon Treaty, has finally become a subject of international law.

A very important step in the process of European integration was the official establishment of the euro area, which has come to be called the Eurozone (sometimes also ‘eurozone’, or ‘euro zone’). While the Eurozone does not cover all 27 EU Member States (only 17, following Estonia’s joining on 1 January 2011), nevertheless it still remains a very important and most interesting experiment on a global scale, as a supranational currency has been established under it by means of a largely ‘top-down’ decision. Unfortunately, as a result of the September 2008 crisis, the Eurozone is suffering a serious crisis, one which is undoubtedly its worst since its entry into force on 1 January 1999. There are many symptoms of this crisis: the collapse of the Greek market, to which the EU Member States and the European Central Bank have not managed to find a remedy for endless months, and the danger that other countries of the Eurozone, the so-called PIIGS States (Portugal, Ireland, Italy, Greece

⁵⁸ For more, see, e.g., *Unia Europejska. Nowy typ wspólnoty międzynarodowej (The European Union. A New Type of International Community)*, ed. E. Halizak, S. Parzymies, Warszawa 2002. On the role of the EU in the international arena see: D. Milczarek, *Pozycja i rola Unii Europejskiej w stosunkach międzynarodowych. Wybrane aspekty teoretyczne (The Position and Role of the European Union in international relations. Selected Theoretical Aspects)*, Warszawa 2003.

⁵⁹ A thorough analyses of the consequences of the entry into force of the Lisbon Treaty can be found in the volume *Dyplomacja czy siła? Unia Europejska w stosunkach międzynarodowych (Diplomacy or Force? The European Union in International Relations)*, ed. S. Parzymies, Warszawa 2009. In this volume, of particular importance are the studies by S. Parzymies *Unia Europejska jako uczestnik stosunków międzynarodowych (The European Union as a Participant in International Relations)* and by W. Góralski *Rozwój i ewolucja systemu decyzyjnego Wspólnej Polityki Zagranicznej i Bezpieczeństwa Unii Europejskiej (Development and Evolution of the Decision-Making System of the EU Common Foreign and Security Policy)*.

⁶⁰ See the two thorough studies on this topic by S. Konopacki in “Studia Europejskie” No. 2/1998 and No. 3/1998.

and Spain) could be next in line to experience such a crisis. Despite the 10 May 2010 decision of the EU ministers of finance on rescuing the Eurozone and their designation of EUR 750 billion (USD 1,035 billion) to fulfil this goal, the effects of the crisis could not be prevented and, in November 2010, a further EUR 85 billion (USD 113 billion) had to be assigned as a relief package for Ireland, which ironically not so long ago was considered to be the economic ‘tiger’ in the EU.⁶¹ It should not thus not be surprising that French President Nicholas Sarkozy, in his 2011 New Year’s Address, considered the protection of the Eurozone ‘*the most important challenge in 2011*’. Both Sarkozy and other European critics openly declare that a collapse of the euro would in fact imply a collapse of the project of European integration, which would have tremendous negative consequences not only for Europe, but for the entire world.⁶² Once again, in a quite visceral form, all of those problems and major dilemmas were visible during the latest G20 summit in Cannes in November 2011, when everyone was openly talking about the current crisis in Greece (and Italy), and searching for a solution to the serious European debt prob-

⁶¹ See the interesting Chinese analysis, *Bumpy road ahead for euro*, published on 31.12.2010 on the webpage www.xinhuanet.com. Among the signs of Chinese interest in this crisis was not only the Chinese intervention and assistance provided to Greece during the three-day official visit of Premier Wen Jiabao in Athens in late September 2010, but also the Chinese proposal – not implemented, but significant because of its origins and the timing of its announcement – to ‘save the eurozone’ (as China currently has the largest and most rapidly-growing foreign-exchange reserves, estimated at USD 3,4 billion). For more on the Chinese foreign-exchange reserves see: www.uschina.org. For more on the Chinese proposal of 22.12.2010 for the eurozone, see: *How desperate can you get: EU places hopes on China to rescue euro* on the webpage www.euointelligence.com and *China to the EU’s rescue – again* (suggesting that after the intervention in Greece, there would now be assistance to the entire eurozone) at: <http://arabnews.com/economy/article224461.ece>. What is more, in late 2010 and early 2011, there were announcements in the press that China could provide help in dealing with the crisis to other, EU Member States (after Greece), such as Spain or Hungary: *China and Spain: A brighter future for win-win cooperation*, at: http://news.xinhuanet.com/english2010/china/2011-01/03/c_13675031.html; *China and Spain BOOT trade ties*, at: <http://news.bbc.co.uk/2/hi/4432694.stm>; See also: *Svájcot utánozva válhat valóra Orbán kínai álma (Following Switzerland Orban can implement his China dream)*, this report, citing the Hungarian Minister of Development T. Fellegi, states that China could soon take over securities, at: <http://vallalkozoi.negyed.hu/vnegyed/20101229-orban-viktor-szerint-versenykepesebbek-leszunk-mint-kina.html>. The issue of the unprecedented Chinese activity in European markets is presented, in the most detail so far, in the report of the European Council on Foreign Relations *The Scramble China* by J. Godement, J. Parello-Plesner and A. Richard. According to the authors: ‘China is buying Europe’, at: http://ecfr.eu/content/entry/chinas_scramble_for_europe

⁶² *Sarkozy: upadek euro byłby upadkiem wspólnej Europy (Sarkozy: the fall of the euro would be the fall of the common Europe)*, at: <http://www.wprost.pl>, 1.01.2011. It is also worth pointing out that F. Zakaria, in his book *The Post American World*, op.cit. almost completely ignores the EU, focusing on China and India. Similarly R. Kagan, in his *Return of History...*, op.cit., next to the USA focuses mostly on China and Russia.

lem.⁶³ Finally, having the future of the whole Eurozone in mind, on 22 July 2011, the leaders of the beleaguered Eurozone's 17 Member States announced a massive EUR 157 billion bailout package for Greece.⁶⁴ Another bailout plan for Greece was announced in late October 2011.⁶⁵ But still the crisis has not been overcome yet, with Italy in danger of following Greece as this text is written.

The dynamism exhibited in the activities of the newly established organisations such as the G20 and BRICS, as well as other organisations already existing for some time but recently gaining more importance, such as the EU or SCO, leads to the conclusion that, **in the institutional sense, important changes and reshufflings have taken place in the international arena in recent years, especially after the outbreak of the crisis in the international markets in September 2008. This confirms the thesis presented earlier that the role of the USA in particular (earlier symbolised by the assigning to it of the Bretton Woods system) and of the Western states in general is relatively diminishing (reflected in the EU by the controversies surrounding the Eurozone and the PIIGS phenomenon), while the role of those States jointly referred to as the 'emerging markets' is dynamically growing.** It now depends on the future dynamism of the latter markets, from China through to India, Brazil, South Africa or Indonesia, whether the presently observed institutional change will prove permanent, or whether they only herald deeper and more complex changes to come.

3. The actual configuration of powers in the early 21st century

Information concerning the 'emerging markets' also must begin with China, which in 2009 overtook Germany and became the largest exporter in the world,⁶⁶ and in mid-2010 overtook Japan and became the second-largest,

⁶³ See the most important documents from the summit at: <http://www.g20.utoronto.ca/summits/2011cannes.html>.

⁶⁴ *Greece gets another bailout from the Eurozone*, at: <http://articles.latimes.com/2011/jul/22/world/la-fg-eu-greece-debt-20110722-32> (last visited 14.08.2011).

⁶⁵ *Greek politicians signal support for tough bailout plan*, „The Washington Post”, 3.11.2001.

⁶⁶ *China top global exporter in 2009*, at: <http://en.rian.ru/business/20100108/157495037.html>. According to this report, China's October 2009 exports amounted to USD 140 billion, while Germany's exports in the respective period amounted to USD 134 billion. According to another report, the exports of these countries in the period January–October 2009 amounted to USD 957 million and USD 917 million, respectively. *China exceeds Germany to become world's biggest exporter*, on the webpage of the “Global Times” magazine, at: <http://business.global-times.cn/china-economy/2010-01/496655.html>. According to reliable data of the US-China Business Council, China's exports in 2009 amounted to USD 1,202 billion, at: <http://www.uschina.org/statistics/tradetable.html>

after the USA, economy in the world (third if the EU is considered as a single economy). The relevant data for 2010 are presented in Tables 1 and 2 below:

Table 1. The most important world economies in 2010, according to the IMF

	Country Rank	GDP (millions of USD)
—	World	62,909,274
—	European Union	16,282,230
1	USA	14,657,800
2	People's Republic of China	5,878,257
3	Japan	5,458,872
4	Germany	3,315,643
5	France	2,582,527
6	United Kingdom	2,247,455
7	Brazil	2,090,314
8	Italy	2,055,114
9	Canada	1,574,051
10	India	1,537,966

Source: [http://en.wikipedia.org/wiki/List_of_countries_by_GDP_\(nominal\)](http://en.wikipedia.org/wiki/List_of_countries_by_GDP_(nominal))

Table 2. The largest world economies in 2010, according to the World Bank

	Country Rank	GDP (millions of USD)
—	World	63,048,823
1	USA	14,582,400
—	Eurozone	12,174,523
2	People's Republic of China	5,878,629
3	Japan	5,497,813
4	Germany	3,309,669
5	France	2,560,002
6	United Kingdom	2,246,079
7	Brazil	2,087,890
8	Italy	2,051,412
9	India	1,729,010
10	Canada	1,574,052

Source: The World Bank: World Development Indicators database. 1 July 2011. <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (accessed on 12.07.2011)

Japan and China switched places in mid-2010,⁶⁷ while only two or three years earlier China, quickly growing in power, overtook Germany on this list. Extrapolating from the data presented above, the weekly *The Economist* produced a forecast which indicates that China could overtake the USA as early as in 2019, thus becoming the largest economy in the world.⁶⁸ It should also be noted that the prognoses concerning the growing importance of the Chinese economy were modified in China's favour by virtually all major analytical centres and rating agencies in the world in the last decade.

Other 'emerging markets', particularly India and Brazil, are closely following China's rise, while Russia has, to a large extent, economically 'revived'. The reputable bank and analytical centre Goldman Sachs, which in November 2001 coined the term 'BRIC' in one of its reports, originally predicted that the economies of these four countries could overtake the most developed countries around 2050, and that China would overtake the USA in 2041. After two corrections to this report, they now believe that such a change could occur already in 2027 and that the BRIC economies (without South Africa yet) would overtake the strongest Western economies around 2035.⁶⁹ What is more, the latest report of Goldman Sachs on the then-BRIC of November 2007 contained a chapter entitled *Is Wall Street doomed?* It is interesting and should be noted that this question was raised even before the outbreak of the 2008 crisis. Another element which should be noted is the fact that the BRIC states (not BRICS yet) jointly cover more than 25 per cent of the surface of the globe and contain more than 40 per cent of its population, and that three of the four most populous countries in the world are among the 'emerging markets' which joined the G20: China, India and Indonesia (the latter is also the most populous Muslim country in the world, with a population estimated at approximately 240 million; in third place in population is the USA, with a population of 309 million). Yet possibly the most important

⁶⁷ According to the report *China Passes Japan as Second-Largest Economy*, "The New York Times", 15.08.2010, at: http://www.nytimes.com/2010/08/16/business/global/16yuan.html?_r=1. See also: S. Phang, *China Overtakes Japan as World's Second-Biggest Economy*, "Bloomberg News", 16.08.2010. This thesis coincides to a large extent with the prognosis by Professor Hu Angang, who also predicts that '2020 is determined to be the likely year that the PRC will surpass the United States as the world's preeminent economic power'. Hu Angang, *China in 2020...*, op.cit., p. 20.

⁶⁸ *The world biggest economy. Dating Game. When Will China Overtake America?*, "The Economist", 16.12.2010. The date of change of the leading world economy, as predicted by "The Economist," is earlier than Goldman Sachs's predictions, which assume that the trends of the last decade will prevail, maintaining China's annual GDP growth at an average level of 10.5 per cent and the USA's at 1.7 per cent, and taking into account the rate of inflation.

⁶⁹ 'BRICS AND BEYOND' – a Goldman Sachs study of BRIC and the N11 nations, 23.11.2007; at: <http://www2.goldmansachs.com/ideas/brics/book/BRIC-Full.pdf>.

factor connected with the BRICS states – and in particular with China and India, which lead this organisation – is the fact that both these states are in reality continents with ancient civilisations. In China, which until the Opium Wars of the mid-19th century produced approximately 1/3 of the world GDP by itself,⁷⁰ the present trends are considered nothing more than a return to the normal state of affairs, even if for the Western world this is an entirely new qualitative change and challenge.

Just as recently as ten years ago two American authors, Joseph S. Nye and John D. Donahue, wrote: ‘*Globalism today is America-centric*’⁷¹ and many scholars agreed with their assessment. In the first decade after the collapse of the Cold-War order, globalisation was identified with Americanisation,⁷² and not only in the USA.⁷³ Paradoxically, Chinese scholars consider the previous great crisis in world markets, which started in 1997 in Thailand and Indonesia, to be the important turning point which marked the universalisation of the process of globalisation, that is the gradual departure from an American-centred approach and, at the same time, an increase in the importance of China and the whole Asia-Pacific region.⁷⁴ From that moment on, China has become a lender and has repeatedly emphasised its independence in the global markets. This independence is constantly growing and resulting naturally in a marked increase in assertiveness by China in the international arena in general. From that moment on Chinese scholars, followed by politicians, ceased to identify globalisation with Americanisation and Westernisation and began to stress its universal character.⁷⁵ At the same time, they started to emphasise the effectiveness of China’s transformation and development model,⁷⁶ equated with reforms and opening up to the world (*kaige, kaifang*), while still not calling it their own chosen development model. This is due to the fact that both Chinese scholars and politicians are well aware that such a model, if one can already speak of something like that at all, still requires

⁷⁰ See the interesting visualization: *Share of GDP: China, India, Japan, Latin America, Western Europe, United States*, at: <http://www.visualizingeconomics.com/2008/01/20/share-of-world-gdp/>.

⁷¹ J.S. Nye, J.D. Donahue, *Governance...*, op.cit., p. 8.

⁷² J.A. Scholte, *Globalization. A critical introduction*, New York 2000, p. 16.

⁷³ Yu Keping, *Quanqiuhua yu zhengzhi fazhan (Globalization versus Political Development)*, Beijing 2005, p. 213.

⁷⁴ *Quanqiuhua: Zhongguo daolu (Globalization: The Chinese Variant)*, ed. Li Huibin, Beijing 2003, p. 15.

⁷⁵ Yu Keping, *Quanqiuhua...*, op.cit., p. 130.

⁷⁶ Xia Chundao, *Zhongguo guoqin yu fazhan daolu (Chinese National Specificity and the Paths of Development)*, Beijing 2010, p. 35, 36. Especially important in this respect is the recent volume by a scholar from Singapore, Zheng Yongnian, *Zhongguo Moshi. Jingyan yu Kunju (The Chinese Model. Experience and Difficulties)*, Hangzhou 2011.

much work and streamlining, and the Chinese transformation is far from being complete.⁷⁷

Now however, at the end of the first decade of the 21st century, entirely new tones have entered the internal Chinese debate. It seems that the strategy employed so far, originating in Deng Xiaoping's once very popular concept of the so-called 28 Chinese characters, which involved not striving for first positions but instead waiting behind and gathering strength,⁷⁸ has changed into an entirely new concept, involving a 'grand renaissance of the Chinese nation', based on uniting the Chinese powers (including Taiwan) and rapid economic and technological development.⁷⁹ Because this strategy has already resulted in many huge successes, at the end of 2010 new theses were put forward, proposing that China should 'step out of the shadow', 'abandon the mentality of a weak state' and 'take international responsibility worthy of a global superpower'.⁸⁰ Such voices were, until recently, unheard of in the Chinese public and political discourse. We should attentively observe China's development, as the processes taking place there will, to a large extent, determine the economic near-future of the world.

However, in this context we should also note the warnings given by experienced diplomats. Kishore Mahbubani reminds us that: *'Throughout history, there has always been rising tension between world's greatest power and the world's greatest emerging power.'*⁸¹ Henry Kissinger, in his recent volume *On China*, writes: *'I am aware of the realistic obstacles to the cooperative U.S. – China relationship I consider essential to global stability and peace. A cold war between the two countries would arrest progress for a generation on both sides of the Pacific. It would spread disputes into internal politics of every region at a time when global issues such as nuclear proliferation, the environment, energy security, and climate change impose global cooperation.'*⁸²

⁷⁷ *Think again: It may not be China's century*, <http://www.xinhuanet.com>, 08.03.2010. For more on the notion of the 'Chinese model' see B. Góralczyk, *The Role of China...*, op.cit., and the volume edited by Yu Keping, Huang Ping and others, *Zhongguo Moshi yu 'Beijing Gongshi' (The Chinese Model and 'Beijing Consensus')*, Beijing 2006.

⁷⁸ For more, see: K. Mahbubani, *The New Asian Hemisphere...*, op.cit., p. 224.

⁷⁹ For more, see: B. Góralczyk, *Chiński Feniks. Paradoxy rosnącego mocarstwa (The Chinese Phoenix. Paradoxes of a Growing Power)*, Warsaw 2010, p. 313 and following.

⁸⁰ Wang Haiyun in the "Global Times", 07.11.2010.

⁸¹ K. Mahbubani, *Can Asians Think?*, op.cit., p. 199.

⁸² H. Kissinger, *On China*, New York 2001, p. 522.

Conclusions: Will we reach a new order?

Edward Hallett Carr, one of the ‘fathers’ of the field of international relations, is said to be the author of the following words: ‘*No crisis, no discipline*’ (concerning international relations, of course).⁸³ In other words, the best time for theoretical studies of international relations and for their practical ordering is when the world is in a crisis or at an important turning point. The last such watershed, connected with the fall of the USSR and the collapse of the communist camp, brought with it, as already mentioned, the domination of neo-liberalism and the conviction that the markets play the role of the main power in the international arena, while at the same time the state and its interventionism become weaker. Even in neo-realist conceptions, the significance of economic events has become much more important, resulting in their inclusion in the mainstream discourse, next to those factors which were once considered the most important, such as power and security.⁸⁴

There is no doubt that the 2008 economic crisis could prove to be another ‘turning point’. The neo-liberal determinism has been abolished, and not only China and Russia have begun proposing theses on the dominating role of the states in managing the shocks resulting from globalisation.⁸⁵ At the same time, the ‘unipolar moment’ that marked American hegemony has ended, at least in the economic sense.⁸⁶ Once more, just as after the Westphalian Treaty (Osnabrück and Münster) and following other important turning points in the history of mankind, we are facing the challenge of ‘crossing from the old world to the new world’. The major concern is that, since 1648, when a new order was developing it was always preceded by a deep crisis, conflict, and war. Now, however, as was the case with the collapse of the Cold-War order, no such conflict exists and none appears even close (at least in the near future). But still, the character of the new powers which recently emerged in the global arena incline us to propose the thesis that the outline of a new global order is emerging, and that it is very different from the ‘old order’.

In the short, one-generation-long period following the collapse of Communism in 1989–91, what has suddenly now become the ‘old world’ was char-

⁸³ L.J. Kiss, *Globalizálódás...*, op.cit., p. 11.

⁸⁴ T. Łoś-Nowak, *Paradygmat realistyczny – projekcje porządku międzynarodowego w XXI wieku (The Realist Paradigm – Projections of the International order in the 21st century)* in: *Porządek międzynarodowy...*, op.cit., p. 28; L.J. Kiss, *Globalizálódás...*, op.cit., p. 25.

⁸⁵ See M. Castells’ postulates in the third volume of his trilogy, *Koniec tysiąclecia*, op.cit., p. 292. See also: D. Rodnik, *The Globalization Paradox...*, op.cit., p. XVI, XVIII.

⁸⁶ One of the first to predict America’s decline in importance, even long before the 2008 crisis, was Niall Ferguson: *Kolos...*, op.cit., e.g. p. 38, 313. G. Soros was also critical, e.g. in the work *The Bubble of American Supremacy*, New York 2004.

acterised by the unprecedented domination of the USA in all possible spheres. During the classical era of the rule of sovereign of states, still important but slowly receding, dominance, prestige and influence were connected with power (political, economic, military or technological). The main problem today, in the era of globalization and the network society, is that a nation state, even one as strong as the USA, is no longer the most important source of legitimisation.⁸⁷

In the presently emerging ‘new world order’, two powers are clashing and we are witnessing two major processes. On the one hand, the constantly deepening processes of globalisation are leading to a ‘transnationalisation’ of foreign policy and international relations. States are no longer the sole sovereigns in the world. The importance of non-state actors, particularly supranational corporations, is constantly growing. There is, therefore, open talk about phenomena such as ‘the retreat of states’, or even their ‘extinction’.⁸⁸ In this new era, the economy, capitals, money and information have broken free of the control of states, which is why more and more experts are speaking of ‘the end of the classical era’⁸⁹ and its replacement by the ‘global’ or ‘network’ society. According to Dani Roderik, the main problems and challenges of this era are due to the fact that ‘*there is no global antitrust authority, no global lender of last resort, no global regulator, no global safety net, and, of course, no global democracy. In other words, global markets suffer from weak governance*’.⁹⁰

We already know that the 2008 crisis has proven the neo-liberal conceptions wrong.⁹¹ And the new centres of power which matter now, starting with China, and Russia, seem to refer in their practice to the rules of state interventionism in internal policies and to have a strictly classical view on the notion of power in the international arena (constantly referring to the five rules of peaceful coexistence – *pancha shila*). Even if the anti-liberal, statist ‘Beijing Consensus’ has not yet fully developed and is definitely not yet a universal

⁸⁷ M. Castels, *Sila tożsamości*, op.cit., p. 74.

⁸⁸ J.A. Scholte, *Globalization...*, op.cit., p. 21.

⁸⁹ A. Giddens, *The New International Relations. Theory and Practice*, London-Paris 1998, p. 7.

⁹⁰ D. Rodrik, *The globalization Paradox...*, op.cit., p. XVI.

⁹¹ Naomi Klein has also accused neo-liberalism of many lies, even stating that ‘*This book is a challenge to the central and most cherished claim in the official story – that the triumph of deregulated capitalism has been born of freedom, that unfettered free markets go hand in hand with democracy. Instead, I will show that this fundamentalist form of capitalism has consistently been midwifed by the most brutal forms of coercion, inflicted on the collective body politic as well as on countless individual bodies*’, N. Klein, *The Shock Doctrine...*, op.cit., p. 18. It must be admitted that Klein’s disquisition is particularly vivid, and even though it is a bit biased, it still gives a lot to think about.

model, its birth and the shaping of it – in the form of ‘Chinese development model’ (*Zhongguo Moshi*) – should still be strictly linked to the collapse of the liberal ‘Washington Consensus’.

It is not clear how far China and the other ‘emerging markets’ will go in promoting multilateralism in the classical sense, that is in shaping the centres of power, just as it is also not certain what the final shape of the ‘Chinese development model’ will be. So far it is still in the stage of transformation and creation. Both these issues are important in the context of the **second major process taking place in the global arena, according to which there is an emerging and rapidly growing awareness of the challenges which nation states are not able to, and will not be able to, deal with on their own.** Some of these ‘global challenges’ were quite well defined in the UN’s Millennium Development Goals of 2000. Issues such as regional stratification and inequality of income (including starvation), resource deposits of states (today, we can easily picture future conflicts over energy resources and even drinking water), climate change and degradation of the environment, next to global terrorism or the ‘oldest’ of them, the proliferation of nuclear weapons, require a strictly global approach and cannot be resolved by local solutions. These challenges are a threat to the human race as a whole and even life on earth as such, and not just to one state or group of states. Therefore, the answers to these challenges can only be global.

While looking for answers to the new challenges, experts in the field of security have developed an entirely new concept of ‘co-operative security’.⁹² **This idea is based on the paradigm that, in order to prevent further conflicts on the globe, people have to cooperate and not compete. It seems that a similar challenge is presently faced by theoreticians and practitioners in the sphere of international relations.** As postulated by Zygmunt Bauman, a ‘global code of conduct’ is necessary. However, how and by whom should it be developed remains an open issue. It is certain that its development will not be a simple task, as: 1) the concepts of global governance have never gotten beyond the stage of theoretical discussion; 2) the only universal system currently in existence, namely the UN, has been in a state of crisis for many years and there is no indication it will be able to get out of it;⁹³ 3) the ‘emerging

⁹² From among the rich literature on this topic, it is worth mentioning the studies by R. Cohen and M. Mihalka with the George C. Marshall European Center for Security Studies, *Cooperative Security: New Horizons for International Order*, Garmisch-Partenkirchen 2001.

⁹³ As the authors of a course book for international relations in the era of globalization, John Baylis and Steve Smith, wrote: ‘phenomena such... as the increasing concern with terrorism and injustice in the world suggest that further changes and adaptations of the UN system will be necessary’. *The Globalization of World Politics. An introduction to international relations*, New York 2005, p. 521 (translated from the Polish version).

markets' are a new category, not yet completely defined, and it is not certain what they will propose to the world in the longer run, although presently it seems that their most serious 'common bond' in the G20 and in BRICS is a common anti-Western platform, not a set of universal values; and 4) it remains an open issue whether China will create a development model which will be attractive enough for others to copy it (due to the specificity of the Chinese state, this seems rather doubtful), as well as whether something like an 'East-Asian model',⁹⁴ opposing the concepts nurtured and well-established in the Western world, could be developed.

Amitai Etzioni posits that, in the modern globalised world, the notion of power should be perceived on three planes – coercion, normative, and remunerative – and consequently is composed of military, idea and money power.⁹⁵ If we accept this paradigm, **the world at the beginning of the second decade of the 21st century looks much different than ten or twenty years ago. The diffusion and diversification of power has deepened. Military power remains primarily with the USA;**⁹⁶ **in the world of ideas there is a struggle of conceptions, with a visible 'twilight' of neo-liberalism, and with new wave of neo-authoritarianism and statism promoted by China and Russia running strong; while in the world of money (or rather foreign-exchange reserves), China is presently the unquestioned leader.** Will the deregulation resulting from globalisation be substituted by regulation? It is hard to tell what should be the origin of the 'ordering factor' in international relations (as postulated by Roman Kuźniar).⁹⁷ However, it is certain that today, more than ever before, the whole of mankind needs ordering in the sphere of international relations. Can we, in accordance with the spirit of the times, reach some single transnational vision of international relations⁹⁸ in a world where not only mutual dependencies are growing, but also a strong opposition is emerging along the axis: Western states – emerging markets?

So far, the increasing mutual dependencies (financial, technological, scientific, cultural) resulting from the globalisation processes are overlapping with the recently strengthened process of an increasing sense of identity, par-

⁹⁴ P.Khanna, fascinated by the economic effectiveness of China, Singapore or Malaysia, writes about the possible existence of such a model in: *Second World...*, op.cit., p.267, 281.

⁹⁵ *Power Shift...*, op.cit., p.308.

⁹⁶ The available data, indicating that the USA spends more on armaments more than all the other largest countries combined, constitutes explicit proof of this. See: *Military expenditure as share of GDP, 2003–2008*, <http://www.sipri.org>.

⁹⁷ R. Kuźniar, *Stosunki międzynarodowe in transition (International Relations in Transition)* in: *Stosunki międzynarodowe. Geneza...*, op.cit., p.472. The Author is the Chief Foreign Policy Adviser to the President of Poland.

⁹⁸ For such a vision, see: S.P.Sałajczyk in: *Stosunki międzynarodowe. Geneza...*, op.cit., p.50–57.

ticularly with those who, so far, have felt like and in fact have been ‘outsiders’. With this, the dilemma presented by Immanuel Wallerstein gains in importance: will the division of the world into a centre, peripheries, and semi-peripheries deepen⁹⁹, or will we manage to walk the path towards a more universal system, in which issues connected with our responsibility to deal with global challenges will move to the foreground? This once again raises the question whether we will be building our future on the basis of ‘the West and the Rest’,¹⁰⁰ or whether the sense of responsibility for all of us as a species will prevail. At the time of writing this text, both options are ever more clearly pronounced, but it remains hard to predict what will come out of this. At the conclusion of this article I would like to stress my belief that, without a common, global responsibility for the crucial matters of our ever smaller – in terms of time and space – world, we will go down. Such a solution is surely desired by no one. However, at least one new factor, which introduces something entirely new to the contemporary international stage, can be taken as a given even now: **the new order will no longer be developed only by the West,¹⁰¹ as has been the case not only in the recent decades but over centuries.** In this sense, the world has a new quality in the practical dimension, even though the ramifications are not yet absorbed and processed in the theoretical sense. Once again, as was in the case with the end of the Cold War – which was predicted by virtually no one – practice seems to be ahead of theory.

⁹⁹ I. Wallerstein, *World-Systems Analysis. An Introduction*, Durham, NC 2004, p. 11.

¹⁰⁰ E. Halizak, in the volume: *Stosunki międzynarodowe. Geneza...*, op.cit., p. 405–446.

¹⁰¹ A similar thesis is proposed by S. Bieleń in the volume *Świat wobec współczesnych wyzwań...*, op.cit., p. 42.



*Xymena Kurowska and Patryk Pawlak**

The EU's Eastern Partnership – More for More, or More of the Same?

Abstract: *The Eastern Partnership (EaP) is a relatively recent form of the EU's engagement with its Eastern neighbours, although it is firmly placed in the existing frameworks of cooperation. Initiated as a restatement of the EU's commitment to diffusing shared democratic values, it confronts a distinct degree of democratic backsliding in the region. The EU's rediscovery of civil society as an instrument to curb such troubling developments is commendable. Yet it is crucial that civil society involvement in reform goes beyond being a mere procedural requirement and strives towards genuine ownership. In order to achieve this, the definition of civil society needs to be inclusive and derived from the local political context. A more individualised approach to forging relations with countries in the region is a positive sign, but it can only come to fruition if it is accompanied by a substantive rethinking of the logic of the EU's assistance. The proliferation of tracks and venues of cooperation that the EaP brings about requires a better justification for the allocated funding and more in terms of its synergy with existing programmes for and in the region.*

Introduction

The Eastern Partnership (EaP), the youngest among EU's cooperation frameworks for Eastern Europe and the South Caucasus,¹ concluded its second summit in September 2011 in Warsaw. With a heavy investment into a PR campaign in the run-up and throughout the summit, the Polish Presidency sought to revive its pet idea and thrust it into more vigorous reins. Yet the summit exposed in full view what many analysts have already noted: there is little about genuine partnership in this arrangement, either in terms of the relationship with the EU or among the EaP countries themselves. The self-isolating

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¹ The EaP covers six countries in the region: Belarus, Moldova, Ukraine, Georgia, Armenia, Azerbaijan.

Belarus and the defiant Ukrainian leadership stood out in the foreground as bad apples throughout the summit, partially obscuring the fact that a more general democratic backsliding in the region and the re-heating of the Nagorno-Karabakh conflict are perhaps more significant issues.

Those who think the summit was a success will argue that the renewal of the EU's commitment to the region will help maintain stability in the East, while keeping the region out of the tentacles of Russian influence. And they will argue too that presumably the renewed commitment in the East will more closely align the region with European values. But this kind of jargon is the only consistency in the EU's re-branded initiatives toward the region. The EaP is yet another incarnation of a weak EU pledge – one that has still not been reciprocated by commitments of the region's leaders to democracy, the rule of law, and political reforms. The EU's Eastern partners refused to sign the declaration on Belarus, which was formulated simply as an expression of 'deep concern over deteriorating human rights, democracy, and rule of law',² even though the core of EaP is supposed to be based on sharing these democratic values. They all had their reasons, ranging from the geopolitical to domestic concerns amid political infighting, which restates the importance of an individualised approach rather than the 'group therapy' that the EU has tended to impose via its European Neighbourhood Policy (ENP). All this drives home the concern about the EU's persistence in reproducing some of its least effective practices in its dealings with the Eastern neighbourhood. The EaP is framed as a broad vision that offers an alternative, but it smacks more of the decades of dubious EU trades in the Southern neighbourhood. Throwing money into a problem is a long tradition of the EU's external assistance, and European leaders invoked it once again, offering Alexander Lukashenko 9 billion euros in exchange for freeing political prisoners and holding free and fair elections. Yet the existing circumstances call for a rethink, and not exclusively *vis-à-vis* shrinking resources in the times of financial crisis. In place of the bullish conditionality and blatant antagonising, we recommend smarter, tailor-made, and more committed strategies for making the Eastern neighbourhood a better place. The reinforced emphasis on partnership with civil society may be a good way to go ahead. The newly recalibrated ENP,³ of which the EaP is part, introduces ideas which may help break the pattern of the EU not delivering on its promises to support civil society. The Joint Communication

² Council of the European Union, *Declaration on the situation in Belarus adopted on the occasion of the Eastern Partnership Summit*, doc. ref. 14983/11, Warsaw, 30.09.2011.

³ European Commission, Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, *A New Response to a Changing Neighbourhood. A review of European Neighbourhood Policy*, Brussels, 25.05.2011, COM(2011) 303.

issued by the European Commission and the EU's High Representative for Foreign Affairs formulates the concept of 'partnership with societies' and declares support for 'deep democracy', to which civil society is fundamental. It explicitly promises curtailing relations with governments engaged in violations of human rights and democratic standards. Holding governments to account and making good on the EaP's unconditional commitment to civil society should indeed define the implementation of the new 'more for more' principle. Importantly, such an approach must not degenerate into *imposing* the EU's idea of civil society, but rather should contribute to the *healthy development of local political dynamics*.

In this text, we offer some observations about ways to facilitate such a recalibration of the current approach. We start with a critical discussion of some of the instrumental features of the EaP, including its political rationale and operational framework. We then proceed with an analysis of the specific aspects of sector-based cooperation, and conclude with some general remarks concerning the future of the EaP.

1. The Eastern Partnership – a critical reintroduction

Launched at the Prague summit in 2009, the EaP was initiated as a Polish-Swedish joint venture aimed at reinvigorating the EU's fading ENP. The official justification was stated as the need for a differentiated approach, while still respecting the character of the ENP as a single and coherent policy framework. The EaP proposed deeper bilateral engagement based on new contractual relations, a gradual integration with the EU economy, enhanced mobility and security, cooperation for a secure energy supply, and enhanced support for economic and social development.⁴ As an improved forum for cooperation within the ENP, the EaP is to provide the foundation for new Association Agreements (AAs) between the EU and those partners who have made sufficient progress towards adoption of the EU's principles and values: 'democracy, the rule of law, and respect for human rights (...) as well as the principles of market economy, sustainable development, and good governance'.⁵ These themes have always been present in the ENP repertoire, but cooperation needed a boost. Analysts emphasised other reasons underpinning the initiative: the refusal of NATO to accept Ukraine and Georgia as members, the need to en-

⁴ See: Joint Staff Working Paper, *Implementation of the European Neighbourhood Policy in 2010 Report: Eastern Partnership*, COM(2011) 303, Brussels, 25.05.2011.

⁵ Council of the European Union, *Joint Declaration of the Prague Eastern Partnership Summit*, doc. ref. 8435/09, Brussels, 07.05.2009.

courage then-Ukraine President Viktor Yushchenko and President Mikheil Saakashvili of Georgia not to give up on the Western orientation, and the pressing and constant demand to diversify gas supplies and keep the EU in the loop about the regional gas politics.

Political momentum and the mobilisation of energy for reforms has transpired, however, almost exclusively in the realm of declarations. While the EaP introduces some technically innovative tools of cooperation (see below), its implementation resembles and reflects the logic of mechanisms created within the ENP Action Plans, with much of the funding still flowing through the European Neighbourhood and Partnership Instrument.⁶ In many areas of EaP flagship initiatives, drafters were hard pressed to find a niche for new projects to which the EaP brand could be attached, as the region is already well catered for by multiple international public and private donors. Clearly, something more than insufficient funding and ill-advised project coverage is at play. The usual suspect is concern with the coordination of international donors' efforts, or de-conflicting, as some who have abandoned the illusion of synergy like to point out. Insidiously enough, many of the projects in need of de-conflicting originate within the 'EU family'. This fragmentation in the EU's approach, lack of strategic coordination and daily communication, and extensive outsourcing of implementation to private consultancy companies and international organisations with their own *modus operandi* muddies the picture beyond comprehension. The EaP has not even begun to break this pattern. It originated in and operates using the same technocratic and ultimately self-referential logic. The EU agents are busy making sure their own procedures are followed and budgets spent, as otherwise they will be reduced in the next financial cycle. They require the introduction of pre-packaged reforms that sit uneasily with the local social and political systems, then wonder that they misfire and blame the recipients. The latter are eager to secure more financial assistance at different levels, so they are usually willing to adopt paper reforms.

A wider shift towards a sectoral approach, based on devising strategies for the reform of an entire sector, offers possibilities for improvement of this situation. Its implementation will still however depend on the piecing together of inputs and effects (often lagging) of numerous projects, some of which are drowning in the sea of technical assistance to the region. It also raises democratic concerns, which we address later on. The EaP did open new financial avenues, such as that under the European Investment Bank's Eastern

⁶ The EC has earmarked €600 million for the six EaP countries for the period 2010–2013 as part of the European Neighbourhood and Partnership Instrument, constituting about a quarter of the total funding available to EaP.

Partnership Facility (€1.5bn). Yet funding, as many of those involved admit, often remains underutilised. This is not only due to the genuine lack of governance capacities in the region. It also reveals the fragmentation and separation of funding tools on offer, which bewilders both the local actors and EU-mandated implementers, who cannot possibly grasp this uncoordinated diversity and thus can hardly advise their advisees. Money talks, and the eastern neighbours expect immediate financial benefits from the EaP. EU needs to provide funding as its buy-in in order to be eligible for mentoring over change, and to show more than just rhetoric about values. This is a longstanding dilemma, illustrating the complexity of externally assisted reform, which has the same elements of a 'deal' as negotiations over an international treaty. There needs to be a more streamlined approach to pouring money into the EaP and a stop needs to be put to perpetuation of the existing labyrinthine logic of assistance.

Unlike an accession process, in which candidate countries must adopt the bulk of EU *acquis*, the EaP offers sector-based integration *à la carte*, with EaP partners choosing among specific sectors offered by the EU. Sectoral integration has brought about positive results only in cases when the interests of both sides coincide. This has been partially the case in trade, and in enhanced mobility, conditional upon border management reform, which the EaP prioritises. Yet reform is particularly impeded in those spheres where the rent-seeking attitudes of the political and economic elites prevail, for example in the spheres of public procurement or the energy market in Ukraine. While sector-wide reform assistance goes some way towards alleviating the fragmentation of project-based aid, it also raises fundamental questions about democratisation and transparency. Unfolding at the mid-level of the governmental hierarchy, it neither provides an overall comprehensive picture of social reform, nor does it attend to the daily needs of ordinary citizens. The promotion of technical harmonisation in policy-specific areas instils distinct practices of governance, but it glosses over the broader issue of civil liberties and the human dimension of such interventions. The modes of cooperation, where actions follow the dealings of mid- and low level officials, may speed up the incorporation of particular solutions, but it obscures the consequences of such decisions for the society at large. Making explicit or tacit bargains with local elites can be counter-productive in terms of building 'depersonalised' state institutions and broadening political representation, fundamental values for which the EU stands.

Below we briefly review the major trends within the framework outlined above: the shift to sectoral cooperation, the negotiations over trade, the emphasis on integrated border management (IBM) in connection with the promise to enhance mobility, and the civil society initiative.

2. From regional to intra-regional and sectoral cooperation

As compared with the overarching ENP, the EaP has been presented as incorporating a much higher level of differentiation, allowing each partner country to develop its links with the EU insofar as its own aspirations, needs, and capacities allow. The EaP also emphasises the need for intra-regional cooperation and cross-country exchanges of practices. Often expressed as ‘bringing stakeholders together’, this strategy has become a significant means of trying to decrease animosity and foster regional collaboration. Such an approach is a welcome response to the ENP’s rather blanket treatment and its ultimate failure to distinguish between the different needs of countries in the region. Crucially, the EaP remains part of a bigger and more complex picture of EU relations with its Eastern Neighbourhood. Its rationale has been mainly political, but in this respect it sadly seems to have failed. The EaP also adds to the mind-numbing fragmentation and overlap of EU reform initiatives in the region. Having said that, many hope that what it can do is to forge and promote cooperation in several crucial sectors.

The EaP has four thematic platforms, designed to offer flexible ‘spaces of discussion’ ‘where experiences, best practices and lessons-learned can be shared, compared, and spread among those who need them to support their own efforts’.⁷ These platforms are: 1) Democracy, good governance and stability; 2) Economic integration and convergence with EU sector policies; 3) Energy security; 4) Contacts between people. The EaP also has identified the following flagship initiatives: Integrated Border Management; Small and Medium Enterprises; Regional Electricity Markets; Energy Efficiency and Renewable Energy Sources; Prevention, Preparedness, and Response to Natural and Man-made Disasters; and Environmental Governance. The EU-Neighbourhood East Parliamentary Assembly (EURONEST) supports the parliamentary dimension of the EaP. The EaP has also created a Civil Society Forum and incorporated a Comprehensive Institution Building (CIB) programme to strengthen core institutions that are central to preparing the groundwork for and implementing future AAs, including Deep and Comprehensive Free Trade Areas (DCFTAs), and making progress towards visa liberalisation a long-term goal. A budget of EUR 173 million has been set aside for CIB implementation in the six partner countries through the relevant 2011–2013 National Indicative Programmes. We cite this list to illustrate the proliferation of tracks which overlap, both in terms of substance as well as participants, with other existing frameworks. The issue of added value seems inevitable. The oft-cited achievements of the EaP in the areas of trade and enhanced mobility are traditionally

⁷ Joint Staff Working Paper, *op.cit.*, p. 5.

well covered and generously funded. But what makes EaP better equipped to deal with these other areas, and does it justify the proliferation of institutional entities which need to be staffed and maintained? How are these different platforms and flagship initiatives integrated into sectoral reform designs and programmes, including funding mechanisms?

Deepening trade relations has been the hallmark of the initiative, but fundamental problems persist and paper reform will not suffice. Border management reform has traditionally featured high on the agenda in connection with visa facilitation and visa-free dialogues. Ultimately, it seeks to curb irregular migration. Yet the panic over irregular migration in the aftermath of the Arab Spring, when migrants from the Southern neighbourhood caused friction among the receiving states (Italy, France, Greece) does not create favourable conditions for a partial opening of borders in the East. The EU was much quicker to deploy the capacities of Frontex to deal with the situation than it was to organise any coherent diplomatic action.

While the Eastern Neighbourhood Policy does not pose a similar danger, it is nevertheless associated with poverty, criminality, and black labour migration, which cannot expect a welcoming embrace amidst an economic crisis. But wealthy criminals may have few problems obtaining a Schengen visa. It is paramount that the EU does not penalise ordinary citizens in its visa policy and that it does not wind up only facilitating mobility for young professionals, who will find their ways to compete on the global market anyway. This is important if the EU wants to shed the image of making deals with the corrupted elites, and if it truly wants to avoid adding to the frustration at the grassroots level with 'business as usual'. It is more than just a question of branding – such an outreach could show that a different, freer, and more participatory model of life is possible. In this context, the reference to the Arab Spring may have limited appeal, as the region has experienced its share of coloured revolutions that largely failed to improve the life of ordinary citizens. The populist 'Occupy' movement in the US and the globally reinvigorated voice of civil society may constitute better inspiration, as they focus on democratisation from below.

In this respect, the EaP's Civil Society Forum is a promising space to begin. It is hardly a novum in the EU's assistance repertoire, which is required to consult and liaise projects on the ground with civil society partners. But the political climate is ripe to substantiate this relationship, so that it is more than just a checkbox on a project implementation form. It is necessary to invest in the creation of an environment where civil society organisations can acquire a freer standing, rather than reproduce existing state practices at the lower level, including endemic corruption, nepotism, and disrespect for citizens. This is no small task, and its magnitude makes it more than just a question of funding. It must

also be about the EU controlling its tendency to patronise over what civil society should look like. The societies in Eastern Europe and the South Caucasus may be culturally closer to the EU than Arab societies, but they certainly have their own social and political customs, traditions, and dynamics.

2.1. Trade

One of the main components of the EaP is comprised of negotiations to create Deep and Comprehensive Free Trade Areas (DCFTA(s)), which are projected to unfold in parallel with the work on AAs with individual countries. DCFTAs provide for the gradual dismantling of trade barriers and aim at regulatory convergence in areas that have an impact on trade. The EU holds out the promise that, for the most advanced partners, a DCFTA can lead to progressive economic integration with the EU Internal Market. To be eligible, partners need to have a fully functioning independent judiciary, an efficient public administration, and have made significant progress towards the eradication of corruption. As of the moment of writing this article, none of the EaP countries yet approximate these goals.

Negotiations on the AA with Ukraine, launched in 2007, continue on, and talks on the DCFTA were successfully concluded on 20 October 2011. This does not yet mean the signing of an AA, which will be subject to ratification in every member state. The fate of the negotiations became uncertain in early October, on the eve of the sentencing of former Prime Minister Julia Timoshenko to seven years in jail, a move which triggered boisterous reaction from European leaders and resulted in the cancellation of the then-pending visit of President Yanukovich to Brussels. It presented the EU with a critical dilemma. Should it, as a retort, drop or freeze the AA and/or DCFTA? Or should it pass the buck to the several EU member states, some of whom would no doubt fail to ratify them?

Crucially, DCFTAs require a high degree of commitment to complex and broad-ranging reforms. These reforms are politically challenging and require the involvement of the business community as well as other interested parties. Some analysts argue that it is all too easy and not uncommon for these countries to fall back on a default model, where business is controlled by cliques which are part of or close to the political elite, enabling the rules to be bent. Here, as Thomas de Waal argues, Russia offers a much more straightforward model, as its businessmen provide lots of easy capital, while the EU's toughly regulated economy model poses a risk to the position of the oligarchs,⁸ thus triggering resistance to the DCFTA with the EU.

⁸ T. de Waal, *Expanding the EU's Ostpolitik*, "Strategic Europe", 24.10.2011. Available at: <http://carnegieeurope.eu/publications/?fa=45792&lang=en> (last visited 29.11.2011).

2.2. Border matters

The Joint Declaration of the Prague Eastern Partnership Summit of May 2009 includes the provision of enhanced mobility, which envisages the gradual possibility of 'full visa liberalisation as a long-term goal for individual partner countries on a case-by-case basis, provided that conditions for well-managed and secure mobility are in place'.⁹ Ukraine and Moldova were the first EaP countries to receive visa liberalisation action plans, in November 2010 and January 2011 respectively. Georgia is one step behind, implementing a visa facilitation agreement with the EU in March 2011, while negotiations with Armenia and Azerbaijan are expected to result in an agreement in the near future. An additional EU instrument for the gradual elimination of visas, while enhancing the mobility of citizens, is a mobility partnership, currently concluded with Moldova, Georgia, and recently Armenia.¹⁰

Visa facilitation and visa-free dialogue is a heavily conditionality-based tool which requires significant reforms in border management, based not only on technical solutions such as the introduction of biometric passports. It also aims to curb irregular migration, as visa facilitation agreements are only signed if accompanied by readmission agreements so that unwelcome migrants can be sent back to the EaP countries of origin. Mobility partnerships are a tool for managing labour migration, and it is essential that the EU does not solely privilege the mobility of professionals, but reaches to different strata of EaP societies.

As regards the broader synergy, the negotiations over visas should be better coordinated with frameworks and projects in the region geared towards introducing the IBM models, such as the EU Border Assistance Mission to Moldova and Ukraine which, *inter alia*, helped both countries draft their national IBM concepts. There is much room for action and potential for added value within the South Caucasus IBM (SCIBM), launched under the EaP IBM Flagship Initiative. Because of the unresolved Nagorno-Karabakh conflict, this programme can only operate through bilateral Georgian-Armenian and Georgian-Azerbaijani arrangements. This should not, however, hamper the possibility of attending to the distinct needs of each of the countries involved. Assisted by the EU's Border Support Team (BST) under the mandate of the EU Special Representative for South Caucasus, Georgia has adopted a strategy for IBM and should appreciate and obtain support for its implementation. Those involved in the design of the Georgian strategy have voiced concern over how it would be followed up, and the SCIBM could constitute an excellent opportunity to add to the implementation efforts.

⁹ Council of the European Union, *Joint Declaration of the Prague Eastern Partnership Summit...*, op.cit.

¹⁰ See especially: M. Arcipowska, *EU Visa Dialogue with Eastern Partnership Countries*, "Bulletin of the Polish Institute for International Affairs" No. 91(308), 04.10.2011.

The state of the Armenian and Azeri border, quite apart from incomplete demarcation, is mired in the Soviet legacy and requires enormous work to bring it in line with modern border management. The SCIBM is executed by UNDP, a frequent implementer of the EU's border-related projects, but it is vital that tailor-made solutions are found rather than simply imposing templates.

2.3. Civil society

The inclusion of civil society in the EaP process is one of the most frequently mentioned positive aspects of the partnership and, in our opinion, one of the most critical for the recalibration of the cooperation. It taps into a broader ENP declaration in support of deeper democracy, which envisages the establishment of a Civil Society Facility for the neighbourhood and supports the creation of a European Endowment for Democracy (EED). Substantively, this should involve the EU's encouragement of a greater political role for non-state actors through a partnership with societies, helping civil society organisations to develop their advocacy capacity, their ability to monitor reform, and their role in implementing and evaluating EU programmes.

The EaP has its own medium dedicated to this role – the Civil Society Forum (CSF). The CSF was established to support the emergence of a strong and effective citizenship in partner countries and integrate as much as possible the views of civil society into the workings of the EaP. Developed into a substantial platform with the involvement of the EU's civil society organisations, it has the potential to foster a truly innovative model of policy-making. It is crucial, however, that it does not end up as a facade for appearances, but it is streamlined into the design of real reform in the region. Each of the EaP countries has a different level and diverse forms of civil society, so it is equally important that the national platforms are taken seriously and the EU adopts an inclusive definition of eligible non-state actors.

In this respect a lot depends on how the idea of the EED will be implemented. Intended as a 'light' version of the existing tools for the promotion of democracy, the EED is expected to reduce the bureaucratic burden associated with the funding of civil society. By introducing more flexibility into the current grant-making architecture, the EED is supposed to stimulate bottom-up democratisation processes. After discussions in the European Parliament, on 15 December 2011 the Committee of Permanent Representatives in the European Union (COREPER) adopted a declaration on the establishment of the EED.¹¹ It envis-

¹¹ On the role of the Polish advocacy in promoting the idea of EED see X. Kurowska and P. Pawlak, *Mesjanizm w transformacji*, Komentarze Międzynarodowego Centrum Badań i Analiz (ICRA), <http://www.icra.pl/index.php/aktualnosci/komentarze/item/92-mesjanizm-w-transformacji> (last visited 12.02.2012).

ages the Endowment as a grant-awarding institution with a lean structure, geared towards fostering 'deep and sustainable democracy' in transition countries. In the discussions expected to take place in the first half of 2012, it will be a genuine challenge to operationalise these generic provisions in a politically savvy fashion and work out viable criteria for grant-making.¹²

3. European prospect or Eurasian Union?

The standing criticism regarding the implementation of the EaP is that there is a lack of a 'European prospect', i.e. a powerful incentive-based conditionality, which creates the biggest obstacle to reform. The 2004 and 2007 enlargements cannot be considered examples to emulate in this context. Central Europe was presented with an *aquis* which by and large it had to incorporate, and any scope for negotiation was slim. Research on Central European accession shows that the effectiveness of incentive-based conditionality was high, because of the credible membership offer and the fact that the governments did not consider the domestic costs of compliance threatening to their hold on power.¹³ And it is precisely these two factors which are absent for the EaP, which has no firm membership offer on the table, and with the EU democratising agenda potentially endangering the position of ruling elites in the region.

Scholars working on external governance have been trying to pin down to what extent the EU is able to integrate its external environment into common systems of rules, absent the prospect of EU membership. They aptly describe the practices that prevail in the cooperation with ENP/EaP countries as follows: the interaction proceeds according to a sectoral policy-specific logic, it has a tendency to rely more on networks rather than hierarchy, and it promotes approximation to the EU's model rather than the adoption of identical solutions.¹⁴ While this description of external governance rightly pinpoints the

¹² For a more extensive discussion about the issues related to the EED see: Open Society Institute, *How could a European Endowment for Democracy add value?* Discussion paper, September 2011; R. von Meijenfeldt, *A European foundation for democracy: what is needed?* Policy Brief No. 93/September 2011.

¹³ See: F. Schimmelfennig, U. Sedelmeier, *Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe*, "Journal of European Public Policy" Vol. 11(4)/2004, p. 661–679; R. Epstein, U. Sedelmeier, *Beyond conditionality: international institutions in postcommunist Europe after enlargement*, "Journal of European Public Policy" Vol. 15(6)/2008, p. 795–805.

¹⁴ S. Lavenex, F. Schimmelfennig, *EU rules beyond EU borders: theorizing external governance in European politics*, "Journal of European Public Policy" Vol. 16(6)/2009, p. 791–812, p. 807–808.

prevalent forms of interaction, it however falsely assumes as a given the EU's ability to transfer its norms and values, and thus overestimates the EU's effects. It also takes for granted the EU's right to transform the Eastern societies in a unidirectional way. Yet the EaP countries have not seen sustained transformation in the last two decades, and many therein would question the EU's superior standing on the market of external assistance.

The role of the EU as the only option for Eastern European and Central Asian countries has been challenged by Russian Prime Minister Vladimir Putin, who has made his own proposal for a Eurasian Union (EAU), outlined in early October 2011. The guiding idea behind this initiative is the creation of an economic grouping focusing on integration between Russia and the former Soviet republics that would further allow for the institutionalisation of Russia's influence and creating 'a new pole in the modern world'.¹⁵ The EAU will largely build on the Single Economic Space of Russia, Belarus and Kazakhstan, and will expand the integration process (including the use of a single currency) to other countries of the Commonwealth of Independent States.

For the moment, Ukraine has resisted any form of closer cooperation with Russia, presenting this position as proof of its 'European choice'. Georgia is clearly opposed to any Russian initiatives, which it sees as expression of Russian imperialist ambitions. However, even though the idea has not received anything yet resembling a unanimous endorsement of all countries in the region, it nonetheless constitutes an attractive, to some, alternative to the 'European package', which is perceived as coming with too many strings attached.

Conclusions and the way ahead

The EaP is branded as a forum streamlining the implementation of democracy, governance and stability, economic integration and convergence with EU policies, energy security, and contacts between people with the aim of bringing the partners closer to the EU. It is designed to rectify and bolster what the ENP and earlier Wider Europe frameworks have so far failed to do. It is not however very clear what these objectives involve in concrete terms. As such, the EaP is permeated by a certain conceptual vagueness and inherits an overwhelming fragmentation at the level of both policy formulation and implementation.

This vagueness is a reflection of a broader EU trait to operate with high flying rhetoric. This would be forgivable if the EaP delivered on its political

¹⁵ F. Weir, *Russia: Putin advances Eurasian Union*, "Global Post", 27.10.2011. Available at: <http://www.globalpost.com/dispatch/news/regions/europe/russia/111026/russia-putin-advances-eurasian-union> (last visited 28.11.2011).

rationale, i.e. renewed encouragement for democratic commitments in the region. The current state of relations with the EaP countries, however, shows an opposite trend. It is not just the usual suspect Belarus and the change of government in Ukraine which threw the country back to a pre-Orange Revolution position in terms of democratic commitments. While the EU likes to tout Moldova, thanks to the pro-EU stance of its current government, as the much-needed success story of the EaP, in fact much of the reform there exists primarily on paper, even printed out using donated printers. Georgia struggles with issues of freedom of speech and the concentration of power in the executive branch. Armenia stagnates in Russian dependency among neighbours busy with pipeline politics, and the openly authoritarian Azerbaijan is only slightly interested in the EaP, as it is busy engaging in regional geopolitics and partnership with Turkey. Given this democratic backlash in the region and, more immediately, its reflection in the outcome of the EaP summit in Warsaw in September 2011, it may be questioned whether the envisaged political momentum ever quite got off the ground.

The inherent dilemma between conditionality, which is open to the charge of neo-colonial meddling, and the *laissez-fair* approach of international donors throwing money at the wall and hoping something will stick, seems here to stay, at least in the short, if not medium term. The only plausible political middle ground for recalibrating cooperation would seem to be a more genuine commitment to partnership with the local societies, based on support for the deeper democracy that the new ENP is supposed to provide. At the ground level of implementation, the multitude problems with fragmentation and lack of synergies – not only with other donors but also within the EU ‘family’ – are well known. The shift to a sectoral approach, which the EU has been phasing in for some time, should bring about positive, even if lagging, effects. The concern remains that new EaP-related project infusions will add to the existing fragmentation rather than improve the situation. There needs to be a focus on participatory project design, management, and implementation, drawing heavily on the lessons learned. This is necessary not only to ensure the right level of obligatory local ownership. Such a participatory approach can provide a platform for civil society actors to acquire experience, self-confidence, a sense of responsibility and, importantly, implementation capacities. Too many projects on the EU record are outsourced to external consultancies with little or no stake in the outcome other than ticking boxes, and the influx of real local stakeholders and well-rounded actors would be a welcome shift. On the part of EU implementers, an investment in cultural competence in an equal measure as technical expertise is a must, as it facilitates forging trustful relationships with local stakeholders.

What the EaP rightly seeks to endorse is the differentiation among countries in the region. This is in line with the yet-to-be-substantiated principle of

'more for more'. The emphasis on sectoral approximation and integration, which can cause ambivalent effects on broader democratisation, should be monitored for overreliance on technical solutions at the cost of fostering democratic values. This also holds true for reforming institutional capacities, where two extremes are to be avoided. The EU has a long tradition of putting much faith in technocratic change in its external assistance, and underestimating short-term politics. Yet if such politics go wrong, they can endanger the democratic processes at the core of the entire structure. The emphasis on the nitty-gritty of sanitary regulations will not salvage democracy. On the other hand, attaching too much importance to declaratory paper reforms and assertions of commitment is equally misguided. The example of Moldova as a success story, having regard to its speedy approval of numerous regulations, is a case in point. The adoption of legislative frameworks should not be equated with their instantiation, nor should it be falsely assumed that they, in and of themselves, give substance to their implementation. Finalisation of documents, even including AAs and DCTAs, should not thus be goals in themselves. Inevitably, the continuing cooperation will raise on more than one occasion the recurring dilemma: What promises a better strategic payoff – a rebuff that might force a rethink in the short-term, or locking both the EU and the EaP countries into transformational commitments that the signed agreements will hopefully create in the long-term? Similarly, while heavily conditioned incentive-based transfers may bring effects, they are not guarantees of sustainable change, nor a recipe for forging a genuine partnership. This demonstrates that there is no golden formula and underscores why political shrewdness, experience, and aptitude play such important roles in the process.

Finally, in our opinion sight cannot be lost of the most promising aspect of such cooperation: the 'partnership with societies', which should find its fullest expression in pragmatic and practical programmes and results. These would contribute to breaking up the predominantly top-down approach to reform, and would foster the internal dynamics necessary for lasting change. It should not be a mere *Ersatz* when, as in the case of Belarus, support is channelled through unregistered opposition movements, since contact with the government is blocked. One may also wonder whether such an outreach to civil society would be possible in the authoritarian Azerbaijan, which has a long record of human rights violations. Full engagement with civil society should be at least as important as the so-far unchallenged alliance with central governments and traditional political elites, who frequently block the kind of political, legislative and economic changes envisaged in the EaP due to their vested interests in the *status quo*. The tarnished image of Ukraine as an ENP frontrunner brings this into sharp relief.

Andrzej Skrzydło*

Danish Development Aid – Case Study of an Effective Instrument Complementing Foreign Policy

Abstract: *The Danish development aid system (known as 'Danida') deserves closer attention. This is not only because it marks its 50th anniversary and Denmark currently holds the EU Presidency, but also due to its particular relevance to other donors, who may wish to use the Danish template, both for guidance and for inspiration. As explained in this article, Denmark's reputation and its international prestige is due, at least in large part, to its high position in the rankings of top world donors and soft powers. The highly successful merger of official development assistance (ODA) with other activities (including security, peace-keeping and also climate change), as well as its policies of trade and investment promotion demonstrate how useful development policy can be if productively blended with other components of foreign policy. In order to accomplish its aims, such an aid delivery system must be, as in the Danish case, smartly designed, cost effective, and equipped with a flexible internal organisation which allows for a rapid response to the new challenges and opportunities arising from globalisation, whilst being grounded on a solid legal and institutional foundation. Its management system should preferably be decentralised, remaining inclusive for the private sector and civil society, well-coordinated internally, and guided by a holistic approach to governing, with a leading role for the Ministry of Foreign Affairs, thus ensuring a strong focus on policy coherence for development (PCD). The aid delivery model should be transparent and non-vulnerable to political changes, based on a strong and reliable legitimacy with parliamentary backing and characterised by a balanced account of national interests. Denmark includes its national economic interests as well as those of its private businesses in its development aid programme in a manner consistent with the OECD requirements, in particular those relating to the untying of aid. In general terms, the example of Danida perfectly illustrates that development policy is also a realpolitik.*

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Introduction

When participating in the current discussions and reflections on the expectations and results of the Danish Presidency of the European Union in the first half of 2012, it seems important to highlight Denmark's attainments in an area where it has achieved unquestioned success on the global scale and which, after careful and critical analysis, could prove to be an interesting and suitable platform for new donors, including Poland.

In the first place one must answer the question whether, in the area of development aid, the small European country of Denmark is, with all its instruments and expertise, a real model of success? Another question to be rightly posed is whether a well-structured and expertly managed aid system can, in addition to its main mission – reduction of poverty and contribution to the development of partner countries – be equally an effective tool to complement the traditional set of foreign policy instruments, which include not only the traditional areas of commerce, export, investment, etc. of the donor country and its economic actors, but such sensitive areas as security and migration as well? Could development aid constitute an additional tool to cope with the global challenges of the contemporary world?

The present article attempts to document and illustrate answers to the above questions. It also makes reference to modern day Poland, which is especially justified in the context of Poland's current efforts to construct and improve its aid system. In addition, the comparative analysis and focus on the best practices and experiences of Danish Development Aid (called 'Danida', the name derived from the implementing agency which was consequently incorporated to the Danish Foreign Ministry) can be a valuable and appropriate source of conceptual support for Poland's efforts.

An effective incentive for rapprochement and closer Polish-Danish co-operation in the field of development assistance is the co-operation, initiated in the second half of 2011, between the 'Trio Presidency' of Poland, Denmark and Cyprus (PL-DK-CY). This cooperation includes important issues such as legislative proposals concerning the Development Co-operation Instrument (DCI), the future of EU development policy, establishing a common position at the High Level Forum on Effectiveness of Development Aid in Busan (December 2011) and others.¹ It is no coincidence that the Danish role in the Trio programme covers such issues as the EU direct budget support (including the criteria for such support – *nota bene*, Danida has developed and successfully used special criteria for budget aid), donor co-ordination, policy coherence for

¹ See: <http://register.consilium.europa.eu/pdf/en/11/st11/st11447.en11.pdf> along with its annex (last visited 22.02.2012).

development (including policies on climate change, trade, and migration), the European Voluntary Humanitarian Aid Corps, the thirteenth round of negotiations of the UN Conference on Trade and Development (UNCTAD) in Doha, etc. In these areas, Denmark is particularly active in international forums, while having its own reliable and high quality solutions and schemes.

1. Why is the Danish model so highly rated?

The deliberate choice of Denmark as an interesting and in many respects a suitable model for a case study is justified by its consistent top position in numerous international rankings. According to the March 2011 Peer Review on Denmark by the Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD DAC), Denmark is one of the highest rated systems in the world.² Also, the recent ranking of donors conducted by an independent research organisation – the Centre for Global Development's 2011 Commitment to Development Index – ranked the Danish system third in the world (after Sweden and Norway), based on a number of specific criteria (e.g. 'contents' of assistance and its implications for the development of trade, investment, technology transfer, improving the environment, positive effects of migration flows, security etc.).³

The question could be rightly posed at this point: how does it happen that a country like Denmark, which ranks among the smallest countries in Europe in terms of its size and population, has such a powerful global aid system, based on one of the highest allocations (ODA/GNI)? How has this system been maintained and continually expanded over the last few decades?

Many influential voices can be heard claiming that development aid has been used as an instrument of successive Danish governments to build an international reputation and image of Denmark as an important and influential global donor, conspicuous in the elite club of donors who spend more than the target set by the United Nations (at the level of 0.7 % of GNI).⁴ The Danish purpose is also to gain the standing of a country able to perfectly combine flagship development aid targets, such as the fight against poverty and achievement of the Millennium Development Goals (MDGs), with the intelligent promotion of its political and economic interests.⁵

² *OECD/DAC Peer Review 2011 Denmark*, OECD, Paris 2001.

³ http://www.cgdev.org/section/initiatives/_active/cdi/ (last visited 24.02.2012).

⁴ Author's interview with Poul Nielson, former EU Commissioner for Development Aid and former Development Co-operation Minister in Denmark in the 1990s, 21.12.2011.

⁵ *Danish Aid Policy: Theory and Empirical Evidence*, ed. F. Tarp, Ch.F. Bach, H. Gansen, S. Baunsgaard in: Discussion Papers, Copenhagen 1998, p.4.

This is demonstrated by quoting the selection criteria for identifying Danida's partner countries, strictly observed by the parliamentary committee: among the seven selection criteria there is one which indicates the possibility of supporting the Danish business sector and promotion of employment growth in Denmark, provided that the supply of Danish goods and services will be competitive in terms of technology, purpose and quality.⁶

2. Legal Basis and Institutional Framework

The Danish model is based on robust foundations and political backing for fighting global poverty, as stated in the DAC/OECD Peer Review on Denmark.⁷ It is evident that Danish development co-operation enjoys continued public support and understanding in the national parliament, civil society, and among the framers of public opinion.

The main legal and strategic framework is set forth by two important documents: the 1971 Act on International Development Co-operation (amended in 2002), and a continuously updated strategy, which gives a clear vision for the development-related activities of the country.

The Act has been a stabilizing factor for Danida and its programme over the last 40 years, ensuring a reliable and predictable framework for aid delivery. However, changing global challenges and priorities have brought about a growing recognition of the need to amend the existing Act. As consequence, a new legislative act has been recently proposed (January-February 2012) and is currently in the public consultation process. A change in the government coalition, bringing about a centre-left ruling majority in September 2011, was one of the catalysts of this decision.

The new draft law seems to even better reflect the role of development aid. In its very first paragraph the legislative proposal provides directly that, apart from its traditional objective of combating poverty and promoting human rights and democracy, sustainable development etc., Danish development co-operation likewise aims at promoting Danish interests in a more peaceful and stable world. Moreover, the first paragraph also states that development policy is a central and integral element of Danish foreign and security policy and of Denmark's global engagement. This is a very robust and clear acknowledgment of that fact that the above-described situation and role

⁶ Danish Ministry of Foreign Affairs, *Denmark's Participation in International Development Co-operation*, Copenhagen, June 2008, p. 186.

⁷ *OECD/DAC Peer review...*, op.cit., p. 11.

has actually been implemented by Danish aid for many years. Thus the fundamental and strategic provisions relating to the framework of Danida remain untouched, while new provisions stipulate even more transparency, openness, inclusiveness of the process, and simplification of aid modalities.

Denmark's current development co-operation strategy, called 'Freedom from Poverty', commits Danish development policy to the over-riding goal of reducing poverty through sustainable development, and places greater emphasis on economic growth and employment. The policy prioritises five broad areas: growth and employment; freedom, democracy and human rights; gender equality; stability in place of fragility; and environment and climate. As admitted in the Peer Review, the strategy provides for general continuity in Denmark's choice of development priorities. It contains little explicit focus on traditional sectors such as education and water and sanitation, which Danida continues to support in a number of partner countries. The Guidelines for Programme Management clarify how the priority directions are put into effect.⁸

Some of the inspiration to amend the Act can be seen in the strategy defined, where the linkages between development and security and foreign policy goals are explicitly identified. Freedom from Poverty notes that 'development policy is also realpolitik'. Also, the Peer review emphasises that Denmark's continued commitment to MDGs and poverty reduction is critical to ensure that short-term foreign and security policy pressures, when they emerge, do not put at risk the overall long-term interest in effective development.

It is evident that Denmark has its own well-identified comparative advantages and recognised, highly prioritised core values such as freedom, democracy, human rights and gender equality, combined with zero tolerance of corruption. However, it may be truly said that Danish expertise in those areas is secondary to its strategic targets and is used to provide important and effective tools in the implementation of the tasks and priorities set out in the strategy, not the other way round. Denmark well recognises that a donor builds its own aid strategy around the tools which are available to it or potentially perceived as its strong advantages. In this particular case it is the overall strategy, translated into regional or national programmes based on the local ownership rule, that determines which specific instruments should be utilised.

⁸ Danish Ministry of Foreign Affairs, *Guidelines for Programme Management*, September 2011.

3. The institutional model – development aid closely linked to foreign policy

As mentioned, Denmark's development co-operation is driven by a parliament-approved development strategy, the annual Finance Act, which covers also aid expenditures over a four-year horizon, as well as the government's annual priority plan, which identifies political priorities for the year ahead and the different sub-strategies and guidelines prepared by the Ministry of Foreign Affairs (MFA). Most definitely the success of the Danish development co-operation model is based on the central role envisaged for the Ministry of Foreign Affairs in an overall framework consisting of solid legislation and the engagement of parliament, civil society, academia, and the private sector, supervised by independent system of evaluations and audits.

Institutionally, the administration of development assistance is unified under the responsibility of the MFA, led by the Minister for Development Co-operation (within the structure of the Foreign Ministry), with a role for the Minister of Foreign Affairs as well.

In its application of this model solution, incorporated into appropriately tailored legislation, Denmark has chosen an aid management model described in the DAC/OECD literature as an 'Integrated Ministry of Foreign Affairs Model', distinct from four other identified models used by other donors.⁹ It seems clear that the choice of model adopted and used was a deliberate one, reflected in the fact that it arose as a consequence of incorporating the previously-separate aid-implementing agency in 1991, leaving its famous name – Danida – in place, even while labelling the aid activities as conducted by the MFA.¹⁰ This was a strongly intentional decision, as was the choice of targets for the development strategy, correlating to the broadly understood principle that aid management systems should be designed around the objectives expected to be attained.¹¹

The arguments for setting an institutional framework for development co-operation, with an inseparable link to foreign policy in the form of a fully integrated development co-operation with other aspects of foreign, security and trade relations, have been accepted as weightier than the claims that administering large amounts of money is not a traditional function of foreign ministries and that the

⁹ H. Chang, A.M. Fell, M. Laird, *A Comparison of Management Systems for Development Co-operation in OECD/DAC Members*, OECD Paris, DCD Vol. (99)6/June 1999, p.29–42.

¹⁰ The MFA reorganisation of 1991 merged Danida, the previously separated aid implementing agency, into the framework of the Ministry of Foreign Affairs. At the same time, the MFA was re-organised along generally geographical lines, by creation of a South Group, which actually incorporated Danida, and the North Group – see more: *Idealer og Realiteter, Dansk Udviklingspolitik Historie 1945–2005 (Ideals and Realities, History of Danish Development Policy 1945–2005)*, ed. C. Due-Nielsen, O. Feldbaek, N. Petersen, Gyldendal 2008, p.390–466.

¹¹ *Ibidem*, p.29.

specificity of aid management necessitates a separation of these two functions (i.e. development aid and foreign policy tools). The integrated approach entails a *geographic* approach, which gives more flexibility in designing the set of instruments to be applied to a specific region or a country in a programmatic manner, ranging from the purely political, human rights-related, to trade and investment, to concerns about security, migration, climate change etc. In this menu development aid is often a strong and convincing element, at the same time offering to a donor country the size of Denmark the sense of being an important soft-power player when compared to other, much bigger global actors.

The precise role of development aid in the overall set of external instruments is defined in the Foreign Ministry's programming document, which states that development assistance must be seen as closely connected to trade policy and security policy efforts, all of which in the long run should lead to sustainable development.¹²

It is also true that when giving more weight to a geographical focus the prospects of better co-ordinated and more coherent national strategies are enhanced, even if, on the other hand, development policy might be more vulnerable to political pressures and possibly less professional in the design of projects etc. In fact, the Danish model tends to combine the geographical approach with the functional one, while at the same time taking advantage of the high level of specialisation of aid delivery attained by respective ministerial units responsible for the 'technical' side of programmes and the discharge of aid allocations.

The integrated system applied in Denmark seems to be also in line with DAC/OECD guidelines set forth in 'Effective Aid Management', which contain a set of twelve recommendations/lessons from DAC peer reviews. In particular one should note 'Lesson' six: Rationalise bilateral aid structures to facilitate coherent action at the country level (dealing with institutional dispersion, which indicates that current developmental thinking suggests that better integrated national development co-operation systems could foster complementary relationships and synergy by integrating, or at least better co-ordinating, fragmented systems under one strategic umbrella). This recommendation states furthermore that the DAC has favoured approaches which make it easier to bring together all forms of assistance at the country level, rather than having two separate approaches for loans, grants and technical co-operation and/or for programmes of a 'vertical' nature.¹³

In Denmark the Development Co-operation Minister, who is nominally a full cabinet minister, is placed within the Ministry of Foreign Affairs. The

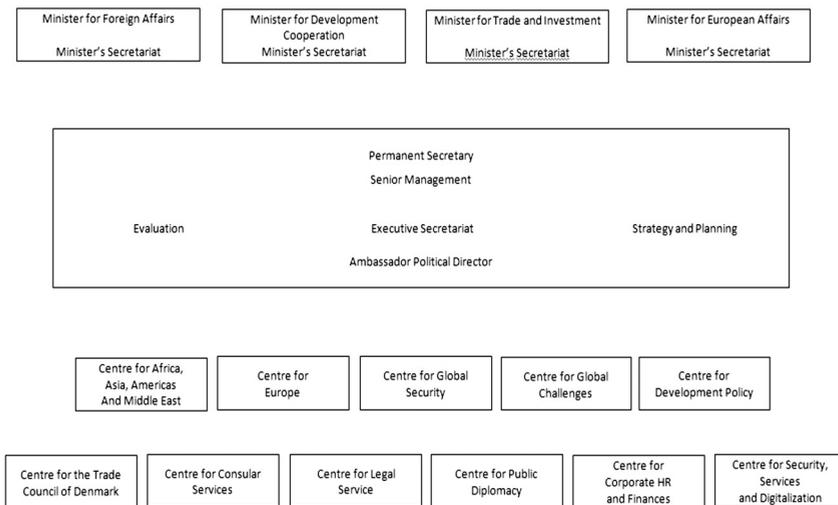
¹² Danish Ministry of Foreign Affairs, *Diplomacy in a Boundless World*, Copenhagen 2006, p. 11.

¹³ OECD Paris, 2008, p. 11–12.

Act on Development Co-operation also lists other cooperating ministries, such as the Ministry of Culture and Ministry of Education, which are responsible for cultural and educational programmes under separate agreements with the countries-recipients of aid, as well as the Ministry of Economy, the Danish Bankers Association, the Confederation of Trade Unions, the Confederation of Danish Industry, and others.

Under the Act on Development Co-operation the Minister for Development operates through a department within the Ministry of Foreign Affairs.¹⁴ At present, following the reorganisation of 2009 of the Ministry of Foreign Affairs, the function is performed by the Centre for Development Policy, which includes: the Department for Humanitarian Aid, Policy and Civil Society Development, responsible for development policy issues and aid effectiveness, DAC, as well as civil society and humanitarian assistance; the Department for the Quality of Development Assistance (Quality Assurance) responsible for quality development, aid management guidelines, and the framework for result-based aid and performance management; the Department of Business Assistance and Contracts and Department for Technical Support and Advisory, which provides technical advice. These constitute the core of the strict development of aid-related activities within the MFA, ranging from the programming of aid to technical operations and money disbursements.

Table 1. Organisational scheme of the Danish Ministry of Foreign Affairs



Source: Danish MFA and author's compilation.

¹⁴ *Denmark's Participation in International Development Co-operation*, op.cit., p. 185.

The re-organisation of the MFA in 2009 further integrated foreign, trade, and development policy to create an organisational framework that would be flexible enough to address the new challenges and opportunities created by globalisation. The Ministry's re-organisation involved disbanding the former North and South pillars to create 11 'centres', overseen by the top management. The objective of the 'centre structure' was to make the division of tasks more relevant and to anchor global issues across the centres. Apart from the Centre for Development Policy, in charge of co-ordination of development policy and humanitarian action, seven other centres are also involved in development co-operation activities (Centre for Global Security; Centre for Global Challenges; Centre for Africa, Asia, Americas and the Middle East; Centre for the Trade Council; Centre for Corporate Services; Centre for Legal Service; and the Centre for Public Diplomacy). The role of the Centre for Global Challenges focuses on new priority global issues which intersect foreign affairs and development policy – for example climate change, the MDGs and the financial crisis – and is responsible for coordination with the United Nations, World Bank, IMF and OECD. The Centre for Africa, Asia, Americas and the Middle East is responsible for the general handling of bilateral relations, while the Centre for Legal Service deals with democracy and human rights. The remaining centres handle Afghanistan and the fragile states, trade, human resource management, and public diplomacy.¹⁵

A new reform as of late 2011 resulted in the inclusion of previously separate aid activities *vis-à-vis* the countries of Eastern Europe, Caucasus and Central Asia among the mainstream of aid operations, which used to report directly to the Foreign Minister.

It should be stressed that all other relevant MFA departments, including the territorial departments, are actively engaged in development activities or – as seen from the reverse side – include development components in their geographical or thematical programmes (e.g. Afghanistan, the Middle East etc.). Moreover, this system extensively uses external consultants based in the headquarters and, first and foremost, the Danish diplomatic missions abroad. According to the author's own estimations, there are approximately 1000 Danish civil servants, including local staff at the embassies abroad, whose primary involvement is in the programming, monitoring and implementation of Danish development programmes. Bearing in mind that the overall annual ODA disbursement totals around 2.8 – 3 billion USD, it can be calculated that the ODA management volume equals around 3 million USD per civil servant. This means that the staffing of aid programmes is not oversized and the well-designed organisation is able to manage its supervision over a large amount of

¹⁵ *OECD/DAC Peer Review 2011*, op.cit., p. 49.

funds, with a division of labour between the headquarters and missions in the field, with a very small percentage of misused money given the results achieved. In comparison, the Canadian International Development Agency (CIDA), having approximately 2,000 aid workers in place, is in charge of 3–5 billion USD ODA allocations over last five years, which yields a relative ratio at the level of 1.5–2.5 million USD per aid worker.

A separate role is envisaged for the evaluation unit, which is situated independently from any other desks and departments, and moreover, reports directly to the ministerial level. The Evaluation Department at the MFA, currently employing six civil servants and a range of external consultants, carries on about 20 evaluation projects per year, with a total budget of between 12–14 million USD. Its reports are presented to the Foreign Affairs Committee at the Parliament. This allocation of responsibilities ensures true independence in the evaluation results, while allowing to feed the subsequent aid programmes through a newly improved system which transposes the ‘lessons learnt’ and findings of the evaluations into new operations or the next stages of continuing programmes.

Over past years Danida has elaborated a highly efficient inter-ministerial co-ordination mechanism, which is known as the Programme Committee. The Programme Committee has been established to provide quality assurance and guidance on best practices to bilateral and multilateral development co-operation, as well as to ensure coherence between specific programmes and overall policy issues. The Programme Committee provides advice on the implementation of policy priorities and on linkage between bilateral and multilateral development co-operation, provides guidance on quality assurance checks of rules and procedures, and endorses the formulation and appraisal phase of programming. Thus, the Programme Committee is a forum for decision-making, strategic discussions, learning and knowledge-sharing, including among the various representatives, who participate as peer reviewers when relevant. Issues discussed in the Programme Committee include: 1) country policy papers; 2) new bilateral programmes (and new phases of programmes) with a commitment above DDK 35 million and subject to appraisal, including the climate fund; 3) multilateral organisation strategies and action plans; 4) management responses to evaluations and follow-up to evaluations. One of the key tasks of the Committee is to ensure that Danish development co-operation priorities and policy considerations are well reflected in the implementation of Danish development policy. The Programme Committee is chaired by the Under-Secretary for Development Policy and its permanent members are: Humanitarian Action, Development Policy and Civil Society Department, Technical Advisory Services, Evaluation Department, Business and Contracts Department, Global Co-operation and Economy Department, and Quality

Assurance Department. Also regional departments, multilateral departments and embassies (making use of technical advances and developments such as, e.g. video-conferencing) can participate when relevant and necessary, depending on the agenda in question. The departments and embassies are represented by their Heads/Deputy Heads. To the extent possible concept notes can be 'peer reviewed' by other embassies with experience in similar programmes. The Committee serves as a unique platform to confront and possibly match different approaches, for example, those of country or regional desks with those of multilateral institution (i.e. EU or UN-systems), and to find a common denominator in line with the overall objectives and priorities of Danish external policy. For example, concept notes on Organisational Strategies (relevant to international organisations) include an assessment of the strategic considerations as regards the relevance and justification of future Danish support to the organisation, including a description of how/why it is a suitable vehicle for advancing Danish policy priorities as outlined in the Strategy for Denmark's Development Co-operation, and how synergy is envisaged with bilateral programme goals. As for the EU development co-operation, the Committee discusses significant EU development policy initiatives in order to identify the various implications for Danish development co-operation and possible areas where Denmark can play a role in influencing and shaping policy initiatives, as well as identifying areas where special efforts could be made to advance Danish interests in line with previously-approved priorities. Furthermore, the Committee plays a role in the follow-up process of evaluation of Danida programmes, by making comments to the main findings and recommendations, and deciding on follow-up actions, including activities facilitating in-house learning.¹⁶ In fact, this body makes the fullest possible use of the assets of the Foreign Ministry and plays a role which cannot be otherwise played, for practical reasons, by the Development Policy Department itself.

A distinctive feature of the Danish aid system is the high degree of utilisation of the network of own diplomatic and consular offices in the countries covered. In 2003, a reform of the system consisted in the decentralisation of aid management from the head office to country representations. This step has been identified by OECD/DAC as a significant instrument for aid effectiveness and appears to demonstrate the principles of the Paris Declaration.¹⁷ The

¹⁶ Ministry of Foreign Affairs of Denmark, *Guidelines, Programme Committee for Bilateral and Multilateral Development Co-operation*, July 2011, p. 3–9.

¹⁷ 'Denmark's development co-operation is decentralised and all Danish embassies and missions in partner countries have developed harmonization and alignment action plans based on the Paris Declaration and the Accra Agenda for Action which are adapted to the specificities of the partner country', after: *The Evaluation of the Paris Declaration, Phase 2, Final Report*, ed. by B. Wood, Copenhagen, May 2011, p. 179.

decentralisation transferred responsibility to missions for the formulation of programme objectives and national programme management. At the same time, it strengthened the structure of the MFA headquarters responsible for the supervision and quality control of the assistance offered.¹⁸ An external evaluation on the decentralisation process revealed that the decentralisation of Danish aid management brought about positive results overall, including more flexibility, and increased alignment and harmonisation with the principles of the Paris Declaration, placing Danida among the most decentralised implementing agencies, particularly with respect to its timeliness and responsiveness during programme implementation. In particular the study concluded that this resulted in an overall upgrading of the quality of Danish development aid.¹⁹ The decentralisation process moved the responsibility to the embassies, not only in the area of programme implementation but also to a large extent in programming and programme appraisal. Key programming documents – country concept papers, country strategies, country programme documents, inception reports on programme implementation, and programme reviews are drafted by embassies and only afterwards finalised and approved by headquarters.²⁰ Also, the embassies have a local grant authority of up to DKK 5 million, which they can allocate without approval from headquarters. The above-described arrangements had been thoroughly prepared over a time span of four-and-a-half years, including a long decision process within the senior management of MFA, where objections to the project were initially strong.²¹ In effect, the successfully-introduced decentralisation resulted in strengthening the links and multi-aspect collaboration between headquarters and Danish embassies, while demonstrating the large potential embodied in the MFA-based integrated aid management system. In particular, this involves: Regional Departments, in their new role of analyzing the political context of draft programming documents submitted by embassies and finalizing Country Strategies; Department of Development Policy, in its role of elaborating development policies and framings; Technical Advisory Service, in providing *ad hoc* technical support; Quality Assurance Department, in performance reviews, programme databases etc.; Centre of Competence, in staff training; Business and Contract Department, in providing consultancy and technical advice; Personnel Department, in recruitment and staff postings; and Evaluation Department, in evaluations of performance.²² As documented in a special study devoted to

¹⁸ *OECD/DAC Peer Review*, op.cit., p. 50.

¹⁹ Ministry of Foreign Affairs of Denmark, *Evaluation of the Decentralisation of Danish Aid Management*, Copenhagen, June 2009, p. 6 and 73.

²⁰ *Ibidem*, p. 33.

²¹ *Ibidem*, p. 21–26.

²² *Ibidem*, p. 47.

the Danish system of decentralised aid delivery, it has been demonstrated that the relatively strong relationship between head office and embassies has been maintained and, contrary to the views expressed in some of the literature, the decentralisation of aid management has not lead to the fragmentation of the embassies from the head office.²³ Furthermore, it has been also been shown that the decentralisation of aid management can actually permit the donor to be more adaptive and responsive to locally expressed needs and to co-ordinate more readily with other partners, provided that it is based on high-quality, lean support systems and addresses those particular challenges which potentially could limit the positive effects of that process, including sufficient staffing of embassies combined with proper training schemes and the problem of a possible over-politicisation of aid.²⁴

Under the Law of 1971, the Danida Board for International Development Assistance is the key institution in programme approval, monitoring and accountability. The Board reviews and makes recommendations to the Minister for endorsement of appropriations greater than DKK 10 million, and discusses the annual country assessments by embassies regarding programme performance. The minister usually follows the board's recommendations when approving programmes. In its present shape, the Board consists of 9 members representing, in equal parts, civil society (3), the private sector, employers, trade unions (3) and research and academia (3). The members are selected for a three-year term, although according to somewhat unclear criteria. In an exclusive assessment by a Board member, it was asserted that this institution has played a vital role in ensuring the close engagement of various sectors of Danish society, and its work overall should be assessed quite positively. Moreover, the Board also gives a sound legitimacy to the Development Minister before the Parliament and can be viewed as having an additional and quite useful role as 'sparring partner' for the minister before his/her upcoming sessions vis-à-vis parliamentary committees to present official documents before the Parliament.²⁵

The presently-debated new proposal on the law for development co-operation, which is supposed to amend the Law of 1971, intends to replace the Board by a Forum for Development Policy in an attempt to bring more transparency and social involvement in development aid. The proposed Forum would consist of up to fifteen members who will be appointed to serve a term of up to six years. The Forum for Development Policy is supposed to create

²³ L. Engberg-Pedersen, *Unpacking Danish Decentralised Aid Management*, draft DIIS paper (unpublished), 10.10.2011, p. 22.

²⁴ *Unpacking Danish...* op. cit., p. 19–21.

²⁵ Author's interview with Prof. Henrik Secher Marcussen, Roskilde University, Member of Danida Board, 21.12.2011.

the framework for a constant strategic dialogue on the completion of the tasks under the responsibility of the Minister of Development Co-operation. The idea is that the previous tasks of the Board, concerning advising the minister with regard to programmes and projects of a certain size, based on professional evaluations, will be transferred to units within the Ministry of Foreign Affairs, which has so far had the same tasks regarding programmes and projects on a smaller scale.²⁶ These new proposals aim at strengthening the general role of the Danish aid system, and is aimed at maintaining the wide-ranging participatory character of the aid delivery model.

The other important stakeholders of the Danish aid system are: the private sector (as described in more detail below), and the Parliament, the latter playing a key role in the domestic accountability mechanism that is considered to be strong in Denmark. In addition to the requirement that Parliament approve the overall development strategy and the annual Finance Act, a number of parliamentary committees address development at the working level. The Foreign Affairs Committee and the Finance Committee monitor and assess development activities through regular visits to partner countries and international organisations. The Finance Committee also approves grants which are not described in the finance bill and are above a certain threshold (DKK 35 million), and ensures that public funds are administered correctly. It is also a common practice that committee members visit partner countries every two years. The obvious benefits of parliamentary engagement are increased public awareness and the support that it creates for development co-operation.²⁷

4. From a separate aid agency to an MFA-based integrated model – grounds and merits

It is remarkable how Danida has evolved from a model initially based on a separate aid agency to the present scheme, which depends on the Ministry of Foreign Affairs' large internal and external (embassies) assets and thus constitutes a well-shaped, very effective institutional arrangement, which has been highly praised internationally.

The evolution of Danish aid goes back in history to 1962, when Denmark established its first overall bilateral development assistance programme for the developing countries under the Ministry of Foreign Affairs (in the 1950s, the Danish development assistance efforts were channelled almost exclusively through the

²⁶ <https://www.borger.dk/Lovgivning/Hoeringsportalen/Sider/Fakta.aspx?hpid=2146003187> (last visited 22.02.2012).

²⁷ *OECD/DAC Peer Review*, op.cit., p. 24.

UN system). In its early years Danish aid was characterised by testing various approaches and building up a development assistance administration.²⁸

From the beginning of the 1970s there was a growing emphasis on poverty as the basis for the allocation of Danish development assistance. Until the early 1990s Danish aid was predominantly project-based.

In 1991 an administrative reorganisation took place, and Danida went from being an independent unit to becoming part of a single-string service in the Ministry of Foreign Affairs. This reorganisation also meant that development assistance became a high-profile element of Danish foreign policy. Since that time Danish development assistance has significantly expanded, with large-scale interventions in conflict areas such as the Balkans, the Middle East, Afghanistan, and Iraq. As such, it is also being utilised as an active instrument of foreign policy in new areas, for example, conflict resolution, the struggle against terrorism, and the promotion of good governance.

The structural reorganisation of Danida, which resulted in placing it into the overall structure of the Foreign Ministry coincided, not accidentally, with two extremely important conclusions which eventually established a new orientation to Danish development aid:

- 1) A need to get away from the project-based approach and proceed to a programme sector-wide approach, based on the principle of local ownership (understanding that sustainable development cannot be created by outsiders alone); and
- 2) A need to better focus the aid policy and link it more closely to the foreign policy line.

As a result the former agency, which was committed by its nature to the project approach, was replaced with a strong and well integrated unit within the Foreign Ministry, adding many new tools and modalities in terms of policy guidance, programming, and pooling resources, including embassy staff etc.

The first motivation was based on the reckoning that that project-based aid was not effective and that aid programmes should be linked to certain sectors and should be run by local authorities. Local ownership and capacity-building should be the focal point of the programmes. Development aid became concerned not only with the receiving state but with its society as a whole, including civic society and the private sector. In the developing countries this meant a growing demand for good governance and the involvement of governments and institutions in aid programmes.²⁹ The corollary is that the donor countries

²⁸ The name Danida appeared in 1963 as a contraction of Danish International Development Agency and, subsequently, Danish International Development Assistance. Today Danida is no longer a contraction but has been designated as the term for Denmark's development co-operation.

²⁹ See more in: *'Idealer og realiteter..'*, op.cit., p.393–403.

began to get involved and therefore wanted to influence local governments, sometimes forcing reforms concerning administration and government on the receiving countries. This was part of a broader trend in the international donor community, where the project aid component of aid budgets declined severely and other aid instruments expanded, notably policy-conditioned programme aid, support for the private sector etc.³⁰

Secondly, in 1989 it was decided that Danish bilateral aid be concentrated on twenty so-called 'co-operation countries', as it was realised that more focus was needed if Denmark wanted to have an impact. This thinking was also an important element of the first major development strategy, called *A World in Development*, adopted in 1994.³¹ Poverty reduction was established as the overall objective, complemented with three cross-cutting issues relating to gender, the environment, and democratisation. Moreover, the strategy announced a change from project aid to sector-wide approaches, and engaged Denmark in negotiations with the co-operation countries to determine how Danish aid could contribute to the implementation of national legislation and policies.³² This point was reinforced in a revised strategy six years later, *Partnership 2000*.³³ Further on, a strengthening and streamlining of aid management prepared the ground for the decentralisation process described above; that process however could not be effectively launched and executed without the prior integration of Danida into the Foreign Ministry structure.

The flexibility achieved by the improved aid delivery system resulting from the new status of Danida made it fairly easy to modify the priorities of aid and shift, just a decade later, towards a new agenda of fighting terror, with a stronger focus on security issues and religious extremism, not least because of the terrorist attack on the World Trade Center on 11 September 2001. It also led to the link, which had gone unnoticed, between military and financial aid. As a result of this trend, in June 2003 a new governmental strategy on Danish aid was introduced for 2004–2008 – 'A World of Difference' – where the focal point was still to reduce poverty, but where two main themes were distinctly present:

³⁰ See more in: P. Mosley, M.J. Eeckhout, *From project aid to programme assistance in: Foreign Aid and Development. Lessons learnt and directions for the future*, ed. F. Tarp, London and New York 2000, op.cit., p. 131–153.

³¹ Danish Ministry of Foreign Affairs, *En verden i udvikling. Strategi for dansk udviklingspolitik frem mod år 2000 (A World in Development. Strategy for Danish Development Policy)*, Copenhagen 1994.

³² *Unpacking Danish Decentralised Aid Management*, op.cit., p. 6.

³³ Danish Ministry of Foreign Affairs, *Partnership 2000. Denmark's Development Policy Strategy*, 2000.

- Stability, security and the fight against terror by fighting underdevelopment and securing democratisation to avoid terror and religious fundamentalism;³⁴ and
- Attention to refugees in their local area in the context of the increased inflow of illegal immigrants to the EU.

Providing help to refugees in their home region was in fact nothing new, but it was the first time it had been given a dedicated priority and such a strong focus. The resulting tendency was a move away from a development policy paradigm based on idealism, altruism, and fighting poverty towards one increasingly reflecting Denmark's own interests and to serve as means to gain political influence in the partner countries. To this purpose the new Danida proved to be an extremely useful instrument.

Due to its increased focus on countries affected by fragility, Denmark has set up a number of cross-governmental structures to promote peace and stability, including policies in the areas of social development, security, diplomacy, and military arrangements. In order to tackle this range of priorities appropriately, Denmark is promoting a holistic approach to fragile states and has created the Danish Stabilisation Fund, the inter-ministerial group, and the Afghanistan Task Force, which together seek more integrated and effective support to Afghanistan and other fragile states. Denmark aims, through its achievements and experience in working with civil-military co-ordination in fragile states, to influence other international actors and organisations to achieve better international co-operation and co-ordination.

The Danish Stabilisation Fund disposes of DKK 150 million a year, both for both development assistance and non-ODA funding. The aim of the fund is to enable an '*enhanced effort in the overlap between security and development*' and to create a platform and a funding mechanism through which both national and international civil-military interventions can be discussed and co-ordinated. Having sufficient staff from the different policy communities actively involved in the design of and decision-making regarding interventions,

³⁴ As evidenced in a devoted report, aid strategy which takes account of security challenges could have significant effects on the links in the casual chain of terrorism: 1) co-operation with Arab donors and diaspora communities can bring about lowering of tensions in the global sphere; 2) support for national and international democracy ("inclusive globalization") is likely to create non-violent alternatives to terrorism; 3) filling the security, health and education vacuums and working in difficult partnerships combined with the surveillance of money flows reduces the options for terrorist organizations and de-escalates conflicts; and 4) promoting human-rights-sensitive governance helps in general to reduce terrorist violence. From: *Development Co-operation as an Instrument in the Prevention of Terrorism*, research report ed. T. Kivimaki, Copenhagen, July 2003, p.99–118.

the fund is flexible enough to respond more holistically to international peace and security challenges.³⁵

Also the newly proposed alterations (February 2012) in the Danida strategy, focusing on the rights-based approach, as discussed with the wider community and public through to and including the new centre-left Danish government (in power since Autumn 2011), are not likely to destabilise the aid delivery system and its basic fundamentals, proving that in Denmark aid policy is less vulnerable to changing governments and current political trends etc., due to its broad popular support, strong involvement of the private sector (see below) and NGOs, as well as the continuously maintained focus on poverty.

Last but not least, benefits arising from the integrated model of aid delivery are evidenced by the fact that it is the Foreign Ministry that now generally takes the lead in co-ordinating EU matters in Denmark and is therefore best placed to ensure policy coherence for development (PCD) and is more systematic and practical about delivering results.³⁶

5. The motivation behind the broad Danish private sector engagement in development aid: corporate responsibility or commercial interest?

Danida has achieved a high degree of private sector (mainly Danish) involvement in development co-operation which contributes, on one hand, to wide public support and a strengthened public mandate for its aid activities and, on the other hand, provides tangible economic and business advantages for the companies involved, resulting in an overall increase of Danish ODA and a more attractive toolbox for Danida in its operations in partner countries. A secondary effect of Danish business engagement in aid delivery is the process whereby ODA money comes back to the donor state and its entities (in some part), creating jobs, improving business links and opportunities for economic activities (including exports, investments etc.) for Danish private businesses. The Danish pattern is even more cherished as it is officially recognised that Danish aid is tied only to a tiny extent to conformity with strict OECD/DAC rules.³⁷

³⁵ *OECD/DAC Peer Review*, op.cit., p. 38–39.

³⁶ *OECD/DAC Peer Review*, op.cit., p. 37.

³⁷ 'Tied aid' is a term used to describe official grants or loans made to recipient countries that limit the procurement of goods or services to the donor country. Untying aid is therefore considered a key test of donors' commitment to coherent policies and effective aid delivery. Denmark continues to play its part in this process: it has untied all of its food aid since 2005, and its technical assistance since 2008. Denmark's untied aid currently comprises 97% of all its aid; this places Denmark in the top category of OECD donors which have, according to the DAC recommendation of 2001, either fully or almost fully untied their aid (DAC data): *OECD/DAC Peer Review*, op.cit., p. 46.

The spectrum used is rather large: it consists of three main distinctive instruments (described below) and widespread private sector participation in ‘non-private’ programmes in the form of provision of services, consultancy, accountancy (especially in capacity-building), auditing etc.

The most powerful tool for private sector involvement in development aid is the Industrialisation Fund for Developing Countries (IFU – to be renamed the Investment Fund for Developing Countries under the new legislative proposal), which is inscribed into the basic legislation – the Danish Act on International Development Co-operation. Section 9 of the Act provides that the Fund is an independent institution promoting investment in developing countries in co-operation with Danish trade and industry and that the Government may subsidise its activities. The Fund may provide support for Danish investments by subscribing its shares, funding analyses of investment options, granting loans, providing guarantees, and other similar activities. The Minister for Development Co-operation plays an important role in the IFU by appointing the members of the IFU’s Board of Directors, including its chairman and deputy chairman, as well as a managing director who manages IFU’s daily business.³⁸ The new legislative proposal keeps these provisions intact virtually unchanged.³⁹

The Fund, which has been in operation since 1967, allocates approx. 500–650 million DKK per year and since its inception has created around 140,000 jobs. Its initial capital, received from the state, was paid off in 2006. By and large, the Fund is highly praised among Danish private businesses. In the vast majority of cases its operations generate the extra bonus of having positive effects on Danish business partners: Danish enterprises that take the step of expanding into poor and less-developed countries get the required capital and knowledge to safeguard their investment (through loans, guarantees and share purchases), but also receive assistance, through IFU’s global network of local employees and advisers (including 5 regional offices in Beijing, New Delhi, Nairobi, Johannesburg and Accra) in overcoming traditional bureaucratic, cultural and language barriers.

Another instrument is Danida Business Finance (DB Finance) which is in fact a soft-loan programme managed by Danida staff (earlier known as the Mixed Credits Scheme). DB Finance increases access to long-term financing through the involvement of commercial actors for investments in important infrastructure projects, especially in Africa, which lay the groundwork for economic growth. DB Finance also aims at minor industrial projects with direct job-creating potential. but which cannot be financed under normal market con-

³⁸ *Denmark’s Participation in International Development Co-operation*, op.cit., p. 184–185.

³⁹ <https://www.borger.dk/Lovgivning/Hoeringsportalen/Sider/Fakta.aspx?hpid=2146003187> (last visited 20.02.2012).

ditions. DB Finance targets key infrastructure sectors where investment improves the climate for economic development, in particular for the private sector. The main sectors are transportation, energy, water supply, and sanitation. In all areas, climate-friendliness and cleaner technology is a top priority.

DB Finance offers interest-free or low-interest loans. A typical loan has 10 years' maturity and is issued in USD or EUR. The subsidy provided by DB Finance consists of up to three elements: payment of interest – in full or in part; payment of the export credit premium and other associated financial costs, and a cash grant to reduce the principal of the loan, if the above does not amount to the subsidy level required by the ruling OECD agreement. The borrower repays the loan in equal, semi-annual instalments, normally starting six months after the commissioning of the project. The borrower pays only a commitment and a management fee.⁴⁰

The element of the programme that ties in the private sector consists of an obligation that companies are registered in Denmark, although goods or services can originate from any country. This instrument is popular amongst Danish companies and effectively complements the set of aid delivery tools.

The third instrument in this category is Danida Business Partnerships (DBP), which replaced the Business-to-Business Programme (B2B). Danida Business Partnerships facilitates the establishment of partnerships that, together, make up a critical mass that can significantly impact development in poor communities. DBP supports partnerships between a wide range of partners in many combinations. One option is the business-to-business co-operation between two companies. Another is to facilitate broader, innovative partnerships, e.g. involving private companies, NGOs, research centres, local authorities etc. It is a prerequisite that at least one private Danish company takes part in the partnership. Another condition is that the partnership has a commercial orientation, creates decent employment, and contributes to local development, e.g. through strategic corporate social responsibility (CSR) initiatives. Moreover, a precondition for support is that a partnership put up some of its own funds. Danida Business Partnerships serves to lower the risk of entering into new partnerships by contributing towards relevant expenses e.g. related to the transfer of knowledge and skills, covering up to 50–75 per cent of the costs of activities. Accordingly, Danida supports the development of a viable business model for partnerships, including a wide range of specific activities, like partner identification, market analyses, risk analysis, due diligence, development of a business plan etc.⁴¹

⁴⁰ <http://um.dk/en/danida-en/activities/business/finance/> (last visited 20.02.2012).

⁴¹ <http://um.dk/en/danida-en/activities/business/partnerships/> (last visited 20.02.2012).

This instrument is also widely used, but a major constraint is that only 19 partner countries are covered by DBP.

6. What does Denmark owe Danida?

It cannot be denied that Denmark's long-standing status as a 'global top donor' has strengthened its international position and its influence in the external dimension, allowing it, for example, to promote its model of the welfare state and perhaps more importantly to export 'the Nordic model' to the world. Denmark, although a small European country, effectively uses the notion of 'soft power' to create global links, partnerships, and the means to intervene overseas and to make a difference in the outside world. The international reputation of Denmark as a global donor is more prominent than its role as a member state in either NATO or the UE and gives it the opportunity to step out of the 'small state' shadow and sharpen its profile on the international arena. Unquestionably, Denmark's image has improved among the like-minded countries of Scandinavia, as well as the Netherlands, Canada, and in general terms among the entire international donor community. At the same time, Danida has achieved the right balance between the idea, supported by the Danish business lobby, to get a portion of aid money back⁴² and internationally recognised poverty reduction objectives, while also playing a role in the sphere of international security in conflict or post-conflict areas, preventing terrorism, migration, supporting human rights etc.⁴³

As result of the broad public support for development aid in Denmark and the focus on poverty that has been maintained, this policy has been increasingly less vulnerable to changing governments, with successive coalitions even adding some specific colours, as is now the case when, after a decade of liberal-conservative governments concentrated on freedoms, the private sector etc. and on reducing ODA appropriations, the present centre-left cabinet promotes the rights-based approach combined with more ODA commitments. Yet in point of fact, neither the proposed new legislation on development co-operation nor the strategy constitute any kind of conversion in Denmark's well-established tradition of development co-operation. Rather the proposed changes fine-tune the existing aid institutional framework, making it more open, transparent and adjusted to present challenges and constraints.

⁴² However, the Danida partner countries eventually selected are not as lucrative as Danish business would like. Concentration on Africa, for example, where Denmark has less potential of exploiting the market, shows that in the Danish case aid is not necessarily connected to market benefits.

⁴³ *Idealer og realiteter...*, op.cit., p. 519–534.

7. What is the rationale behind Danida's strength?

In light of Denmark's recognised position as one of the top world donors in terms of providing quality aid with a real global impact, the question arises of the rationale and main reasons for this indisputable success.

The key points can be summed up and listed in a straightforward fashion:

- 1) Broad public support for development aid,⁴⁴ including a political inter-party consensus and agreement in parliament; a large role for civil society and the private sector as well as academia, based on the widely-recognised combination of poverty reduction goals and the promotion of Danish interests in a way which is in line with UN/OECD/UE rules (MDGs, Paris Declaration on Aid Effectiveness, European Consensus on Development etc.), as well as on an effective public accountability system (MDG do not overshadow *realpolitik*);
- 2) A solid legal and institutional base as a result of a long-term evolution and adjustment process, resulting in a strong MFA-based, well-integrated and decentralised system of aid delivery;
- 3) Focus on a limited number of beneficiary countries with an established (by parliament) set of criteria for the selection of countries⁴⁵ and a proven phasing-out policy;
- 4) Use of a proper approach: identification of targets and strategy first, then instruments and comparative advantages available, which are eventually employed, achieving a successful merger between development strategy and aid strategy;⁴⁶
- 5) Proper selection of aid modalities, with strong focus on sector-wide programme support and general budget support and a limited use of project support (which is given a complementary role, as it is no longer compatible with up-to-date trends and guidelines when treated as a primary modality);
- 6) Successful long-term involvement of the private sector, not only in terms of a corporate responsibility formula but in a business interest-based approach, safeguarded by legislation at the top;

⁴⁴ In 2010, 94% of Danes thought it was important to help people in developing countries, which is slightly higher than the EU average of 89% (Eurobarometer, 2010), after: *OECD/DAC Peer Review*, op.cit., p. 32.

⁴⁵ Statement by a majority of members of the Foreign Affairs Committee, in the Committee's report on the selection of future partner countries in relation to Danish development assistance, 23.05.1989, in: *Denmark's participation... 2007*, op.cit. p. 186.

⁴⁶ See: *Foreign Aid and Development, Lessons Learnt and Directions for the Future*, ed. F. Tarp, London and New York 2002, p. 13: 'A successful aid programme requires matching one or more elements of a desirable development strategy with an appropriate aid strategy, supported by well-designed modalities and effective implementation'.

- 7) A focus on quality assurance and a results-based management, including a benchmarking system for satisfactory goal achievement⁴⁷ and strengthened, transparent anti-fraud safeguards;⁴⁸
- 8) A perfect link between the principle of ownership and aid conditionality achieved by means of a system of governmental agreements on development co-operation concluded between Denmark and a partner country (which has the added advantage of making Danish aid predictable for its recipients);⁴⁹
- 9) A smart merger of ODA and non-ODA money, bringing more synergy and added value to external actions using development aid money, on the basis of joint development and e.g. security objectives (for example, the Danish Stabilisation Fund) and also climate change financing;
- 10) Independent evaluation (institutionally detached from the development aid section of the Ministry);
- 11) Accountability before parliament within a four-year framework plan of expenditures.

The above described model, which in fact has evolved over the last fifty years, could be a good *a-la-carte* menu for other less experienced donor countries, especially emerging donors which are in search of best practices, and proven records, choices, modalities etc. Denmark provides a positive answer to the general question which is so commonly posed: ‘*Does development co-operation work?*’ It is not only one of the most generous global donors but, more importantly, because of its smart, integrated approach (in particular the retreat from a stand-alone agency towards an MFA-based aid delivery system) its aid programmes enjoy broad public support. Development aid, which is well integrated into the overall foreign policy of the state and its trade and investment strategies, helps position Denmark at or near the top in international rankings and therefore has increased its reputation, influence, and weight within the international community.

⁴⁷ *Denmark's participation... 2010*, op.cit., p. 155–156.

⁴⁸ *Ibidem*, p. 157–159.

⁴⁹ *The Guidelines for Development Co-operation Agreements* outline how Danish Embassies and departments enter into agreements with partners: <http://amg.um.dk/en/menu/Management-Tools/GovernmentAgreements/> (last visited 24.02.2012).



Peter Kerckhofs*

The EWC Directive and the Capacity of the EU to Develop European Social Dialogue within Multinational Companies

Abstract: *European economic integration and EU enlargement have enhanced transnational restructuring in multinational companies (MNCs). This allows MNCs to benefit more from local competitive advantages in their production and in their access to consumer markets and labor markets. When the central management of MNCs decides to restructure their operations and eventually close a plant, this demonstrates their impact on local workplace developments. The EU Directive on European Works Councils (EWC Directive) can thus be assessed as a case of European social policy-making providing a corrective mechanism for the democratic deficit in MNC decision-making.*

Introduction

The EWC Directive¹ allows employee representatives from the different European countries in which MNCs have their operations to meet with central management and with their colleagues representing employees from other countries. During EWC meetings, these representatives are informed and consulted by central management on transnational issues of concern to the company's employees. By this means, EWCs aim to bridge a representation gap

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¹ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees; OJ L 254, 30.09.1994, p. 64-72.

between international corporate decision-making and employees' nationally defined information and consultation rights.

Fifteen years after the adoption of the first EWC Directive in 1994, better representative rights were provided in the new 2009 EWC Directive.² Simultaneously, the financial and economic crisis eroded significant parts of the trust and efficiency in the European single market, which is illustrated by the high unemployment rates caused by the lack of job-creating investments.

This article analyses how the European Union has economically integrated, and what impact this had had on MNCs and their European workforce. Furthermore, it analyses the capacity to develop a European legal framework for social dialogue in multinational companies in the changing economic and political context. Finally, the new 2009 EWC Directive is evaluated on the basis of practical and political learning processes, as well as relevant court rulings. The new EWC Directive 2009/38/EC entered into force on 6 June 2011.

1. Economic integration and its impact on employment

European economic integration and enlargement have enforced the transnational interdependence of companies operating in Europe.³ This interdependence is measured in terms of Foreign Direct Investments (FDI). FDI are investments to acquire a lasting management interest in an enterprise. This can involve transfer of technology and expertise, but also influence from the mother company, or even control over strategic decision making in the foreign subsidiary.

1.1. FDI flows illustrate the increasing economic integration in the EU

These developments were already going on well before Poland joined the EU in 2004. Since 1992, the European Single Market has brought tremendous benefits and created new opportunities with its principles of the free movement of goods, services, capital and people.⁴ The table below shows how entry into the European Single Market enhanced inward FDI in Poland from 2004 to 2007. For the EU as a whole, FDI flows reached a high in 2000, after which it declined until the 2004 enlargement made it rise again.

² Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast); OJ L 122, 16.05.2009, p. 28-44.

³ M. Kahancova, *One Company Diverse Workplaces, The Social Construction of Employment Practices in Western and Eastern Europe*, ed. M. Palgrave, Houndmills 2010.

⁴ http://ec.europa.eu/internal_market/smact/index_en.htm (last visited 03.12.2011).

Table 1. Inward and outward FDI⁵

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010
FDI in PL	4131	4123	6159	10293	19603	23561	14839	13698	9681
FDI outflow	230	196	806	3406	8864	5405	4414	5219	4701
EU Inward	420433	338678	216440	496075	581719	850528	487968	346531	304689
EU Outward	384549	372400	279830	605515	690030	1199325	906199	370016	407251

All these FDI flows into Poland brought about a gradual improvement on the labour market. Unemployment rates, for example dropped from 20 per cent in January 2005 to 12.3 per cent by December 2010.⁶ Besides quantitative effects, FDI can also have qualitative effects on employment, both directly and indirectly. The potential effects of FDI may be different for the employees of the mother-company, the foreign subsidiaries, or the local labour markets in which they operate.

1.2. FDI impact on employment in the home country of the MNC

From the home-country perspective, FDI or subcontracting can mean delocalisation of production⁷ and eventually also technological enrichment of the home-based production.⁸ This may result in a combination of positive and negative effects on both the quantity and the quality of employment. Shifting the mother-company to a more innovative role, based upon a highly skilled and motivated workforce, entails positive effects on the quality of employment and industrial relations, while the jobs of lower-skilled workers may be threatened when parts of production are relocated to foreign subsidiaries.

In Poland there are many more subsidiaries of foreign-owned multinational companies⁹ than Polish companies with operations abroad. This is illustrated by the larger FDI inflows than outflows. Therefore, the FDI impact on for-

⁵ UNCTAD Division on Transnational Corporations and Investment (UNCTAD-DTCI), *World Investment Report 2011*, United Nations, New York 2011.

⁶ http://www.msp.gov.pl/portal/en/71/2076/Background_information.html#ad8#ad8 (last visited 03.12.2011).

⁷ J. Arthuis, *Les délocalisations des activités industrielles et des services hors de France*, "Problèmes Economiques" Vol. 2/1993, No. 338.

⁸ UNCTAD Division on Transnational Corporations and Investment (UNCTAD-DTCI), *World Investment Report 1994*, New York 1994.

⁹ S. Contrepois, V. Delteil, P. Dieuaide, S. Jeffreys, *Globalizing Employment Relations, Multinational Firms and Central and Eastern Europe Transitions*, ed. M. Palgrave, Houndmills 2011.

eign subsidiaries of multinational companies is more relevant for Poland than the impact of FDI on employment in the home country.

1.3. FDI impact on employment in the foreign operations of an MNC

Employment growth in one foreign subsidiary or its subcontractors may be the result of, or for that matter the source of, some degree of delocalisation away from the mother-company or from other foreign subsidiaries. Increased efficiency can sometimes also lead to overproduction, in which case the central management then needs to decide how to reduce production. This reduction of production can take place in the home country operations of the MNC or in its foreign operations.¹⁰ Such events depend on the integration of the production of multinational companies' subsidiaries,¹¹ which can either be horizontally or vertically integrated, or even not integrated at all. Horizontal integration encompasses similar products being produced at different locations, which may result in internal competition within a company. Vertical integration increases the interdependence of the different production units because the output of one subsidiary is the input for another.

From the point of view of the foreign-owned subsidiaries, green-field investment means additional jobs, unless this employment disappears elsewhere within or beyond the company. The appearance of MNCs will have only surrogate effects if the newly created jobs end up finally ousting existing employment generated by local employers. When the production of a multinational's subsidiary manages to be more productive and less labour intensive by transferring technology, this could shrink overall employment in the foreign subsidiary, even though at the same time working conditions may improve in the first instance. In the end, increased competition for available jobs may once again decrease the qualitative terms of employment.¹²

Brown-field investments translate only into a change of ownership, with no immediate impact on the workforce size. After some time, double functions resulting from mergers and take-overs will have to be cut away to realise synergy effects.¹³ The combination of a take-over followed by restructuring and

¹⁰ U. Rehfeldt, *Der Renault-Vilvoorde-Konflikt und seine Bedeutung für die europäische Gewerkschaftspolitik*, "WSI-Mitteilungen" No. 7/1998, p. 450–459; M. Bartmann, *General Motors Europe, Facing tough decisions at the European Works Council*, "Mitbestimmung" No. 51(8) 2005.

¹¹ B. Hancké, *European Works Councils and Industrial Restructuring in the European Motor Industry*, "European Journal of Industrial relations" Vol. 6/2000, No. 1, London.

¹² S. Beechler, A. Bird, S. Raghuram, *Linking Business Strategy and Human Resource Management Practices in Multinational Corporations, A Theoretical Framework*, "Advances in International Comparative Management" No. 8/1993.

¹³ W. Ruijgrok, R. Van Tulder, *The logic of international restructuring*, ed. Routledge, London 1995.

disinvestments may create feelings of confusion, uncertainty, and erosion of corporate identity among the workforce.¹⁴ With regard to the quality of employment, FDI may also include the introduction of undesired techniques of production or management.¹⁵

Table 2. Effects of FDI on employment¹⁶

FDI effects on employment	Directly Positive	Negative	Indirectly Positive	Negative
Quantitative	Job-creation	Rationalisation and job-cuts	Multiplication effect on local economy	Replacement of local enterprises
Qualitative	Increasing productivity and high salaries	Introduction of undesired practices	Spill-over of high productivity and improved working conditions	Increased competition on the labour market, eroding labour conditions

1.4. EWCs and the democratisation of European economic integration

Mergers, acquisitions, relocations and restructuring plans are strategic decisions taken by the central management of the MNC at its headquarters, far away from the workplace of the employees, and usually outside their workplace representation structures. While EWCs cannot entirely prevent these developments from happening, they are nonetheless instruments to channel information and generate consultation between transnational decision-making bodies and workplace employee representation structures.¹⁷ Viewed in this light, the establishment of EWCs can be regarded as a question of voice or exit.¹⁸ The voice option includes direct communication between employee

¹⁴ D. Corteel, G. Le Blanc, *Cross-border mergers and employee participation, Franco-German case studies, the importance of the national issue in cross-border mergers*, paper presented at the “Cross-Border Mergers and Employee Participation in Europe” conference, Ecole des Mines, Paris 09.03.2001.

¹⁵ W. Müller-Jentsch, H.J. Sperling, *New Technology and Employee Involvement in Banking: A Comparative View of British, German and Swedish Banks in: Organised Industrial Relations in Europe: What Future?*, ed. C. Crouch, F. Traxler, Aldershot 1995.

¹⁶ UNCTAD-DTICI, *World Investment Report 1994*, op.cit.

¹⁷ T. Huzzard, P. Docherty, *Between Global and Local: Eight European Works Councils in Retrospect and Prospect*, “Economic and Industrial Democracy” No. 26/2005, p. 541–568.

¹⁸ C. Crouch, *Exit or Voice: Two Paradigms for European Industrial Relations after the Keynesian*, “European Journal of Industrial Relations” No. 1/1995.

representatives and central management. Without an opportunity to voice their opinion on important changes affecting their working conditions, the exit option might stand for rejection of such decisions, impeding employees' loyalty towards central management.

The information that central management gives a EWC helps employees to understand the strategy behind central management's decisions, and thus gain acceptance of them and facilitate their implementation.¹⁹ The development of EWCs is, in this context, a test of the performance of the democratic system in the EU, to correct or gain acceptance for the distorting effects of European economic integration.²⁰ Having understood this challenge, the EU legislated the EWC Directive, with the aim of sustaining democratisation of its European economic integration policy.²¹ In the preamble of the EWC Directive it is stated that:

'Whereas the functioning of the internal market involves a process of concentrations of undertakings, cross-border mergers, take-overs, joint ventures and, consequently, a transnationalization of undertakings and groups of undertakings; whereas, if economic activities are to develop in a harmonious fashion, undertakings and groups of undertakings operating in two or more Member States must inform and consult the representatives of those of their employees that are affected by their decisions'.²²

For employee representatives, the EWCs offer a European-level information and consultation process, in addition to offering the possibility of direct communication with central management. Of equal importance are the cross-border meetings of employee representatives and the opportunities these bring for European trade union co-operation and solidarity. For the management, EWCs offer no fewer opportunities. First of all, the EWC can serve central management in finding a balance between internationalised and decentralised strategic approaches in human resource management. The principle of thinking globally and acting locally can be fine-tuned and eventually monitored through a EWC. It can also be a vehicle for the development of an international corporate identity, and an instrument for internal communication, stimulating social harmony and cohesion within diversified multinational companies.

¹⁹ J. Lamers, *The added value of European Works Councils*, Haarlem 1998; S. Nakano, *Management Views on European Works Councils: A Preliminary Survey of Japanese Multinationals*, "European Journal of Industrial Relations" No. 3/1999.

²⁰ R. Rezsöházy, *Pour comprendre l'action et le changement politiques*, ed. Duculot, Louvain-la-Neuve 1996.

²¹ R. Erne, *Organised labour – an agent of a more democratic EU?*, paper presented at the European Conference on Organised Labour "An Agent of EU Democracy? Trade Union Strategies and the EU Integration Process", Dublin 2004.

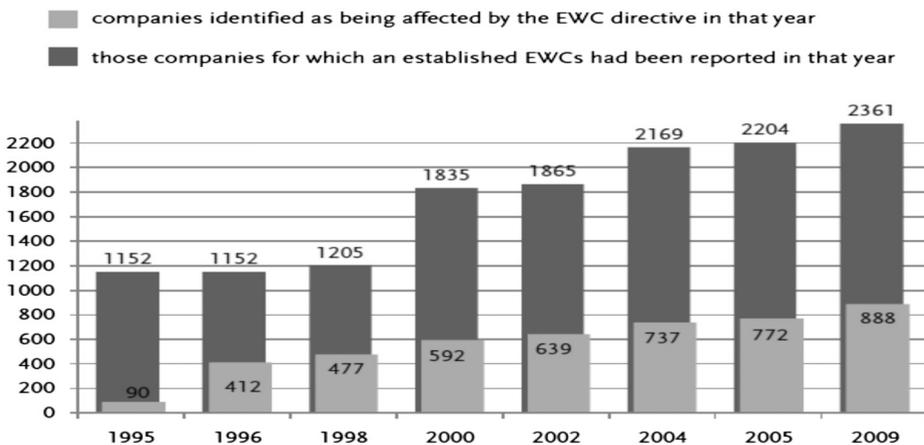
²² Recital 9 of Directive 94/45/EC.

2. The European Directive on European Works Councils

Directive 94/45/EC, as well as Directive 2009/38/EC, applies to companies that have at least 1,000 employees in the European Economic Area (EEA) and 150 or more employees in at least two Member States. Consequently, these companies have to establish a European Works Council if employee representatives of at least two EU member states so request. The establishment of a EWC is done through negotiations with employee representatives from the European operations of the MNC, which results in a EWC agreement establishing the terms of operation of the EWC.

Over the years, the number of companies with more than 1000 employees and more than 150 in at least two countries has increased, due to increasing FDI flows and EU enlargement. At the time the EWC Directive entered into force in 1996, there were 1152 companies affected, of which 412 had established a EWC. Over the years both numbers have doubled,²³ leaving the compliance rate of companies with a EWC between 30 and 40 per cent of the total number of affected MNCs. These figures point out that the right to a EWC is a right that needs to be requested and is implemented for each company by an agreement. It is not automatically imposed.²⁴

Figure 1. The number of companies affected by the EWC Directive²⁵



²³ P. Kerckhofs, *Europejskie Rady Zakładowe. Fakty i liczby 2006 (EWC facts and figures)*, Brussels 2006. <http://www.emcef.org/committees/EWC/Trace/EWC-FF2006-PL.pdf>

²⁴ M. Martinez Lucio, S. Weston, *European Works Councils and 'Flexible' Regulation: The Politics of Intervention*, "European Journal of Industrial Relations" No. 6/2, p. 203–216.

²⁵ P. Kerckhofs, op.cit.

2.1. The political history of transnational employee representation

The implementation of the 1974 European Commission's action programme resulted in the first European Directives providing for information and consultation rights within companies in certain circumstances. These covered collective redundancies (Directive 75/129/EEC) and transfers and mergers of companies (Directive 77/187/EEC). In the 1970s, two other proposals appeared on the political agenda, providing, in addition to EWCs, for participation of employee representatives in company supervisory boards. These concerned a draft European company statute regulation and a proposal for a fifth company law Directive. Revised versions of both proposals were re-submitted for adoption in the 1980s. While they were not adopted, nevertheless these revised versions, as well as the very fact that they were not acceptable for adoption owing to certain reasons, yielded important information and lessons which were incorporated into the draft Vredeling Directive on transnational information and consultation.²⁶

Unlike the EWC Directive, the Vredeling proposal was not limited to transnational companies. It also concerned national enterprises with complex structures. The Vredeling proposal required local management to provide information and consultation through the existing workplace representation structures, based on information received from central management.

Even though Sir Richard Ivor, the new Commissioner for social affairs who had taken the place of Henk Vredeling, issued a revised version of the draft Vredeling Directive in 1983, it too was never adopted. Business lobbyists successfully countered it, while trade unions were unable to convince Commissioners of the importance of this proposal. In the debates in the September and October 1983 meetings of the 'social questions working group' of the Council, resistance occurred first from the Thatcher government. Reservations also came from Germany, which feared an erosion of its co-determination practice. Finally, the French presidency of the Council did not make the revised Vredeling proposal a priority for the first half-year of 1984. In the end, probably the most important contribution of the Vredeling proposal in the political process which eventually enabled the adoption of the EWC Directive was the growing awareness it engendered that the then-required unanimity had to be replaced by qualified majority voting for the adoption of such proposals.

While the proposed Vredeling Directive was abandoned, three different events in France influenced the formulation of a proposal for a EWC Direc-

²⁶ R. Blanpain, P. Windey, *European Works Councils: the European Directive (94/95 EEC) of September 22, 1994 – Information and Consultation of Employees in Multinational Enterprises in Europe*, ed. Peeters, Leuven 1994.

tive. First, France adopted the so-called Auroux laws. The second Auroux law, of 28 October 1982, strengthened the consultation rights of works councils and introduced group works councils.²⁷ One of such group works councils, within the glass-producing company Saint-Gobain, invited foreign workers' representatives in 1983 and became the first *de facto* EWC.

Second, in the French state-owned Thomson Group the first EWC was created based upon a formal written agreement between central management and trade unions. The management of this company granted the French trade unions this first EWC agreement in return for political support at the EU level to obtain anti-dumping measures against Asian TVs entering Europe, which eroded Thomson's potential market shares. The content and structure of this first formal written EWC agreement was copied in several other companies in the second half of the 1980s, and became the template for the creation of EWCs according to the draft EWC Directive in 1990.

Third, within days of taking office, the French president of the European Commission, Jacques Delors, launched European social dialogue talks at the Val Duchesse Priory.²⁸ In this way the European Commission mobilised trade union support for the adoption of the Maastricht Treaty in return for the Social Protocol annexed to it. This was formalised in the European social partner joint letter of 31 October 1991, which asked the Inter-Governmental Conference (IGC) to adopt the proposal for a new Article 118b. This was done, and the proposal was integrated in Protocol number 14 to the Maastricht Treaty, and later on integrated, as Articles 137, 138 and 139 of the Treaty Establishing the European Community (TEC). In the current Treaty on the Functioning of the European Union (TFEU) they are now articles 153–155.

In this manner, the social partner summits initiated by Jacques Delors resulted in an agreement institutionalising European social dialogue. This opened up the possibility of negotiated agreements of the European social partners that would be enforced through Directives (Article 155), as well as the legal basis to issue Directives in certain policy domains by qualified majority instead of the previously required unanimity (Article 153). Both of these new decision-making procedures were used for the first time in the adoption process of the EWC Directive.

²⁷ M. Coffineau, *Les Lois Auroux dix ans après*, Paris 1993.

²⁸ Val Duchesse is a castle on the outskirts of Brussels that was the location for European social partners summit meetings in January 1985 and in November 1985. In May 1987 the meeting was held at the Egmont palace in the centre of Brussels. That period, as well as the actors involved, were however continuously referred to by the symbolic place of 'Val Duchesse'. See: Z. Tyszkiewicz, *The European Social Dialogue 1985–1998 – a personal view in: European Trade Union Yearbook 1998*, ed. E. Gabaglio, R. Hoffmann, Brussels 1999.

2.2. The adoption of the EWC Directive

The adoption process of the EWC Directive is an interesting case study in European social policy-making, because it runs through three different types of decision-making procedures. At present, it also demonstrates the important capacity of the country holding the presidency to set priorities and seek compromises over proposed EU legislation.

In the first phase, the decision-making procedure in place at that time required unanimity in the Council of Ministers. As was the case with the Vredeling draft, it was the unanimity requirement which obstructed the adoption of the draft EWC Directive. The Maastricht Treaty, signed on 7 February 1992, included a Social Protocol (hereinafter referred to as the ‘Maastricht Social Protocol’) that opened up two new procedures for European policy-making on the issues of information and consultation:²⁹

- The possibility for the European social partners to make an agreement that is enforced under a Directive, and
- The possibility for Council adoption of a Directive by qualified majority.

Until the Maastricht Treaty entered into force in November 1993,³⁰ the required unanimity continued to obstruct the adoption of the EWC Directive. In the meantime, the political willingness to legislate a Directive on EWCs resulted in the creation of a budget line for financing meetings of employee representatives to prepare them for the establishment of EWCs.³¹ With the help of this budget line, 47 European Works Councils were established even before the EWC Directive was adopted in 1994.³² This rather large and increasing number of voluntarily established EWCs constituted a strong argument in the decision-making process concerning the Directive.

2.2.1. Unanimity required in the Council of Ministers

The European Commission issued the first draft of the EWC Directive on 5 December 1990, which was presented to the Council meeting of 12 December 1990. The views of the social partners were given through the opinion of the

²⁹ G. Falkner, *European Works Councils and the Maastricht Social Agreement: Towards a New Policy Style*, “Journal of European Public Policy” No. 2/1996, p. 192–208.

³⁰ The Maastricht Treaty was only approved in Denmark in the second referendum of 02.06.1993 (the first referendum of 18.5.1992 did not permit Danish ratification). The French referendum of 20.9.1993 was positive, although only with a slight majority. Germany was the last Member State to complete the ratification process (following the judgment of the Constitutional Court of 12.10.1993 which allowed the ratification). Following German ratification the Maastricht Treaty and its Social Protocol entered into force on 01.11.1993.

³¹ S. Cox, *Your new EWC agreement: What's in – what's out. A guide for workers' representatives*, Brussels 2005.

³² P. Kerckhofs, op.cit.

European Economic and Social Committee (EESC) of March 1991. Considering this, as well as the amendments contained in the opinion of the European Parliament (EP) of July 1991, the European Commission presented a revised version of the draft in September 1991. This was subject to a political debate in the social and labour affairs Council on 3 December 1991. The UK opposed this draft, which at that time still required unanimous approval for adoption.

Table 3. Three stages in the adoption process of Directive 94/45/EC

Phase 1 Unanimity of 12 Member States in Council	Phase 2 Consultation of Social Partners & possibility to make social partner agreement	Phase 3 Qualified Majority of 11 in Council
05/12/90 => 31/10/93	01/11/93 => 30/03/94	01/04/94 => 22/09/94
Legal Basis = Art. 100 of the Treaty establishing the European Community	Article 3 §2 and §3 of Maastricht Social Protocol ³³	Article 2§2 of the Maastricht Social Protocol ³⁴

The Presidencies of the Council of Portugal in the first half-year of 1992, and of the UK in the second half-year of 1992, both blocked the proposal, while intensive diplomatic efforts of the subsequent Danish and the Belgian Presidencies consolidated support for the draft of the text in 1993.³⁵ This political willingness to negotiate over legislation is illustrated by the fact that the draft EWC Directive was discussed at fourteen meetings of the working group social questions of the Council, at five meetings of the committee of permanent representatives (COREPER), and at five meetings of the Council of Ministers.³⁶

³³ This is now Article 154 and 155 of the Treaty on the Functioning of the European Union (TFEU).

³⁴ This is now Article 153 of the TFEU.

³⁵ For a detailed analysis of the role and impact of the provisions in the draft EWC Directive, based upon interviews with members of COREPER and the working group social questions, see P.Kerkchofs, *La Directive sur les comités d'entreprise européens*, "Courier Hebdomadaire du CRISP" No.1579/1997.

³⁶ Council activities take place at three levels:

- The working group social questions, composed of heads of administration, dealing with juridical-technical questions;
- COREPER, the committee of permanent representatives, preparing political agreement on the proposal (Ambassadors of the Member States to the EU are referred to as permanent representatives);
- The Council of ministers of work and social affairs.

2.2.2. Social partners' opportunity to legislate by agreement

When the Maastricht Treaty entered into force in November 1993, its Social Protocol enabled the adoption of the EWC Directive with a qualified majority consisting of eleven Member States. Since the UK had opted out of the social protocol until 1997, the large support mobilised during the Danish and Belgian Presidencies of the Council enabled a speedy adoption.

The Maastricht Social Protocol, however, prescribed a double consultation round of the European Social Partners. In the first round the desire for, and the general orientation of, a legislative proposal were discussed. A second consultation period debated the content of the proposal and an eventual commitment of the European Social Partners to negotiate an agreement on a text for a Directive.

The first consultation round took place from 18 November to 13 December 1993, subsequent to which the European Commission issued a new draft version for the EWC Directive on 7 February 1994, the so-called Flynn proposal, named after Commissioner P. Flynn.

Two exploratory meetings were held on 23 February and 9 March 1994. On 15 March, UNICE and CEEP, the European organisations of public sector employers, offered negotiations without preconditions. UNICE and CEEP reviewed their position twice, first on 23 March and secondly on 28 March. As such, there seemed to be a basis for negotiations at the opening of the final meeting on 30 March 1994. At that occasion the Confederation of British Industry (CBI) found UNICE's position unacceptable and rejected it as a basis for negotiations. Consequently, the European Social Partners could not launch negotiations on the establishment of a legal framework for EWCs.³⁷

2.2.3. The adoption of the EWC Directive by qualified majority

The European Commission presented a new draft Directive on 13 April 1994 based upon the 12 October 1993 draft that received large support during the Belgian Presidency. The EP and the EESC each issued an opinion, which were taken into consideration in the revised draft presented by the European Commission on 3 June 1994. On 18 July the Council of Ministers reached a common position which was transmitted to the EP for the second reading.

The EP proposed 12 amendments, on which the European Commission had to give its opinion a few days later. Commissioner Pdraig Flynn's position was

³⁷ J.E. Dølvik, *Redrawing boundaries of solidarity? ETUC, social dialogue and the europeanisation of trade unions in the 1990s*, Oslo 1997; R. Hoffmann, *European trade union structures and the prospects for labour relations in Europe* in: ed. J. Waddington, R. Hoffmann, *Trade Unions in Europe, Facing challenges and searching for solutions*, Brussels 2000.

that certain amendments could be considered, if the Council was unanimous on the same line. This appeared not to be the case.³⁸ On 22 September 1994, the Council of Ministers unanimously adopted the common position of 18 July, without any changes. Portugal abstained, and the UK did not participate in the vote since it had opted out of the Maastricht Social Protocol.

The speed in which the draft Directive was passed – from April to September 1994 – reflects the broad political consensus to adopt a legal framework for EWCs. Even though this had not been possible throughout the negotiations with ETUC, UNICE and CEEP, the implementation of the EWC Directive brought a new impetus for European social dialogue.

2.3. The Polish implementation of the EU Directive 2002/14/EC

Both the 94/45/EC EWC Directive as well as the 2002/14/EC Directive on national level information and consultation were transposed into Polish law by the Act of 5 April 2002. Before the implementation of these Directives, trade unions were the only existing channel of employee representation. The introduction of a dual system, combining trade unions with their collective bargaining role and works councils with competences limited to information and consultation, led to a Polish court case over the role of trade unions in the appointment of works council members.

This question of the status of the works councils and their relation to trade union organisations was ruled upon by the Polish Constitutional Court in a landmark judgment of 1 July 2008.³⁹ Following a complaint lodged by the Confederation of Polish Employers,⁴⁰ the Court analysed whether the provisions of the Act of 7 April 2006 on informing and consulting employees,⁴¹ which laid down the mode of election and dismissal of works councils, were compatible with Article 59 paragraph 1 in connection with Article 32 paragraph 3 of the Polish Constitution of 1997.⁴²

³⁸ *Richtlijn ondernemingsraden ongewijzigd goedgekeurd, amendementen europees parlement verworpen, (Directive on works councils adopted, amendments of the European Parliament rejected)*, “De Tijd”, 20.09.94.

³⁹ Judgment of the Polish Constitutional Tribunal of 01.07.2008, file ref. K 23/07, *Dziennik Ustaw* (Journal of Laws), No. 120/2008, item 778.

⁴⁰ In June 2010 the Confederation of Polish Employers officially announced it was changing its name to Employers of Poland, See: *Major national employer organisation changes name* <http://www.eurofound.europa.eu/eiro/2010/07/articles/pl1007019i.htm> (last visited 03.12.2011).

⁴¹ *Ustawa z dnia 07.04.2006 o informowaniu pracowników i przeprowadzaniu z nimi konsultacji (Act of 07.04.2006 on informing and consulting employees)*, *Dziennik Ustaw* (Journal of Laws), No. 79/2006, item 550.

⁴² J. Unterschütz, E. Podgorska-Rakiel, *Rady pracowników po nowelizacji – wybrane zagadnienia (Works Councils after the revision – selected issues)*, „Praca i Zabezpieczenie Społeczne” (PiZS) No. 3/2010, p. 17–21.

In its 2008 judgment the Polish Constitutional Court noted that the Act of 7 April 2006 transposing Directive 2002/14/EC provided for three modes of election of works council representatives: (i) only by trade unions, (ii) by all employees, and (iii) mixed. The Act gave the priority to the first mode: accordingly, as a general rule only trade union organisations were entitled to elect the employees' representatives. The second mode, election of the representatives by all employees, was only subsidiary and applied as an exception to that general mode, i.e. it was provided for only in cases where no trade union organisation existed in the enterprise, or in cases where, if there were more than one trade union in the enterprise, the trade unions could not manage to agree on the election of the representatives. This was in line with the recommendations of the Working group of labour ministries officials that looked after the harmonised national transposition measures, ruling out the provision of additional rights that could have stimulated MNCs to undertake regime shopping.⁴³

The Court noted that the same Act provided that a works council, elected in an enterprise in which no trade union organisation existed at the time but one was subsequently formed, should be dissolved and the mandate of its members would expire six months after the day on which an employer is notified about formation of a trade union organisation. As a consequence, the employees previously elected to the works council can not oppose the dismissal of its representatives whenever a trade union organisation is created in a given enterprise. After having analysed the Act of 2006 in the context of the principle of trade unions' negative freedom and the principle of equality of workers, the Court found that Article 4 paragraphs 1, 3 and 5 of the Act of 2006 was unconstitutional to the extent that it specified the mode of selection and dismissal of the employees' representatives depending on whether the workers in a given enterprise belonged to a trade union organisation or not. Following this judgment the Polish legislature has derogated all the provisions questioned by the Court and laid down only one procedure to create work councils, by employees' election.⁴⁴

The relevance of this judgement seems to be limited only to the question of the transposition of Directive 2002/14/EC. So far several other laws transposing the social *acquis communautaire* in which the Polish legislature granted company trade union organisations a monopoly to elect employees' representatives have not been questioned by either the employers or the employees. In particular, this right is currently enshrined in the provisions concerning the se-

⁴³ G. Barisi, *L'Evolution des Comités d'Entreprise Européens: Enquête auprès des groupes français*, "Travail et Emploi" No.79/1999.

⁴⁴ J. Unterschütz, E. Podgorska-Rakiel, *op.cit.*

lection of employees' representatives for a special negotiating body in the Act on European Works Councils⁴⁵ and the Act on the *Societas Europaea*.⁴⁶

3. The recast of the EWC Directive in 2009

European Works councils continued to develop over the years, based upon learning effects and improved cooperation between EWCs. According to its Article 15, the EWC Directive was supposed to be revised in 1999, however this only happened ten years later, in 2009. The difficulties which gave rise to this significant delay are presented below, together with the rulings of the European Court of Justice (ECJ) that illustrated the need for the revision. Finally, an assessment is made of the extent to which the new EWC Directive incorporates the lessons from the ECJ rulings.⁴⁷

3.1. The difficult process of revising the EWC Directive

The developments concerning the revision of the EWC Directive can be grouped in a similar way as the stages in which the EWC was adopted in the first instance, i.e. in the first half of the 1990s. In the first period the actors took positions: the ETUC formulated its demands, UNICE opposed revision, and the European Commission decided to prioritise two other Directives, withholding the revision of the EWC Directive until these two other Directives, in the field of European Industrial Relations, were adopted, which they finally were, as 2001/86/EC and 2002/14/EC.

In the second period, from 2003 to 2005, the European social partners were given the opportunity to legislate a revised EWC Directive by agreement. This turned out to be not possible, as was previously the case in the adoption process of the first EWC Directive. Finally a third period, beginning in 2006, reflected an increased political willingness to legislate a revised EWC Directive. In that year the European Parliament called for a revision in its Cottigny Report, and in resolutions on restructuring and closures this need for revision was repeated.

Frustrations over the lack of developments in the process of revision of the EWC Directive simultaneously raised the expectations associated with its

⁴⁵ Ustawa z dnia 05.04.2002 o europejskich radach zakładowych (*Act of 05.04.2002 on European Works Councils*), Dziennik Ustaw (Journal of Laws), No. 62/2002, item 556.

⁴⁶ Ustawa z dnia 22.07.2006 r. o spółdzielni europejskiej (*Act of 22.07.2006 on the Societas Europaea*), Dziennik Ustaw (Journal of Laws), No. 149/2006, item 1077.

⁴⁷ The political process leading to the adoption of Directive 2009/38/EC is described by R. Jagodziński in: *Review, revision or recast, the quest for an amended EWC Directive in: Social developments in the European Union 2008*, ed. C. Degryse, Brussels 2009.

revision.⁴⁸ From 1999 to 2007, this revision process had not yet resulted the presentation for adoption of any draft. Media attention given to transnational restructuring stimulated political actors to revitalise the revision process in 2008. In the meantime, case law illustrated the need for additional safeguarding of the effectiveness of the information and consultation rights provided by the EWC Directive. With EU enlargement, the inclusion of the UK into the process, and the extension of the EWC Directive to the EEA, its geographical scope was enlarged from 11 to 30 countries. Enlarging the European Single Market also enhanced transnational restructuring⁴⁹ and increased both the expectations associated with EWCs⁵⁰ as well as the number of countries represented in EWCs.⁵¹ In addition, lessons learned from existing EWCs caused participants to project solutions for the difficulties they saw in the functioning of their own EWCs into the ongoing revision process of the EWC legal framework.⁵² The resulting Directive 2009/38/EC is thus no longer referred to as a 'revision' but a 'recast' of the earlier Directive 94/45/EC.⁵³

3.2. Deficiencies leading to court cases, reflecting the need for a revision

As the above-mentioned process unfolded, deficiencies in the implementation of the earlier Directive resulted in the rulings by the European Court of Justice that not only safeguarded the effectiveness of the EWC Directive but also provided lessons for its ongoing revision process.⁵⁴ These rulings concerned the EWCs of Renault, Bofrost, Kühne & Nagel, and Anker. Each of these four cases is described below.

The first court case involving EWCs arose from the decision of the French central management of Renault to close its plant in Vilvoorde, resulting in the collective dismissal of almost all of the approximately 3,000 workers there. This decision was taken by management, and announced to the press before

⁴⁸ W. Buschak, *Review of the EWC Directive in: European Trade Union Yearbook 1999*, ed. E. Gabaglio, R. Hoffmann, Brussels 2000.

⁴⁹ M. Carley, M. Hall, *European Works Councils and transnational restructuring*, Luxembourg 2006.

⁵⁰ P. Morvannou, *Methodological guide on the informing and consulting of European Works Councils in the case of restructuring*, Paris 1999; V. Pulignano, *EWCs' cross-national employee representative coordination: A case of trade union cooperation?*, "Economic and Industrial Democracy" No. 3/2005, pp.383–412.

⁵¹ E. Vos, *The experience of European Works Councils in New EU Member States*, European Foundation for the Improvement of Living and Working Conditions, Luxembourg 2006.

⁵² V. Telljohann, *European Works Councils, a role beyond the EC Directive*, "Transfer", Brussels 2005.

⁵³ R. Jagodziński, *op.cit.*

⁵⁴ E. Pichot, *Ce que la Cour de justice nous apprend sur la Directive relative aux CE européens*, "Liaisons Sociales Europe" No. 107/2004.

employee representatives were informed or consulted. A Belgian court issued a judgment condemning Renault's decision as being in breach of Belgian regulations on information and consultation. In parallel a court case was initiated in France to defend the EWC and its information and consultation rights, because the simultaneous start of a new production line in Spain clearly proved the transnational character of the closure. The French court of first instance,⁵⁵ as well as the court in higher appeal,⁵⁶ judged that the effectiveness of the information and consultation rights of the EWC Directive were not sufficiently guaranteed by the Renault EWC agreement. The ruling however assessed a penalty of only 5000 French Francs (approximately 750 Euro or £500), which for such a large company was hardly a deterrent.⁵⁷

In the Bofrost court case⁵⁸ the ECJ received a reference for a preliminary ruling from a German court, concerning the request of workers to receive information on the organisation, structure, and workforce numbers of the company. The Bofrost defence claimed that the individual establishments were independent, as they were parts of a joint venture, without a central management or a controlling undertaking. Consequently, the German management claimed it was not required to provide this information, according to the German law transposing the EWC Directive. The ECJ decided that the provision of this information was essential for the effectiveness of the EWC Directive and ruled that not only central management, but any management is obliged to provide this information if it is requested to do so by a EWC.

Two other ECJ court cases concerning Swiss-based multi-nationals followed. In the Kühne & Nagel case⁵⁹ the largest workforce was situated in Germany, which, according to the ECJ, made the German management the substitute for the Swiss central management. The ECJ obliged the German management of Kühne & Nagel to provide information on its operations in other EEA countries. In the Anker case,⁶⁰ German employee representatives obtained the same result. This Swiss company had a Dutch subsidiary which held all the shares of the concern, and the largest workforce was situated in the UK. Thus the management of the Anker operations in the Netherlands or in the UK would hold the responsibility of central management in terms of the EWC Directive, though they did not acknowledge this when German employee representatives requested information to prove that their company fell with-

⁵⁵ Le Tribunal de Grande Instance de Nanterre, ordonnance de référé du 4.04.1997.

⁵⁶ La Cour d'Appel de Versailles, 07.05.1997.

⁵⁷ U. Rehfeldt, *op.cit.*

⁵⁸ C-62/99, *Betriebsrat der Bofrost*, [2001] ECR I-02578.

⁵⁹ C-440/00 *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v Kühne & Nagel AG & Co. KG* [2004] ECR I-787.

⁶⁰ C-349/01 *Betriebsrat der Firma ADS Anker v. ADS Anker* [2004] ECR I-6803.

in the scope of the EWC Directive. In this case the ECJ ruling obliged management to provide information enabling workers' representatives to prove that their company fell within the scope of the EWC Directive.

Hence, it can be concluded that the effectiveness of the EWC Directive is enforced by these ECJ rulings.

3.3. The new EWC Directive 2009/38/EC

To assess the impact of Directive 2009/38/EC on EWC developments, the overall question to be answered is whether the new EWC Directive will bring about more – and more effective – EWCs in response to participants' expectations.⁶¹ In order to increase the number and proportion of established EWCs, Directive 2009/38/EC provides help and stimuli for the setting up of new EWCs, as well as an upgrading of the legal framework for the existing EWCs.

3.3.1. Help for setting up new EWCs

In line with the Bofrost, Kühne & Nagel, and Anker court rulings, Article 4 §4 of Directive 2009/38/EC provides help in the process of collecting information on the scope of a company by making local management responsible to disclose this information within each workplace.

Another legal incentive to start setting up EWCs in companies where they are absent is provided in Article 14, which replaces Article 13 of the former 94/45/EC Directive. It discharges companies from their obligations arising from this Directive if they reach a EWC agreement on the basis of Article 6 of Directive 94/45/EC before the 6th of June 2011. This is the date the national transposition measures of Directive 2009/38/EC entered in force. If the obligations of Directive 2009/38/EC raised fears, they could be avoided by voluntarily setting up a EWC before the 6th of June 2011. The impact of this provision was not, however, significant.

Further help for the Special Negotiation Bodies (SNBs) employed in the process of establishing new EWCs is given in terms of: employee-only SNB preparation meetings; training for SNB members; notification of ongoing negotiations to European trade unions and their expert assistance in SNB meetings.

3.3.2. Legal upgrading of existing EWCs

The legal upgrading of the rights of existing EWCs is provided in Articles 1, 2 and 10 of the new EWC Directive 2009/38/EC. This involves both better

⁶¹ J. Waddington, *Views on the agenda of EWCs and on the revision of the Directive: a perspective from five countries* in: *European Trade Union Yearbook 2001*, ed. E. Gabaglio, R. Hoffmann, Brussels 2002.

defined information and consultation rights and improvements in the means that have to be provided to allow EWC members to exercise their rights and fulfil their duties.

New in Article 1 is that it sets out the objective to define information and consultation in such a way as to ensure their effectiveness, while simultaneously limiting the competence of EWCs to transnational issues. These are defined as matters that concern the company as a whole or at least two different countries (Article 1 §4). This does not reflect the court ruling on the closure of a Renault plant in a country different from that in which the company's headquarters were located, where the closure was decided upon.⁶² According to recital 12 of the 2009/38/EC Directive, which was previously included in the 94/45/EC Directive as well, EWCs need to be properly informed and consulted on decisions taken in another European country from where they will have an impact on employees. Neither the Renault court ruling nor this prescription in the preamble of the Directive is reflected in the transnational competences given to EWCs by the 2009/38/EC Directive.

The definition of information is new (Article 2 §1f), and to the definition of consultation is added that it needs to take place in such a time, in such fashion, and with such content, as to allow EWC members to express an opinion based upon the information provided. The information, the consultation and the expression of the EWC opinion also need to happen within a reasonable time, and sufficiently in advance that it can be taken into account in the company's decision-making process.

Also the role of EWC members is legally upgraded in Article 10 of Directive 2009/38/EC. This Article gives EWC members the right to obtain the means necessary to fulfil their EWC rights and duties (Article 10 §1). It is their duty to pass on information to local workplace representatives, or if there are no local workplace representatives, to the entire workforce (Article 10 §2). In order to develop the skills, knowledge and competences needed to exercise their representative duties, EWC members are entitled to training during their working time (Article 10 §4).

Conclusions

The EWC Directive illustrates the capacity of the European Union to develop a legal framework for European social dialogue in MNCs. On several occasions lessons were learned from the potential negative impacts of transnational restructuring and from the impossibility to legislate on this matter

⁶² U. Rehfeldt, *op.cit.*

through unanimous decision-taking. Thus a joint letter of the European Social Partners of 31 October 1991 was included as a Social Protocol to the Maastricht Treaty, opening up two new possibilities for social policy making: by European Social Partner Agreement enforced by a Directive, or by a Directive adopted in the Council by qualified majority instead of unanimity. With voluntarily-established EWCs serving as good examples and a driving force, and political consensus mobilised by some ministers for employment during their countries' presidency, the draft EWC Directive was adopted in 1994. The innovative character of this Directive brought with it some imperfections that resulted in several rulings of the ECJ, some of which are reflected in the new 2009 EWC Directive. This article demonstrates that the new EWC Directive is a good example of European social policy making, bringing together and responding to developments in the economic, political, juridical and industrial relations fields. Despite the difficult and lengthy decision-making process, it illustrates the capacity of European policy-making to adopt a legal framework for European social dialogue structures within multinational companies.

Pavel Svoboda*

EU Law Flexibility – A European and Czech Law Perspective

Abstract: *European law flexibility makes it possible to change the rules of conduct set out in an act of greater legal force by means of an act of lower legal force. Among various cases of such legal flexibility, Article 48(6) TEU attracts special attention because it concerns changes of the EU founding treaties in the form of a Council decision – an EU secondary law act. This case of flexibility provokes consequences not only within the EU legal system, but in national law as well, as demonstrated in this article using the case of Czech law.*

Any average Central European lawyer has it in his blood that: ‘*in terms of legal force a normative instrument may be repealed or amended only by a normative instrument of equal or higher legal force*’.¹ It follows for empowering ‘blank’ norms that ‘*as regards the derived sub-statutory regulatory instruments, a blank norm cannot be filled by any act which is contra legem, but only by an act which is secundum et intra legem (in compliance with and within the law). A conduct preter legem (outside the law) is excluded*’.² Many would readily swear that this principle of hierarchy of legal norms forms a part of the rule of law principle worldwide.

1. Flexibility in general

Nevertheless there are situations which refute this postulate, i.e. legal provisions exist which allow for a norm of greater legal force to be modified by a norm of lesser legal force. We shall call this *flexibility*.

When it comes to flexibility in general, we need to distinguish between those cases of flexibility which result in an amendment of technical or non-

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¹ Cf. A. Gerloch, *Teorie práva* (Theory of Law), 4th edition, Pilsen 2007, p. 51.

² *Ibidem*, p. 59.

substantive elements (technical flexibility³) and those amendments modifying substantive rules of conduct (normative flexibility). The borderline between these two categories however is not always clear-cut. For instance, in the institutional framework of the EU, one can wonder whether an increase in the number of Advocates-General pursuant to Article 252 TFEU constitutes a mere technical amendment or amends a substantive rule of conduct.

Given that bodies issuing acts of greater legal force in a state of law always have the authority to repeal an act of lower legal force by means of an act of greater legal force, the fact that less important matters remain governed by lower legal acts reflects a certain pragmatism and flexibility in the legal order. This approach is a functionalist one, teaching that law should serve people and not vice versa. However, it is an approach that might seem incomprehensible, or even unlawful, especially to hard-line positivists.

2. Flexibility in EU law

In connection with the Lisbon Treaty, a constitutional debate was launched on the admissibility of transitional clauses, or '*passerelle*' clauses.⁴ Their underlying effect is that they make it possible to amend primary EU law otherwise than by a full-fledged international treaty. The *passerelles* therefore allow for a certain flexibility, of which they are the most significant embodiment. The greatest difference between them and the aforementioned modifications of a technical nature lies in the fact that the *passerelles* allow for a change in the normative rules of conduct themselves, rather than merely changing a list of items to which a particular rule of conduct applies. This concerns three areas specifically: (1) flexibility within primary law, (2) flexibility provided for in primary law and implemented by secondary legal acts, (3) flexibility not provided for in primary law.⁵

³ Technical flexibility exists in Czech law too: see for instance the power of the government, under Section 28 par. c) of the State Social Assistance Act No 117/1995 Coll., to modify, by means of government regulation, the amount of so-called 'normative housing expenses' in order to account for the increase in rents and expenses similar to rents and the changes in consumer price indexes.

⁴ From the French *passerelle* – footbridge, overcrossing; cf.: Decision of the Czech Constitutional Court, PL. ÚS 19/08 (Lisbon I), No. 446/2008 Coll., in particular par. 156–167.

⁵ Although all these examples would suggest further ingratiation of the EU, we need to bear in mind *Declaration No.18 on two-way flexibility* – a non-binding document recalling the possibility of the inverse disintegration process i.e. limitation of EU powers. This possibility (to modify the content of an international treaty in almost all conceivable ways and directions) has existed virtually from the very beginning of the international legal system (Cf. Articles 39–41 Vienna Convention on the Law of Treaties) and is therefore from a legal standpoint quite superfluous.

- 1) Flexibility within primary law includes:
 - **Shift from unanimity to qualified majority voting in the Council** (i.e. loss of the right of veto, Article 48(7)(1) TEU);
 - **Shift from special legislative procedure to ordinary legislative procedure**, which can be decided upon by the European Council generally (Article 48(7)(2) TEU) or by the Council in special cases (Articles 81(3)(2), 153 (2), 192(2), 333(2) TFEU);
 - **Revision of primary law without convening an intergovernmental conference** (Article 48(6) TEU);
 - Power of the Council to **increase the number of Advocates-General of the Court of Justice** (Article 252 TFEU) or **the number of judges of the Civil Service Tribunal** (Annex I, Article 2 of Protocol No 3 on the Statute of the ECJ);
 - Adding **areas of judicial cooperation subject to minimal harmonisation** (Article 82 (2)(d) TFEU);
 - **Transforming Eurojust into the European Public Prosecutor's Office** (Article 86(1) TFEU) and **extension of its substantive jurisdiction** (Article 86(4) TFEU).
- 2) Flexibility provided for in primary law via secondary legal acts concerns the following cases:
 - **delegated acts**: a legislative act of the Council and the European Parliament may delegate to the Commission the power to amend its non-essential elements (Article 290(1) TFEU);
 - **subsidiary powers**: the power of the Council to adopt unanimously certain measures for which no legal basis exists, but which constitute an objective of the EU within the framework of EU policies (Article 352 TFEU).
- 3) Within the EU law, flexibility exists also outside primary legislation in the case of an **amendment of a so-called external agreement**. This involves a two-fold or two-tier flexibility. First, the legal basis (Article 217 TFEU) stipulates that an external agreement shall contain, *inter alia*, 'common action and special procedure' (which to such an extent would fall under category 2) above). The specific agreement then, under the common action or special procedure provision, lays down the amending powers of bodies established pursuant to these agreements. It is only once such powers are exercised that we actually get to the final substantive rule of conduct. For instance, according to Article 50(4) of the Stabilisation and Association Agreement between the EC and Albania⁶ the

⁶ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part; OJ L 107, 28.4.2009, p. 166.

Stabilisation and Association Council⁷ can amend the Agreement by its own decision in so far as it shall ‘*establish the modalities to extend the above provisions to the establishment of nationals of both Parties to take up economic activities as self-employed persons*’.⁸ This example is once again a predictable modification of the original norm, moreover in a predictable timeframe. However the possibility for the Stabilisation and Association Council to ‘*extend or modify*’ the scope of ‘financial services’ pursuant to art. 49 (i) of the same Agreement is much less predictable. Here we deal with a straightforward change of a substantive rule of conduct.

From the perspective of the East European 2004 enlargement countries, the above-mentioned cases are ‘post-entry’ examples; however flexibility can be found even in earlier legislation. For instance the primordial Article 166 TEC (subsequently Art. 222 TEC) made it possible for the Council to increase, by unanimous decision, the number of Advocates-General; former Article 308 TEC (originally Article 235 TEC) granted so-called subsidiary powers to the Council (similarly, see former Article 137(2) TEC and former Article 175(2) TEC).

3. Analysis of Article 48(6) TEU

We shall begin with a brief overview of the content of the provision which forms the subject of our analysis, then proceed to reflect upon the implications it might have, including several examples taken from the Czech legal order.

3.1. Procedure pursuant to Article 48(6) TEU

Revision of primary legislation by way of simplified procedure pursuant to Article 48(6) TEU may concern exclusively amendments to the TFEU provisions (not the TEU) on internal policies (Part Three), which do not increase the competences conferred on the EU. The proposal for revision may be submitted to the European Council by the government of a Member State, the European Parliament, or the Commission. The European Council shall decide unanimously after consulting the EP and the Commission (and the European Central Bank in the case of institutional changes in the monetary area), i.e.

⁷ A joint body, whose aim is in particular to manage the relevant agreement and to settle disputes that might arise from it.

⁸ Similarly in Article 50(5)(b) of the same Agreement ‘*Seven years after the date of entry into force of this Agreement the Stabilisation and Association Council shall establish the modalities for extending rights under this paragraph to the excluded sectors*’.

without intergovernmental consultation. The final phase consists in approval by the Member States according to their constitutional rules.⁹

The first-ever measures involving the application of this simplified procedure have been taking place since December 2010 in connection with the modification of certain euro area (eurozone) rules under Article 136 TFEU.

3.2. Ban on increasing EU powers based on Article 48(6) TEU

Under Article 48(6)(3) TEU it is prohibited to apply this procedure to adopt amendments that increase the EU competences. This raises two issues: (a) the meaning of ‘competence’ and (b) the meaning of ‘increasing the competence’.

3.2.1. Power vs. competence

The Czech legal system is not the only one to distinguish rigorously, in contrast to EU law, between ‘competence’ (scope of regulated relations) and ‘power’ (tools to regulate them).¹⁰ In EU law the term competence (*compétence* in French) is often used for both concepts without distinction, although such a distinction could be made (*attributions – compétences* in French, *Befugnisse – Zuständigkeiten* in German).¹¹

3.2.2. Increasing the competences

The meaning of the term ‘increasing the competences’ remains ambiguous. However, it seems beyond any doubt that it does not include, for example, modifications of the decision-making processes of the EU institutions, changes in the attribution of competences of the EU institutions to decide on different policies, changes of policy objectives, or limiting the powers of the EU.¹²

3.3. Nature of the decisions of the European Council pursuant

⁹ Cf. e.g., Decision 2010/349/EU on the location of the seat of the Office of the Body of European Regulators for Electronic Communications (BEREC); OJ 156 L, 31.05.2010.

¹⁰ Cf. D. Hendrych, *Právnícký slovník* (Law Dictionary), 3rd edition, Praha 2009, according to which: ‘the **competence of public administration** refers to the tasks attributed by the law to a specific public administration body or to a specific person acting on behalf of public administration. In connection with public administration, competence takes on a particular meaning due to the great number and variety of tasks [...] **Power** refers to the entitlement of a competent body to exercise public administration within the scope of its competence by means of legal tools defined by the law, for instance by issuing regulations, administrative decisions etc’.

¹¹ From a Czech lawyer’s perspective, this ambiguity in the EU law has been injected into Article 10a of the Czech Constitution, which refers to the conferral of ‘powers’ (pravomoci) of national bodies to an international institution, whereas it clearly aims mainly at conferring ‘competence’ (působnost).

¹² Cf. J. Syllová, L. Pítrová, H. Paldusová, *Lisabonská smlouva, komentář* (Lisbon Treaty – Commentary), Praha 2010, p. 178.

to Article 48(6) TEU

Council decisions are adopted on the basis of primary legislation, i.e. on the basis of Article 48(6) TEU. This constitutes the main characteristic of a secondary legal act. In general terms, a decision is a typical instrument of EU secondary legislation (Article 288 TFEU). Nothing can overturn this conclusion, not even the fact that the procedural rules for its adoption under Article 48(6) TEU make it, undoubtedly, a secondary legal act with the greatest legal force conceivable.¹³ Primary EU legislation provides for multiple cases where the Council acts by means of decisions, even though the procedural requirements are less strict.¹⁴

The foregoing could imply that a Council decision adopted pursuant to Article 48(6) TEU is a secondary legal act, a position confirmed by the Czech Constitutional Court: '*the Treaties retain a higher legal force over these acts (which amend a formally de-classified norm)*'.¹⁵ Such a formalistic conclusion, however, needs to be confronted first with the fact that there are other legal acts not listed in Article 288 TFEU, and secondly with the fact that under EU law legal acts are not classified according to their title but according to their content.¹⁶ On the other hand, none of the aforementioned arguments has so far called into question the fact that these acts are placed outside the category of secondary law norms.

Furthermore, the possibility to amend the TFEU by a secondary act having its basis in a TEU provision contains an implication that the TFEU is subordinated to the TEU.¹⁷

¹³ A parallel can be drawn with so-called 'external secondary legislation'. This includes legal acts adopted by joint bodies established under so-called external agreements, a typical example of such an act being a decision by a Stabilisation and Association Council based on an association agreement, today pursuant to Article 217 TFEU. The CJEU places these acts in the hierarchy of EU legal norms between external agreements and secondary legislation. With regard to the fact that the CJEU does not put these acts, which implement a norm inferior to primary law, on par with secondary law, but rather above it, it follows *a fortiori* from the argument *a minore ad maius* that an act amending primary legislation cannot be considered as an ordinary secondary legislation norm. Cf. 87/75 *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR I-1029, C-192/89 *S.Z. Sevince v Staatssecretaris van Justitie* [1990] ECR I-03461; for a counter-view see M. Hilf, *Organisationsstruktur der Europäischen Gemeinschaften*, Berlin Heidelberg 1982, p. 182.

¹⁴ See footnote 19.

¹⁵ See par. 162 of the Decision of the Czech Constitutional Court, ref. Pl. ÚS 19/08.

¹⁶ *Ibidem*, p. 106.

¹⁷ This conclusion is corroborated, from the **factual standpoint**, by the partition of the substance between the TEU and the TFEU. The TEU contains the constitutional foundations of the EU, which are then implemented by the TFEU. Article 48(6) – the material scope of which is limited only to Part Three of the TFEU dealing with internal EU policies – was clearly formulated according to the same logic. However from the legal standpoint this conclusion poses two difficulties:

3.4. Reviewability of Council decisions by the ECJ under Article 48(6) TEU

As secondary legislative acts, Council decisions are in principle amenable to review by the Court of Justice of the European Union ('CJEU') if they affect third parties' rights (Article 263(1) TFEU).¹⁸

1) Article 1(3) TEU ('*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value.*') and Article 1(2) of the TFEU ('*This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as 'the Treaties'.*') both declare that the TEU and the TFEU have equal legal force.

2) There are too many examples which are not in line with this purported factual relation between the TEU and the TFEU (i.e. the TEU providing for constitutional foundations, and the TFEU detailing the TEU). It would seem, at first glance, as if the alleged partition relied on two principles: (1) fundamental matters are governed by the TEU, less important matters by the TFEU; and (2) matters of equal importance are dealt with in the same Treaty.

– Both the EP and the Council of the EU shall be henceforth involved in the adoption of legislative acts. The general decision-making principle ('*save where otherwise provided*') according to which the EP acts by simple majority is laid down in the TFEU (Article 231 TFEU); the analogous rule stipulating that the Council acts by qualified majority is laid down, without any obvious reason, in the TEU (Article 16(3) TEU).

– The legal personality of the EU is provided for in the TEU (Article 47 TEU); its scope in the Member States is laid down in the TFEU (Article 335 TFEU).

– The territorial application of the Treaties is provided for as follows: the basis is in Article 52 TEU, the rest in Article 355 TFEU, without there being a any relation 'fundamental to implementing' between the two provisions.

– The fundamentals of the European judicial system are set out in the TEU (Article 19), the rest in the TFEU (Article 251 and following); here the incongruity of the partition is striking.

– The definition of qualified majority in the Council: situations where the Council acts on the initiative of the Commission are provided for in the TEU (Article 16(4) TEU), while if the Council acts on the initiative of any other entity, the relevant provisions are in the TFEU (Article 238(2) TFEU); a partition which fails to be justified by any underlying logic.

– Individual resignation of a Member of the Commission upon the President's request is governed by the TEU (Article 17(6)(2)); the collective resignation of the Commission as a body after a motion of censure by the EP is governed by the TFEU (Article 234 TFEU).

– The European External Action Service, a new institution, has its legal basis in Article 27(3) of the TEU; however the first mention of its units, external tentacles or Union delegations, is to be found only in Article 221 of the TFEU.

¹⁸ Similarly, according to the Czech Constitutional Court: '*Decisions under these articles are also reviewable by the Court of Justice as regards their consistency with the treaty itself, which proves that they are not amendments to the Treaties, but, on the contrary, the Treaties retain a higher legal force over these acts (which amend a formally de-classified norm)*' (Decision of the Constitutional Court Pl. ÚS 19/08 [Lisbon I], No. 446/2008 Coll., par. 162). Nevertheless it is hardly possible not to comment on the Constitutional Court's claim that the decisions of the European Council under Article 48(6) TEU '*are not amendments to the Treaties*'; taking into account that this provisions is solely about modifying, i.e. amending the Founding Treaties.

However, the European Council decides mostly on institutional matters¹⁹ and cannot issue legislative acts (Article 15(1) TEU), which are primarily intended to govern the legal situation of individuals. Therefore, the scope for review by the CJEU of the validity of Council decisions under Article 48(6) TEU is not apparent. Council decisions amending Part Three of the TFEU may obviously produce '*effects vis-à-vis third parties*' (although indirectly), in so far as the amended provisions of the TFEU do not need to be destined exclusively to the Member States or EU bodies. The reviewability is even less obvious when it comes to the Council decisions amending Article 136 TFEU governing the euro area rules i.e. an area of interstate relations. Although monetary policy falls, according to Article 3 TFEU, under the exclusive powers of the EU, the nature and the content of the measures that might be taken in the future pursuant to an amended Article 136 TFEU ('*the Member States may implement stability mechanisms*') constitute a intergovernmental tool which does not affect the legal situation of individuals.

It can, however, be assumed that the CJEU will retain, as it has done in the past, at least the possibility to review the lawfulness of Council decisions in terms of their compliance with the conditions set out in Article 48(6) TEU, in particular if the amendments concern exclusively Part Three of the TFEU, and the competences of the EU are not increased.

Notwithstanding the above, decisions by the European Council may of course be the subject of a reference for an interpretative preliminary ruling, as is the case for the Treaties themselves under Article 267 TFEU. It may be (i) a preliminary question on the interpretation of a TFEU provision which has been amended by a Council decision, i.e. a standard primary law interpretation pursuant to Article 267(a) TFEU; or (ii) a question concerning the validity and interpretation of the act of an EU institution – the European Council being quite obviously one such institution – pursuant to Article 267(b) TFEU (see above). Therefore even if Council decisions were not amenable to review of their validity under Article 263 TFEU, there would still be a way to assess their potential invalidity by means of a preliminary question on validity.

In so far as the power to review is not explicitly conferred to the General Court, it follows from the negative definition of the powers of the Court of Justice (Article 256(1) TFEU) – and indirectly from the utmost importance of these acts – that their review falls within the powers of the Court of Justice alone.

¹⁹ The European Council acts by means of a decision relatively often – in cases governed by Articles: 14(2)(1), 17(1), 15(5), 7(2), 17(5)(1), 18(1), 22(1), 24(1)(1), 24(1)(2) 26(1)(1), 31(1) 31(2)(2), 31(3), 42(2), 48(7), 49 TEU; and Articles 48(2), 82(3), 236, 244, 275(2), 283, 312 and 355(6) TFEU.

3.5. Implication of Article 48(6) TEU for the Czech legal system

The following remarks shall be dedicated first to an analysis demonstrating that flexibility formed a part of the *acquis communautaire* as adopted by the Czech Republic when joining the EU, and secondly to analysis of the Czech legal rules governing the adoption of Council decisions under Article 48(6) TEU.

3.5.1. Flexibility forms part of the *acquis communautaire*

It follows from the above-examined examples that normative flexibility is a phenomenon inherent to EU law. The examples dating back to the period preceding the entry of the Czech Republic to the EU furthermore illustrate that it is also a **phenomenon the Czech Republic adopted by its acceptance of and adherence to the *acquis communautaire* when joining the EU**. Article 2 of the Act of Accession of the Czech Republic stipulates that ‘*From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act*’.²⁰ This provision implies that the acceding state is bound by the entire *acquis communautaire*, i.e. by everything that has been attained in EU law, including the principles of the functioning of the legal order, which include the possibilities foreseen for flexibility.

The question is whether such a lenient understanding of the incident legal force is binding for the Czech Republic legal order as well. It ensues from the case-law of the Czech Constitutional Court that, in terms of the application of EU law, the flexibility as provided for in the Lisbon Treaty is acceptable.²¹ It also follows that the principle of non-amendability of a higher legal act by a lower legal act (flexibility) does not violate the so-called ‘material core’ of the Czech Constitution, otherwise the Lisbon Treaty could not have been approved.²²

3.5.2. Limits of the Czech national rules in the adoption of Council decisions under Article 48(6) TEU

First, it is not possible to preclude the application, in the case of Council decisions, of the same procedure applicable for the adoption of national agree-

²⁰ Cf. Communication of the Czech Ministry of Foreign Affairs No. 44/2004 Sb.m.s. (Coll. of International Treaties).

²¹ Cf. Decision of the Constitutional Court, ref. Pl. ÚS 19/08 (Lisbon I), No. 446/2008 Coll., particularly par. 156–167.

²² Cf. Decision of the Constitutional Court, ref. Pl. ÚS 19/08 (Lisbon II), No. 387/2009 Coll., particularly par. 113, 114.

ments. Article 48(6) TEU aims at simplifying, from the EU law perspective, the procedure for adoption of amendments of primary EU legislation, mainly by doing away with the need to convene an intergovernmental conference. The intention of the provision cannot, by its nature, be to simplify the adoption procedures at the national level. The approval by the Member State ‘*in accordance with their respective constitutional requirements*’ (Article 48(6)(2) TEU) as a prerequisite for a Council decision proposal to be adopted further corroborates this view. It is therefore up to the Member State to set out the procedure that will apply when approving Council decisions.

Czech regulations – Rules of Procedure of the Chamber of Deputies²³ and the Senate²⁴ of the Czech Parliament,²⁵ which build on the Czech Constitution – may therefore legitimately require Council Decisions to be approved by the Czech government using the same procedure applicable to international agreements²⁶, even if they do not provide for any detailed rules governing such approval.

In author’s view, in order to lay down such rules the following restrictions need to be respected:

- To approve decisions of the European Council on behalf of the Czech Republic a previous imperative mandate is required;²⁷

²³ Cf. Rules of Procedure of the Chamber of Deputies of the Czech Republic (Act No. 90/1995 Coll.), particularly par. 109i and par. 109l.

²⁴ Standing Rules of the Senate (Act No. 107/1999 Coll.) lays down in par. 119o the obligation for the government to proceed in the same manner as for the international treaties: ‘*The Senate shall consider decisions of the European Council to amend the provisions of Part Three of the Treaty on the Functioning of the European Union under Article 48 (6) of the Treaty on European Union as an international treaty*’.

²⁵ Cf., in particular, Articles 1(2), 10, 10a, 39(2),4, 49, 63(1) and 87(2) of the Constitution of the Czech Republic.

²⁶ Par. 109l of the Rules of Procedure of the Chamber of Deputies of the Czech Republic (Act No. 90/1995 Coll.): ‘(1) *The deliberation of the proposal of the Government in the Chamber shall be governed by the provisions on the deliberation of international treaties accordingly*’. For the sake of accuracy it needs to be noted (although it does not affect the outcome) that the Rules of Procedure of the Chamber of Deputies and the Senate do not claim that the decisions of the European Council under Article 48(6) **are** new international treaties. They only stipulate that for their approval on the national level the same rules shall **apply** as for the deliberation on international treaties.

²⁷ Cf. par. 109i (b) of the Rules of Procedure of the Chamber of Deputies of the Czech Republic (Act No. 90/1995 Coll.): ‘*The consent on behalf of the Czech Republic may not be declared without a prior approval of the Chamber of Deputies; (b) in the European Council, when deciding on the amendment of the provisions of Part Three of the Treaty on the Functioning of the European Union pursuant to Article 48 paragraph (6) of the Treaty on European Union*’.

Par. 109l: ‘(1) *The approval of decisions by the European Council amending Part Three of the Treaty on the Functioning of the European Union pursuant to Section 48 paragraph (6) of the Treaty on European Union requires the consent of the Chamber*’.

- The government shall follow the same procedure as when approving international agreements;²⁸
- Council decisions are not an international agreement under Article 10a of the Czech Constitution, in so far as the Constitutional Court has ruled that the impossibility to increase competences pursuant to Article 46(6) TEU ‘*expressly eliminates any doubt in relation to Art. 10a of the Constitution of the Czech Republic...However, the key factor from a constitutional law viewpoint – as mentioned – is the fact that under the literal wording of this article no other competences can be conferred on the Union*’.²⁹

The question now is whether these restrictions also require approval or ratification by the President of the Republic. In the above mentioned decisions the Constitutional Court does not refer to the approval procedure of Council decisions; it only lays down its own prerogatives and those of the Parliament of the Czech Republic, not those of the President.

The Czech Constitution distinguishes between two procedures applicable to the approval of international treaties; the criteria being mainly whether the treaty involves a transfer of powers to an international institution (Art. 10a of the Constitution) or not (Art. 10 of the Constitution). The relation between Article 10 and Article 10a of the Constitution is one of *lex generalis* to *lex specialis*, therefore Article 10 applies to all cases where the condition of a transfer of powers to an international institution is not met.³⁰ According to the Constitutional Court of the Czech Republic, a mere amendment of the provisions of the Founding Treaties that does not increase the competence of the EU (i.e. procedure under Art. 48(6) TEU) cannot be deemed to constitute a further transfer of powers to the EU pursuant to Article 10a of the Czech Constitution. The Constitutional Court thus adopts a so-called ‘material qualification’ of international treaties (based on their content) rather than a ‘formal qualification’.³¹

Resorting to an approval procedure stricter than necessary – for instance in order to respect the purported principle of procedural consistency (i.e. that an amendment of an international treaty shall be approved according to the same procedure as the one used for the original approval of the treaty, i.e. application of ‘formal qualification’ of international treaties pursuant to Art. 10a of the Constitution) – might be challenged on the following grounds:

²⁸ Cf. footnote 26.

²⁹ Cf. Decision of the Czech Constitutional Court, ref. Pl. ÚS 19/08 (Lisbon I), No. 446/2008 Coll., par. 160.

³⁰ Cf. K. Klíma, *Komentář k Ústavě a Listině* (Commentary to the Constitution and the Bill), Pilsen 2005, p. 103.

³¹ See par. 160 of the Decision, ref. Pl. ÚS 19/08 (Lisbon I).

- Breach of the *pacta sunt servanda* principle, according to which: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. (Art. 26 of the Vienna Convention on the Law of Treaties). An application of stricter national approval procedures than those required can hardly be considered as acting ‘in good faith’ where the parties have the opportunity to autonomously set out rules for the amendment of the treaty (Article 40 VCLT³²), as the Member States have done in Article 48(6) TEU;
- Breach of the principle of sincere or loyal cooperation (set out in Articles 4/3, 24/2 TEU³³), which is primarily a commitment of the Member States vis-à-vis the EU. It applies in situations where Member States retain certain exclusive powers. When exercising such powers – in particular when issuing measures implementing EU acts – the Member States are obliged to make every effort to ensure the *effet utile* of the European law. They are bound, *inter alia*, to take all measures to fulfil their obligations toward the EU (positive obligation), to facilitate the EU’s achievement of its tasks, in particular to guarantee the full effectiveness of EU law;³⁴ and to refrain from applying any measure susceptible to undermining the achievement of EU objectives (negative obligation);
- Breach of constitutional procedures due to the failure to meet the conditions necessary for the application of Article 10a of the Constitution.

Conclusions

It follows from aforementioned that European legal flexibility, which makes it possible to change the rules of conduct set out in an act of greater legal force (primary law) by means of an act of lower legal force (secondary law), was ‘absorbed’ by the Czech Republic when joining the EU and accepting thereby the *acquis communautaire* in its entirety.

In the case of Article 48(6) TEU, this flexibility does not prevent the national law from providing that the approval of Council decisions ‘in accor-

³² *A contrario*, Article 40(1) VCLT: ‘Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs’. VCLT 1969 is a treaty falling under Article 10 of the Czech Constitution. It was published in the Czech Republic under no. 15/1988 Coll., and thus prevails over national law.

³³ C-105/03 Maria Pupino [2005] ECR I-5285, par. 42.

³⁴ C-275/00 First [2002] ECR I-10943, par. 49; C-132/06 Commission v. Italy [2008] ECR I-05457.

dance with constitutional requirements' shall be carried out by applying the same procedure that applies to the adoption of international treaties.

At least in terms of the aforementioned narrow definition of 'non-increase of powers', it is obvious that when approving Council decisions at the national level, and with regard to the procedural economy of both Chambers, the procedure pursuant to Article 10 of the Czech Constitution should be used, which entails, *inter alia*, voting by simple majority as provided for in Article 39(2) of the Constitution.

The Czech Constitutional Court has ruled in its case-law that decisions of the European Council do not constitute a further transfer of powers from the Czech Republic to the EU. While the reference in Article 48(6) TEU to the national procedure '*in accordance with constitutional requirements*' does not explicitly exclude the use of the same procedure as the one applicable to international treaties pursuant to Article 10a of the Constitution, resort however to such a procedure could be challenged on the grounds of breaching the international legal principles of *pacta sunt servanda* and loyal cooperation.



Magdalena Godowska*

Democratic Dilemmas and the Regulation of Lobbying – the European Transparency Initiative and the Register for Lobbyists¹

Abstract: *This article provides a preliminary assessment of the register for interest groups launched by the European Commission (EC) in June 2008 within the framework of the European Transparency Initiative (ETI). The analysis is carried out in light of the democratic dilemmas between input and output legitimacy, i.e. between transparency and openness on one hand (input), and effectiveness of the EU decision-making process on the other (output). The critique of the ETI is presented from the viewpoints of three classes of actors: the EC, civil society organizations, and business representatives. The critique demonstrates that the ETI tools are too weak, and only partially contribute to strengthening the legitimacy of the EU political system.*

Introduction

The European Transparency Initiative was intended as a ‘review of the Commission’s overall approach to transparency’ and a step towards a ‘more structured framework for the activities of interest representatives’.² It was launched in a climate of mistrust towards the EU political system and a growing Euro-scepticism following the fiascos (from the EU point of view) of the constitutional referenda in France and the Netherlands in 2005. The transparency reform was a response to that credibility crisis and intended as a means to strengthen EU legitimacy, especially in its input dimension.

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¹ This paper is based on, *inter alia*, the results of research carried out during the preparation of the author’s MA thesis under the supervision of Prof. Rudolf Hrbek at the Political and Administrative Studies Department, College of Europe in Bruges, 2008, which is available in the College library (unpublished).

² Commission of the European Communities, *Green Paper. European Transparency Initiative*, 03.05.2006., Brussels, COM (2006) 194 final, p.3.

The European Commission launched an ‘*enormous programme of self-legitimation*’, making ‘*transparency, efficacy and the ethics of public action core parts of the European agenda*’.³ The ETI aim was to strengthen both output legitimacy (making use of the informational value of interest groups), and input legitimacy (the right of citizens to ‘*know who the lobbyists are, what they do and what they stand for*’).⁴ These efforts, aimed at fighting the democratic deficit in the EU political system, produced as side effects particular dilemmas between transparency and openness (inclusiveness) on the one hand, and efficiency on the other – dilemmas which European decision-makers are still dealing with.

The ETI provides an appropriate framework in which to demonstrate the outlines of these democratic dilemmas and methods for addressing them. This article focuses on regulating the relations between the Commission and the lobbyists, with particular emphasis on the question of a formal register for interest groups. The aim is to conduct a critique of the ETI in light of the two dimensions of legitimacy – transparency and efficiency – in order to show how they are interconnected and sometimes conflicting.

On the one hand, in the light of the negotiation theory described below, the question is how open and transparent the EU decision-making process should be when it involves a variety of interest groups, assuming that transparency and publicity do not promote deliberation at the elite level. Another important issue is to find out if it is possible to reconcile the efficiency-driven and output-oriented approach of the Commission with inclusiveness and openness to all comers.

This analysis is carried out on the basis of three types of empirical material: interviews, contributions to the consultations on the ETI, and opinions expressed in the media during 2007–2009. The selection of the interviewees was aimed at ensuring that three main groups of actors in the debate over the ETI were represented, i.e. the European Commission, Brussels-based non-governmental organizations, as well business interests. The list of interviewees is contained in the footnote below.⁵

³ D. Chabanet, *The Regulation of Interest Groups in the European Union in: European Governance and Democracy. Power and Protest in the EU*, ed. R. Balme, D. Chabanet, Lanham 2008, p. 209–234.

⁴ S. Kallas, *The need for a European transparency initiative*, Speech in The European Foundation for Management, Nottingham Business School, 3.03.2005.

⁵ The interviews were carried out in March and April 2008 in Brussels, with the following persons: Bodo Lehmann, Project Coordinator – European Transparency Initiative, European Commission Secretariat-General; Kristian Schmidt, Deputy Head of S. Kallas’ Cabinet, European Commission; Pirrko Kauppinen, Policy Officer, Relations with Civil Society: follow up of consultation standard, European Commission-Secretariat-General; Adrian Aupperle, Associate Advocacy Officer, Transparency International; Christine Pohl, Corporates Campaign, Friends of the Earth Europe; Emmanuelle Faure, Director for European Union Affairs, European Foundation Centre; Regula Heggli, Coordinator, Civil Society Contact Group, c/o Social Platform, Brussels; Christian Feustel, Senior Adviser for EP Affairs, Business Europe.

The article begins with a review of the theoretical concepts used to analyse the ETI. In the second section, the analysis of the ETI is carried out in the light of the democratic dilemmas mentioned above. In the last part, possible measures for improvement of the ETI are proposed, taking into consideration that the register has now been in operation for three years.

1. Input and output legitimacy

A clear distinction between input and output legitimacy was introduced by F. Scharpf. Input legitimacy, described as government *by* the people, is based on the assumption that *'political choices are legitimate if and because they reflect the "will of the people", so they can be derived from the authentic preferences of the members of a community'*. Consequently, governing bodies and officials should be accountable to those governed. Input legitimacy requires participation of *all* persons affected by the decision, or their representatives in the decision-making process. These arguments, however, are not plausible in large political systems, where such inclusiveness is impossible and where decisions are taken by a majority, which poses a threat to minority interests. This danger can be diminished if a 'thick' collective identity exists and members of a community can assume that the *'people will do no wrong'*, i.e. they rely on the benevolence of their fellow citizens.⁶

Secondly, with regard to the output perspective – government *for* the people – Scharpf claims that *'political choices are legitimate if and because they effectively promote the common welfare of the constituency in question'*. Legitimate government is one which is capable of effective problem-solving and delivering outcomes which respond to the expectations of those governed.⁷

Scharpf claims that these two dimensions of legitimacy co-exist and complement each other in the nation-state, but that this is not the case for the European supranational polity, capable of legitimacy only in terms of output.⁸ According to Scharpf, *'Given the historical, linguistic, cultural, ethnic and institutional diversity of its member states, there is no question that the European Union is far from having achieved the "thick" collective identity that we have come to take for granted in national democracies – and in its absence, institutional reforms will not greatly increase the input-oriented legitimacy of decisions taken by majority rule'*.⁹ His scepticism about the possibility of achieving input legitimacy at the European level is related to a triple deficit: lack of col-

⁶ F. Scharpf, *Governing in Europe: effective and democratic?*, Oxford 1999, p. 6–8.

⁷ *Ibidem*, p. 6.

⁸ *Ibidem*, p. 12.

⁹ *Ibidem*, p. 9.

lective identity, lack of European-wide policy debates and discussions, and lack of a European-wide institutional infrastructure which could hold decision-makers accountable.¹⁰ Similarly, S. Saurugger points out in this regard that ‘*the EU has difficulties providing European citizens with government **by** and **of** the people, that is, with political representation and citizen representation, but assures government **for** and **with** the people, that is, effective government*’.¹¹

As we shall see, both dimensions of legitimacy are closely related and mutually reinforcing. Scharpf claims that the output legitimacy of the EU would be strengthened if a system of informal policy networks would be established, creating conditions for a wide deliberation over policy outcomes. This would allow for the achievement of win-win outcomes, satisfying all interested parties.¹² Inclusiveness – an input-legitimacy condition – is here regarded as a mechanism for strengthening output legitimacy. According to J. Greenwood the EU, as a non-majoritarian multi-level system, suffers from ‘*the lack of public space*’ of participation, i.e. the absence of ‘*traditional structural mechanisms ensuring input legitimacy such as: mass political parties, adversarial party politics, EU-wide media, voting that changes a government, and a decision-making system which is understood by the citizens*’.¹³ The involvement of organised civil society into the European decision-making process would serve to enhance the democratic character of the EU system. Interest groups are meant to be a ‘*potential transmission belt conveying the plurality of interests to EU institutions and bringing Europe closer to the people*’.¹⁴ They perform core democratic functions in the EU, by contributing to input legitimacy (i.e. securing citizens’ participation in public policy formulation) and output legitimacy (providing lawmakers with expertise and information otherwise not available).¹⁵ In an international organization, the democratic character of which is difficult to ensure due to the large extent of the delegation of powers, citizens’ participation, influence, and control of policy-making can be seen as mechanisms ensuring input legitimacy.¹⁶

¹⁰ Ibidem, p. 187.

¹¹ S. Saurugger, *Democratic ‘Misfit’? Conceptions of Civil Society Participation in France and the European Union*, “Political Studies” No. 55/2007, p. 387.

¹² F. Scharpf, op.cit., p. 19–25.

¹³ J. Greenwood, *Governance and organised civil society at the European Union level: the search for ‘input legitimacy’ through elite groups* in: *Governance and civil society in the European Union*, ed. C. Ruzza, V. Della Salla, Vol. II, Manchester 2007, p. 31 and 44–45.

¹⁴ B. Kohler-Koch, *The organization of interests and democracy in the European Union* in: *Debating the democratic legitimacy of the European Union*, ed. B. Kohler-Koch, B. Rittberger, Lanham 2007, p. 267–268.

¹⁵ J. Greenwood, *Interest Representation in the European Union*, Basingstoke 2007, p. 1.

¹⁶ R. Dahl, *Can international organizations be democratic? A sceptic’s view* in: *Democracy’s edges*, ed. I. Shapiro, C. Hacker-Cordon, Cambridge 1999, p. 19–31.

The European Commission, owing to its role as a technocratic administration dealing with agenda-setting and facilitating compromise in the interest of the Community, is the '*foremost venue for interest representation at the European level*'.¹⁷ Its legitimacy has been historically based on the delivery of effective solutions to the problems of European citizens. Consequently, there was little demand for input legitimacy and democratisation of this depoliticised bureaucracy. The recourse to organised civil society however had a clear instrumental value for the Commission as a means to strengthen both its input and output legitimacy.¹⁸ In its institutional interest, the Commission focused on the 'functional participation' of civil society organisations in policy-making, in order to provide expertise and ensure compliance and implementation. This conceptualization is consistent with the efficiency-driven and output-oriented approach of the Commission as the central-policy-entrepreneur of the European integration process.¹⁹ The involvement of civil society, however, is frequently viewed more an instrument of engineered discourse than a true bottom-up process. As S. Smismans states: '*the Commission's governance debate seems at best an efficiency driven exercise, and at worst an attempt to provide a legitimating discourse for its own institutional position and functioning, without including profound reforms*'.²⁰

While inclusive decision-making can be a cure for a legitimacy deficit in some aspects, at the same time it can also pose a threat to transparency and equality of access for all actors. As we shall see, certain dilemmas and conflicts between different dimensions of democratic legitimacy have emerged in the EU political system.

2. Democratic dilemmas in the EU political system

The greater involvement of citizens in the decision-making process leads to the classic problem of governance, which R. Dahl described as the need to find a balance between 'system effectiveness' (efficient and effective

¹⁷ J. Greenwood, *op.cit.*, p. 24.

¹⁸ B. Kohler-Koch, *Civil Society Contribution to Democratic Governance: A Critical Assessment* in: ed. B. Kohler-Koch, D. De Bièvre, W. Maloney, *Opening EU-Governance to Civil Society – Gains and Challenges*, CONNEX Report Series No. 5, February 2008, Mannheim, p. 11.

¹⁹ S. Smismans, *European Civil Society: Shaped by Discourses and Institutional Interests*, "European Law Journal" Vol. 9(4)/2003, p. 486.

²⁰ S. Smismans, *The Constitutional Labelling of 'The Democratic Life of the EU': Representative and Participatory Democracy* in: *Political Theory and the European Constitution*, ed. A. Follesdal, L. Dobson, London 2004, p. 129.

delivery of outcomes) and ‘citizen effectiveness’ (citizens’ participation in policy-making).²¹

Undoubtedly, inclusive decision-making processes carry a democratic potential, but they may also raise concerns about transparency, accountability, and responsibility.²² The essence of a governance approach is *flexibility*, which implies the emergence of ‘*informal structures and processes able to constitute and reconstitute themselves easily*’ in order to provide the most effective policy outcomes. However, it is difficult to keep them transparent when their advantage lies in blurring the boundaries in order to stay responsive to changing conditions. A basic tension in governance is between efficiency (providing cohesive, timely responses to demands) and transparency.²³ Multi-level governance in the European Union, based on informality and orientation towards achieving effective outcomes rather than complying with formal rules and procedures, has even been called a ‘Faustian Bargain’, where fundamental democratic values, such as transparency and political accountability, are traded for increased policy-making efficiency and effectiveness.²⁴

Publicity can have negative consequences, among which inefficiency seems to be one of the most important problems. This argument has been developed and augmented by the negotiation theory, according to which negotiations should be held behind closed doors, otherwise the problem-solving capacity of the system suffers.²⁵ For negotiation theorists, actors in the decision-making process are hampered by a constant exposure to the audience of their *constituents*, who have fixed preferences and focus on their own interest, often without a willingness to compromise. This forces negotiators to demonstrate that they are fighting their interests.²⁶ D. Naurin proved this mechanism by analysing letters sent by industry lobbyists in Brussels to the EC under the presumption that they would remain confidential, and comparing them with the public position papers and press releases. His study demonstrated that arguments for show are used more frequently in public documents than in confidential letters, which is in line with the assumptions of negotia-

²¹ R.A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, “Political Science Quarterly” Vol. 109(1)/1994, p. 34.

²² V. Della Salla, *Introduction: the unequal sides of a triangle – democracy, governance and civil society in: Governance and civil society in the European Union*, ed. C. Ruzza, V. Della Salla, Vol. I, Manchester 2007, p. 1–10.

²³ *Ibidem*, p. 6–7.

²⁴ B.G. Peters, J. Pierre, *Multi-level Governance and Democracy: A Faustian Bargain? in: Multi-level governance*, ed. I. Bache, M. Flinders, Oxford 2004, p. 79–92.

²⁵ D. Naurin, *Taking Transparency Seriously*, SEI Working Paper, No. 59/2002, p. 7.

²⁶ D. Naurin, *Why increasing transparency in the European Union will not make lobbyists behave any better than they already do*, Paper prepared for the “EUSA Ninth Biennial International Conference” Austin, 31.03–2.04.2005, p. 10–11.

tion theory.²⁷ That is why, according to David Stasavage, ‘*in any empirical investigation we should expect to see more uncompromising positions taken during open-door bargaining, greater polarization of debate, and more frequent breakdowns in bargaining than would otherwise be the case*’.²⁸ Transparency will in fact lead to an increase in self-interested justifications, boosting pressure from home constituencies, which makes representatives less willing to search for common solutions and more eager to use self-referenced public arguments (for show) in the decision-making process. This turns the supposed purifying effect of publicity into its something opposite, i.e. into a lower problem-solving capacity.²⁹ Some authors claim that ‘*transparency of negotiation and bargaining processes in the phase of decision-preparation do not constitute a necessity (...) as the atmosphere of trust and confidence among decision-makers, which allows for complicated compromises to be made, would suffer*’.³⁰

Against this background, it becomes clear that transparency, while reinforcing input legitimacy (by making the decision-making process easier to understand and control), can substantially threaten output legitimacy by impeding the ability of EU institutions to carry out their tasks effectively.³¹ In this sense, rendering relationships between EU institutions and interest groups too transparent can negatively affect the efficiency of problem-solving. Therefore, relations between EU institutions and interest groups are to a high extent informal, not based on any provisions of the Treaties (except for the European Economic and Social Committee), ‘*ad hoc and discretionary and exist wherever there are ‘grey areas*’.³²

The question is then how open and transparent the EU decision-making process, involving a variety of interest groups, should be, if transparency and publicity do not promote deliberation at the elite level. Consequently, another issue to examine is whether the negotiation pattern can be applied to the relations between the Commission and the interest groups, and if it is possible to introduce into those relations the concept of a ‘confidentiality area’ which would facilitate compromise.

²⁷ Ibidem, p. 26.

²⁸ D. Stasavage, *Open-Door or Closed-Door? Transparency in Domestic and International Bargaining*, “International Organization” Vol. 58(4)/2004, p. 679.

²⁹ D. Naurin, *Taking Transparency Seriously*, op.cit. p. 17.

³⁰ C. Grønbech-Jensen, *The Scandinavian tradition of open government and the European Union: problems of compatibility?*, “Journal of European Public Policy” Vol. 5(1)/1998, p. 195.

³¹ A. Menon, S. Weatherill, *Legitimacy, Accountability and Delegation in the European Union* in: *Accountability and legitimacy in the European Union*, ed. A. Arnall, D. Wincott, Oxford 2002.

³² K. Middlemas, *Orchestrating Europe. The Informal Politics of the European Union 1973–1995*, London 1995, p. XX.

The European Commission also faces another dilemma. It declares openness to all-comers but at the same time, for the sake of efficiency, grants privileged access in order to ensure a high-quality input of ‘relevant’ interest groups. Inclusion of all affected parties in the process, e.g. public consultation of legislative initiatives, would lead to information overload. This makes selection among inputs not only necessary but inevitable.³³ As some scholars have pointed out, ‘*deliberation under real-world conditions tends to privilege actors better equipped in material and cognitive resources and this could lead to new forms of exclusion or domination*’.³⁴ Some authors even claim that the Commission, although officially against to any system of accreditation, in fact grants selected lobbyists with privileged access.³⁵ The system of ‘insiders’ and ‘outsiders’ has been established by the use of various forums (such as committees, working groups, conferences), grouping together the most relevant players.³⁶ In consequence, a system of ‘*élite pluralism*’ emerges in these relations, privileging mainly business interest groups.³⁷

From the above examination it appears that multi-level governance carries with it certain dilemmas and trade-offs: ‘*increase in efficiency reduces transparency, improvement in deliberation weakens equal representation*’.³⁸ Therefore, inclusiveness and informality, although presumably allowing for participation and a higher problem-solving capacity, cannot be taken so uncritically as an impetus for democratization.³⁹ It follows from this observation that there is a dilemma between input and output legitimacy – between transparency and openness (inclusiveness) on the one hand, and efficiency on the other (which is often enhanced when the degree of transparency and openness is lower). Priority has not always been given to input dimension legitimacy, especially in the case of the technocratic European Commission, which has traditionally relied on the output dimension of legitimacy. This has resulted in the unequal access of different interest groups to the decision-making process and contributed to a relatively high level of secrecy.

³³ B. Kohler-Koch, *The organization of interests and democracy...*, op.cit., p. 260.

³⁴ J. De Bardeleben, A. Hurrelmann, *Democratic dilemmas of multilevel governance: legitimacy, representation and accountability in the European Union*, Houndmills 2007, p. 8.

³⁵ J. Greenwood, *Interest Representation...*, op.cit., p. 45.

³⁶ A. Broscheid, D. Coen, *Lobbying activity and fora creation in the EU: empirically exploring the nature of the policy good*, “Journal of European Public Policy” Vol. 14(3)/2007, p. 348.

³⁷ D. Coen, *The evolution of the large firm as a political actor in the European Union*, “Journal of European Public Policy” Vol. 4(1)/1997, p. 91–108.

³⁸ J. De Bardeleben, A. Hurrelmann, op.cit., p. 8.

³⁹ B. Kohler-Koch, B. Rittberger, *Charting crowded territory: debating the democratic legitimacy of the European Union* in: B. Kohler-Koch, B. Rittberger, op.cit., p. 9.

3. The European Transparency Initiative (ETI) in light of the democratic dilemmas

The debate on the ETI in the College of Commissioners commenced in May 2005 and led to the decision to launch the Initiative on 9 November 2005. On 3 May 2006, the Commission adopted the *Green Paper on European Transparency Initiative*.

The main problem area which is addressed in the Green Paper is the lack of sufficient information about lobbying practices in the EU, resulting in an unclear influence being exerted by different lobbyists in the legislative process, obscure sources of their funding, and insufficient information on how public money is spent by citizen interest groups, and even including cases of deceptive lobbying (such as fake grass-roots campaigns financed by business groups).⁴⁰ This lack of transparency in the mechanisms of interest representation at the EU level is acknowledged to be damaging to the democratic legitimacy of the supranational polity.

The Green Paper groups transparency measures into two categories, i.e.: outside scrutiny and integrity rules.⁴¹ The first category contains measures regulating interactions between the Commission and interest groups, mainly through public consultations of legislative proposals. Outside scrutiny was ensured e.g. by the Minimum standards of 2002⁴² or the CONECCS voluntary database of interest groups.⁴³ The Green Paper proposed the establishment of a voluntary registration system for all interest groups.

Measures falling into the category of 'integrity rules' regulate the actions of those who are lobbied, i.e. decision makers (Staff Regulations and codes of administrative behaviour) as well as the lobbyists (i.e. voluntary codes of conduct,). The Green Paper called for a common code of conduct for all lobbyists, or at least common minimum requirements, developed by the lobbying profession itself, and for a system of monitoring and the provision of sanctions for incorrect registration and/or breaching the code of conduct.⁴⁴

⁴⁰ Commission of the European Communities, *Green Paper...*, op.cit, p. 5–6.

⁴¹ *Ibidem*, p. 6.

⁴² Commission of the European Communities, *Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission*, 11.12.2002., Brussels, COM(2002) 704 final,.

⁴³ On the basis of a White Paper on Governance of 2001, 'a comprehensive on-line database with details of civil society organisations active at the European level' called CONECCS (Consultation, the European Commission and Civil Society) replaced a telephone directory created in 1997. Cf. Commission of the European Communities, *European Governance. A White Paper*, 25.07.2001., Brussels, COM(2001) 428 final,.

⁴⁴ Commission of the European Communities, *Green Paper...*, op.cit, p. 10.

On 21 March 2007, the Commission decided to open a voluntary register for interest groups, classified into three categories: professional consultancies and law firms; in-house lobbyists and trade associations; NGOs (non-governmental organizations) and think tanks. Registrants have to reveal who they represent, what their objectives are, what their funding sources are, and who are their major clients. Incentives for registering include a boosted reputation, recognition of contributions as representative for specific sectors, and the possibility to receive alerts for consultations in those areas of lobbyists' interests. The financial disclosure rules differ for each category. Professional consultancies and law firms have to declare their turnover linked to lobbying EU institutions and the relative weight per client. NGOs and think tanks have to disclose their overall budgets and the relative share of funding from various sources, while the remainder have to declare their costs associated with lobbying.⁴⁵

A voluntary code of conduct drawn up by the Commission in discussion with stakeholders was introduced as a complement to the register. It was not intended to replace the existing codes, but rather to draw from that experience and improve deficiencies, e.g. by including a system of monitoring and sanctions.⁴⁶ The heated debate over the ETI tools was mainly about the register and the scope of information subject to disclosure, especially that of a financial character. The concept of a common code of conduct turned out to be less controversial, since it would have been counterproductive for the lobbying profession to oppose a set of ethical rules of behaviour. However, the code is criticised in any case as a toothless and meaningless tool, '*a joke which won't change anything*' (oral information received from a representative of a Brussels-based NGO, 21 April 2008).

The register was launched on 23 June 2008 and linked to the subscription to a code of conduct. Evaluation of the system was foreseen after one year of operation, and the introduction of a system of compulsory registration was left 'on the table' if the existing scheme proved unsatisfactory (i.e. if an insufficient number of lobbyists signed up during the first year).⁴⁷

⁴⁵ Ibidem.

⁴⁶ The Commission has been encouraging interest groups to draw their own codes of conduct since the early 1990s. In 1994, a group of 25 commercial lobby firms in Brussels adopted a self-regulatory code. In the following years, various umbrella organisations of European public affairs practitioners (e.g. SEAP – Society of European Affairs Professionals; EPACA – European Public Affairs Consultancies Association) adopted voluntary codes of conduct, based on the minimum standards proposed by the Commission; cf. J. Greenwood, *Regulating Lobbying in the European Union*, "Parliamentary Affairs" Vol. 51(4)/1998, p. 591.

⁴⁷ Commission Press Release, *European Transparency Initiative: Commission invites lobbyists and interest groups to subscribe to public register*, doc. ref. IP/07/367, Brussels, 21.03.2007.

In public consultations on the Green Paper, 160 contributions were received from the EU Member States, private sector interest groups, NGOs, and several individual citizens. The idea of establishing a register and a code of conduct, as well as making the disclosed information public, was commonly accepted. The main points of contention concerned: the voluntary character of the register, incentives for registering, the financial information to be disclosed, and the lack of a common approach with other EU institutions.⁴⁸

Three main groups of actors emerged in the discussions. The EC consistently stood for a voluntary register. Commercial lobbyists, of whom the most active group included public affairs consultancies (EPACA, SEAP and ECPA – European Centre for Public Affairs) and the law firms, openly criticised the rules of financial disclosure. Finally, there was a broad camp of NGOs, concentrated around the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU), which called for a mandatory register common for all EU institutions.

3.1. The ‘confidentiality versus transparency’ dilemma

As pointed out above, transparency can make negotiations more difficult since it encourages actors to use more ‘arguments for show’ in order to satisfy their home constituencies, which makes it more difficult to achieve a compromise. This is the first democratic dilemma to be dealt with by the EU decision-makers.

Siim Kallas, Vice-President of the Commission and Commissioner for Administrative Affairs, Audit and Anti-Fraud, described the aim of the ETI as ‘ensuring a proper functioning of the decision-making process, responsive to public demands but allowing also for a ‘space for reflection’ if a balance on the highest possible level of transparency is acquired’.⁴⁹ In his opinion, there is a need for a confidential ‘protected area’ in the relations of policy makers with stakeholders, mainly at the early stages of policy formulation. A line between what should be public and what should be confidential should be drawn by a person responsible for a certain dossier.⁵⁰

However, empirical evidence shows that the relations between the Commission and interest groups do not resemble the classical negotiation pattern. Rather, it is much more a one-way relationship, where the interest group presents its position to the Commission and no particular bargaining takes place.

⁴⁸ Commission of the European Communities, *Results of the Commission consultation on the Green Paper ‘European Transparency Initiative*, 21.03.2007., Brussels, COM (2006) 194 final.

⁴⁹ S. Kallas, *The need for a European transparency initiative*, op.cit.

⁵⁰ EurActiv.com, *Interview: Commissioner Kallas on the Transparency Initiative*, 02.11.2005; <http://www.euractiv.com/en/pa/interview-commissioner-kallas-transparency-initiative/article-146719> (last visited 05.08.2011).

The negotiation theory argument about the ‘blessing effect of confidentiality’ on the search for a compromise works well when applied to real life workings in the world of politics, and it can be applied to internal relations within the Commission or between the ‘EU executive’ and the EP. However, it does not fit as a model to demonstrate the relationship between decision-makers and interest groups, at least not in the case of NGOs (interview with Ch. Pohl). In their lobbying activities, NGOs are ‘*just presenting their positions, making their point clear, while transparency, especially towards their members – the constituencies – lies in their very nature*’ (interview with R. Heggli).

A so-called ‘black box’ for the Commission prior to opening the consultations seems necessary for it to work efficiently and to draft a proposal *internally* (Interview with K. Schmidt). But at some point, the Commission has to go public with a proposal, where it meets with the stakeholders’ reactions (Interview with A. Aupperle). A universal ‘change of generation’ in terms of policy-making takes place in the EU and in every democratic system, including greater openness of decision-makers to inputs from different stakeholders and greater publicity. Bowing to pressure from only one sector or a specific interest group is unthinkable (Interview with E. Faure). On the other hand, interest groups do recognise that there are some desirable limits to transparency, especially in bi-lateral meetings with Commissioners (interview with Ch. Feustel).

These findings suggest that confidentiality in relations between the Commission and interest groups is not necessary to ensure effective decision-making. The negotiation theory argument does not apply to those relations, which seem to be much more unidirectional than bargain-like and are based on unequal positions of stakeholders, among whom only the Commission has the right to define what the ‘European interest’ is. Transparency should thus contribute to increased input legitimacy without a serious weakening of its output dimension, but it is doubtful if the ETI tools are effective enough to achieve real transparency.

One of the reasons is that the register is voluntary and incentive-based. Lobbyists were expected to register for the sake of their reputation and credibility.⁵¹ In this ‘bottom-up approach’ the Commission would rely on the lobbyists themselves to keep the tool credible, like in case of Wikipedia – a database consulted by many with trust in its content and resources that are in fact verified only by other users (interview with E. Faure). However, there remains a risk that lobbyists who have something to hide will not register, and these

⁵¹ EurActiv.com, *Interview: Friends of the Earth’s Paul de Clerck on lobbying transparency*, 26.07.2005; at: <http://www.euractiv.com/en/pa/interview-friends-earth-paul-clerck-lobbying-transparency/article-142957> (last visited 05.08.2011).

are exactly those whose at whom registration should be primarily aimed (interview with Ch. Pohl).

The 'alert' incentives for registering, although possibly useful for small interest groups from outside of Brussels, are commonly seen as weak and inappropriate. Serious lobbyists have to stay up to date anyway and already have well-established channels of contact. The main EU institutions already offer newsletters and online alerts available by simple e-mail registration (Interview with R. Heggli). Consequently, it can be more advantageous to avoid full transparency than to register in exchange for the weak benefits offered.⁵² A more convincing argument to register is reputation, since *'there would be negative publicity for those who choose not to register'*.⁵³

The weakness, especially the lack of a verification mechanism concerning the accuracy of the information provided by the registrants, has been proven several times. In December 2008, The Cheerleading Federation of Ireland registered, having mistaken the tool for a grant application form.⁵⁴ In February 2009, the ALTER-EU revealed thirteen cases of fake shell companies that entered into the register and declared suspiciously high expenditures on lobbying,⁵⁵ whose aim was possibly just to spam the register. An Italian spammer was accused of false listings in the Commission's and the EP databases when he registered Fares Bank with an enormously high lobbying expenditure amounting to 250 million euro.⁵⁶ Paradoxically, the register thus discloses irrelevant information about organizations which have nothing to do with lobbying, while at the same time leaving too much discretion for the big players to not register or to hide and disguise their lobbying activities, and in particular their spending on lobbying.

Commissioner Kallas was widely appreciated for *'kick-starting an open debate on lobbying transparency and ethics reforms'*, which fell in line with a general consensus that the ETI *'falls short of what is needed and would largely preserve the current non-transparent and unregulated practices of EU lobbying'*.⁵⁷

⁵² Greenpeace, *Response to the ETI Green Paper. Transparency and interest representation*, Brussels 2006.

⁵³ S. Taylor, *Commission register shunned by lobbyists*, "European Voice", 05.02.2007.

⁵⁴ L. Phillips, *Irish cheerleaders mistake lobby registry for grant application*, EUobserver, 19.02.2009, <http://euobserver.com/9/27644> (last visited 05.08.2011).

⁵⁵ BNA Money and Politics Report, *Lobby register faulted*, Arlington 2009.

⁵⁶ L. Phillips, *Italian 'spammer' used EU registry to boost his image*, EUobserver, 16.02.2009, <http://euobserver.com/9/27624> (last visited 05.08.2011).

⁵⁷ Corporate Europe Observatory, *Response to chapter 1 and 2 of the Green Paper on the European Transparency Initiative*, Brussels 2006.

3.2. The 'openness versus efficiency' dilemma

The second dilemma to be dealt with by the Commission in its relations with interest groups is about reconciling effectiveness in delivering timely solutions to citizens' problems with the requirement to remain open to all interested parties. In order to solve this problem, the Commission is said to select 'relevant' interest groups and grant them with privileged access.⁵⁸

The issue of unequal access of different interest groups within the EU decision-making structures seems to be neglected in the ETI, although it could be linked to the Commission's persistent preference for a self-regulatory scheme. The Commission has maintained this approach since the early 1990s, for fear of damaging '*well-developed patterns of institutional involvement by private interests in public policy formulation and implementation*' by an imposed solution.⁵⁹ The output dimension of legitimacy is prioritised, while input legitimacy suffers.

The self-regulatory scheme can also be looked at as the 'lowest common denominator' possible for acceptance by the member states,⁶⁰ which represent different 'transparency cultures'. For example, the Scandinavian countries and the Netherlands generally push for more openness, while France, Belgium, Luxembourg and Germany more often prefer to work behind closed doors.

A voluntary register was intended to be '*an expression of trust in the European lobby professionals*',⁶¹ a preventive instrument to avoid an Abramoff-like scandal in Brussels.⁶² This approach was based on the assumption that the price of non-registering – i.e. damaged reputation – would be sufficiently high to encourage all to register (Interview with K. Schmidt). Also, the EC did not want to waste time waiting for the necessary legal basis provided by the Treaty of Lisbon.⁶³

⁵⁸ A. Broscheid, D. Coen, op.cit., p. 348.

⁵⁹ A.M. McLaughlin, J.Greenwood, *The Management of Interest Representation in the European Union*, "Journal of Common Market Studies" Vol. 33(1)/1995, p. 143.

⁶⁰ D. Chabanet, *The Regulation of...*, op.cit., p. 30.

⁶¹ S. Kallas, *Speech to SEAP's General Assembly*, Brussels, 23.04.2007.

⁶² Former Republican lobbyist Jack Abramoff was sentenced to five years and 10 months in prison in March 2006 in the USA, after pleading guilty to fraud, tax evasion and conspiracy to bribe public officials. The scandal prompted two Congressmen of the Republican Party to give up their seats in the Congress; cf. *Investigating Abramoff – Special Report*, "The Washington Post", <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited 01.04.2008).

⁶³ That legal basis can be found in Articles 8A and 8B of the new Title II in the EU Treaty concerning 'Provisions on democratic principles'. However, according to the EP Legal Services, the register could also be adopted by a legal act under the existing Treaty provisions, namely under the procedure of Article 308 CE, since openness is declared as one of the Community objectives in Article 1 of the EU Treaty and the actions of the Community 'prove necessary' to ensure that aim; cf. European Parliament, *Legal Service, Legal Opinion on legal basis for a mandatory registration of lobbyists and possible sanctions foreseen by such a system*, doc. ref. SJ-0821/07, Luxembourg, 18.01.2008, p. 6–9.

Regardless of the merits of its justifications, the Commission's preference for a voluntary register has met with severe criticism, both from commercial lobbyists and the NGO sector, as a 'triumph of hope over experience'.⁶⁴ Commercial lobbyists called for a mandatory register with the aim of creating a level playing field for all lobbyists and avoiding distorted competition between those registered (obliged to disclose sensitive information e.g. client fees) and those who are not. ALTER-EU directly links the self-regulation preference with unequal access of different interest groups to the decision-making process: '*Vested interests are defending secrecy and privileged access by advocating self-regulation, voluntary codes of conduct, and other pseudo-solutions that do nothing to increase democratic scrutiny of the role of lobbyists in EU policy-making*'.⁶⁵

The NGOs are calling for a mandatory system for those who spend a certain amount of money or time on lobbying activities in Brussels, so as not to impose excessive burdens on individuals and small groups and guarantee the openness of the Commission to all-comers.⁶⁶ Business representatives, refuting the arguments about their privileged position in Brussels, give examples of major legislative acts, such as the REACH Directive, where a balance in consultations was ensured between the private sector and citizens' organizations (interview with Ch. Feustel). The director for European Public Affairs of one of the multi-national companies claims that: '*NGOs are extremely powerful in Europe today; they enjoy a great public confidence. It is very difficult for politicians to take a decision which goes in line with the interests of business and against a 'nice and fuzzy' NGO. They cannot dismiss the opinion of a credible NGO such as WWF or BEUC*' (oral information received on 21 April 2008). Some scholars have noted that the EU system of interest representation is still open to outsiders that can come 'from nowhere' and easily get their agenda adopted,⁶⁷ which falls in line with the Commission's commitment to a consultative policy style.⁶⁸ Similarly, some practitioners maintain that even small interest groups, with limited human or financial resources, can be successful in lobbying in Brussels as long as they have a clever strategy (interview with A. Aupperle).

⁶⁴ EurActiv.com, *Kallas urges lobbyists to co-operate on EU register*, 19.06.2007, <http://www.euractiv.com/en/pa/kallas-urges-lobbyists-operate-eu-register/article-164716> (last visited 05.08.2011).

⁶⁵ ALTER-EU, *Ending corporate privileges and secrecy around lobbying in the European Union*, Brussels 2005, p. 2.

⁶⁶ ALTER-EU, *Recommendations on lobbying transparency and ethics in European Union*, Brussels 2006.

⁶⁷ J. Greenwood, *Interest Representation...*, op.cit.

⁶⁸ D. Coen, J. Richardson, *A commitment to consultation*, "European Voice", 17.09.2009.

Nevertheless, NGOs continue to criticise the Commission's selective approach towards interest groups. According to the European Citizens Action Service (ECAS), 'there are some 15,000 lobbyists around the EU institutions, and although the presence of NGOs has increased, only some 10% of lobbying is on behalf of non-profit causes'.⁶⁹ ALTER-EU gives examples of Joint task forces in which only corporate interests are represented (e.g. the high level group 'CARS21 – Competitive Automotive Regulatory System for the 21st Century'), and of privileged status granted to business lobby groups (e.g. the European Services Forum and the Trans-Atlantic Business Dialogue).⁷⁰ In a study published in March 2008, ALTER-EU provided an analysis of expert groups advising the EC, claiming – despite a very limited sample – that business interests' dominance is indicative of EU policy-making in general. Publicity is seen as a cure for the unbalanced composition of advisory bodies.

The postulate that there is a direct link between the lack of transparency and unequal access to the Commission suggests that the ETI could help in resolving this problem. According to NGOs however, the Initiative is a great disappointment in this regard. The Commission has given in to the business lobby on the point of financial disclosure and names of individual lobbyists, taking it for granted that the NGOs would join the register (interview with R. Heggli).

The question of unequal access to the Commission implies the existence of two particular problems, both triggered by the EC's pro-efficiency orientation: the dominance of business representatives to the detriment of NGOs on the one hand, and the preference given to European-level federations, appreciated as sources of high-level expertise. This latter preference was reflected in the representativeness criteria for registering in the CONECCS database,⁷¹ and in the White Paper on Governance (WPG) with its idea of 'more extensive partnership arrangements' with interest groups 'well established in consultative practices'.⁷²

In response to the first dimension of inequality, i.e. the industry bias of the Commission, the ETI register, by disclosing financial sources and lobbying expenses, can at least provide information about the disproportion between citizens' organizations and businesses (interview with Ch. Pohl). This could help

⁶⁹ ECAS, *Tips for the would-be european lobbyist*, Brussels 2007, p. 2.

⁷⁰ ALTER-EU, *Ending corporate privileges...*

⁷¹ The eligibility criteria to register in CONECCS were as follows: an organisation had to be a non-profit representative body organised at the European level, i.e. with members in three or more European Union or Candidate countries; be active and have expertise in one or more of the policy areas of the Commission, have some degree of formal or institutional existence; cf. Commission of the European Communities, *Towards a reinforced culture...*, op.cit., p. 17.

⁷² Commission of the European Communities, *European Governance...*, op.cit., p. 17.

reveal the ‘*dangers of money buying influence and concentrate the minds of legislators on the need to seek out views from a wide spectrum of interests*’.⁷³

On the other hand, with regard to the preference for European-level Federations and organizations, it should be noted that in comparison to previous solutions, the Commission seems here to move towards greater openness. There are no representativeness criteria proposed in the new registration system, which seems to suggest a shift in the Commission’s priorities from output to input legitimacy. Still, commercial lobbyists and several NGOs have pointed out that making the alert about consultations available only to those registered could create a privileged class of lobbyists, whereas such information should be available to the general public.⁷⁴ The criticism was also raised that treating the contribution of a non-registered organization as a response of an individual person was ‘entirely undemocratic’ and turned the Kallas’ stick-and-carrot method on its head and against the aim of the ETI, which was to improve the means of consulting with interested parties.⁷⁵

To sum up, the empirical evidence gathered during this study seems to suggest that any solution to the dilemma between openness and effectiveness in the ETI is ambiguous at best. On the one hand, the preference for a self-regulatory approach could imply that the Commission, in its institutional interest, wants to preserve a well-established system of relations with selected interest groups, within which industrial and pan-European organizations are in a majority. In that sense, the ETI prioritises output legitimacy. On the other hand, the register does not impose any representativeness criteria and is open to all interested parties ready to reveal information about who they represent. This approach works in favour of greater openness, at least in terms of formal requirements towards registrants, strengthening at the same time input dimension of legitimacy.

4. Prospects and perspectives for the future

The findings of this study suggest that the ETI solutions are not sufficient to ensure either a high level of transparency or equal access to the Commission. A common opinion is that the register is only a ‘first step’ and further measures need to be taken.

⁷³ ECAS, *op.cit.*, p. 2.

⁷⁴ EPACA, *Response to the European Commission’s European Transparency Initiative (ETI) Green Paper and Consultation*, Brussels 2006.

⁷⁵ EurActiv.com, *EPACA: Single public affairs register ‘better system’ – interview with J. Laloum*, 15.11.2007; at: <http://www.euractiv.com/en/pa/epaca-single-public-affairs-register-better-system/article-168429> (last visited 05.08.2011).

The EC re-evaluated the register after one year of functioning, in October 2009.⁷⁶ The improvements it proposed concerned mainly clarification of the definition of direct lobbying and financial disclosure rules. Voices were raised that those changes – although fixing some deficiencies in the scheme – would let the ‘*fundamental flaws remain*’.⁷⁷

There also emerged a willingness to work simultaneously on a common solution with the EP, starting with the initiative of spring 2008.⁷⁸ On 11 May 2011 an Inter-institutional agreement on a Joint Transparency Register between the Parliament and the Commission was adopted, including a common Code of Conduct for the registrants. This agreement foresees quite severe measures in the event of the non-compliance with the Code of Conduct, such as suspension or withdrawal from the register and withdrawal of the badges granting access to the EP.⁷⁹ The Joint Transparency Register of the EC and the EP was launched on 23 June 2011, with the proclaimed intent, as formulated by the EC vice-president Maroš Šefčovič to ‘*set benchmarks for many other capitals in Europe and the world*’.⁸⁰ Registrants are now able to switch their existing registration to the Joint Register and any new registration or update is possible only through it.⁸¹ As of 8 August 2011, 4158 interest representatives have signed up, among which 751 are already listed in the new Transparency Register. The breakdown into different categories shows that the highest number of registered entities represent in-house lobbyists and trade associations

⁷⁶ Communication from Commission of the European Communities, *European Transparency Initiative: the Register of Interest Representatives, one year after*, Brussels, 29.10.2009.

⁷⁷ ALTER-EU, *Commission review of lobby register brings minor improvements but fails to fix fundamental flaws*, Brussels 2009.

⁷⁸ On 1.04.2008, the EP Constitutional Affairs Committee adopted the Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions (approved in a plenary vote on 8.05.2008). The amended draft report by A. Stubb, the rapporteur, called for a mandatory register common for the EP, the Commission, and the Council and a ‘*full financial disclosure*’ (in line with what the Commission proposes; a more detailed description to be prepared by mid-2009 by a joint working group with representatives from the Commission and the EP, formed on 16 December 2008). Still, it was underscored that financial figures are not always adequate to reflect the scale of lobbying activity, given the NGOs reliance on voluntary unpaid work. In this regard, the idea of a ‘*legislative footprint*’, attached to parliamentary reports or legislative proposals of the Commission, was proposed; cf. European Parliament, Committee on Constitutional Affairs, *Report on the development...*, op.cit.

⁷⁹ European Parliament decision of 11.05.2011 on the conclusion of an inter-institutional agreement between the European Parliament and the Commission on a common Transparency Register, doc. ref. 2010/2291(ACI), Annex: Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, p. 4.

⁸⁰ Commission Press Release, *Commission and European Parliament launch Joint Transparency Register to shed light on all those seeking to influence European policy*, doc. ref. IP/11/773, 23.06.2011.

⁸¹ European Parliament decision of 11.05.2011, op.cit.

(1976), followed by the NGOs (1262). Only 301 registrants are commercial lobbyists (public affairs consultancies and law firms). The reasons behind the delay in registering may be different, e.g. difficulties in getting the agreement of all clients, a fear of being removed from the register,⁸² or insufficient guidelines from the Commission on how to declare financial information.⁸³

Despite the growing number of registrants, the register still lacks efficiency, in particular because it does not provide relevant financial information about what interests are engaged in lobbying. ALTER-EU calls for disclosing detailed information on how money is spent on lobbying, as well as the names of individual lobbyists in order to ‘*identify possible “conflicts of interest” and “revolving door” cases at an early stage*’.⁸⁴ Meanwhile, commercial lobbyists criticise the current disclosure rules as too burdensome and practically impossible to comply with, resulting in a register with ‘non-comparable’ figures.⁸⁵ Business representatives raise the argument that ‘*money does not equal influence*’ in Brussels, where successful lobbying relies much more on ‘*communication skills, coalition building and good arguments*’, and in consequence, ‘*quantitative information about the financing of lobbying efforts at EU level is not a useful measure of influence*’.⁸⁶

A possible way to reveal the real influence of interest groups on decision-makers would be to develop a practice of tracing a ‘legislative footprint’ – a written description of lobbying activity containing a list of interest representatives consulted during the preparation of a piece of legislation, attached to each parliamentary report and legislative proposal of the Commission.⁸⁷ This could, however, cause serious operational problems since with major legislative acts the Commission could end up with a 50 page proposal and a 300-page description of consulted interest groups (interview with Ch. Feustel).

After three years of its functioning, various weaknesses of the register can be noted, including inappropriate incentives and the as-yet unclear rules of financial disclosure. Against this background, it is doubtful if the ETI contributes to any great extent to increasing the legitimacy of the EU political system.

⁸² In January 2009, The European Commission decided to suspend Public affairs consultancy firm GPlus from the register for failing to disclose the identities of all its clients. That was only a temporary exclusion and the consultancy firm was back in the register after declaring all the missing clients.

⁸³ S. Taylor, *op.cit.*

⁸⁴ ALTER-EU, *Benchmarks for the EU lobbying transparency register*, Brussels 2008.

⁸⁵ EurActiv.com, *Kallas defends voluntary lobbying scheme in face of boycott*, 23.08.2007, <http://www.euractiv.com/en/pa/kallas-defends-voluntary-lobbying-scheme-face-boycott/article-166077> (last visited 05.08.2011).

⁸⁶ EPACA, *op.cit.*

⁸⁷ European Parliament, Committee on Constitutional Affairs, *Report on the development of the framework for the activities of interest representatives (lobbyists) in the European institutions*, doc. ref. 2007/2115 (INI), A6-0105/2008, 02.04.2008.

Conclusions

The findings of this study suggest that it is necessary to re-evaluate the first assumption derived from the negotiation theory. Relations between the Commission and interest groups do not seem to resemble the accepted negotiation pattern, and consequently the argument propagating the ‘blessing effect of confidentiality’ applies more to the internal procedures within the Commission as well as to inter-institutional relations. It follows from this observation that increased transparency in relations with interest representatives could contribute to strengthening input legitimacy without seriously damaging the efficiency of decision-making. However, as we have seen, the ETI tools are evaluated as insufficient and too weak to achieve a high degree of transparency. This could imply that the Commission is still more output-oriented in practice.

The empirical material seems to confirm that a dilemma between openness to all-comers and output legitimacy does exist. As we have seen, the ETI is criticised for not addressing the issue of privileged access granted to business representatives. Yet it has to be emphasised that in comparison to previous regulations, the ETI instruments do not seem to preserve the Commission’s preference for pan-European organizations. It can be argued in this light that the Commission has somewhat prioritised the input dimension of legitimacy (allowing for greater inclusiveness). However, given the severe criticism that has been levelled at the ETI, it is difficult to state that its overall contribution to strengthening the legitimacy of the EU system has been meaningful, primarily due to the weak and inappropriate tools proposed.

On the eve of the launch of the Joint Transparency Register, ALTER – EU revealed in its report that the largest industry lobby groups consistently under-report their expenditure data in the Commission’s register. Those conclusions were drawn on the basis of a significant gap between the staffing levels of those organizations with the lobbying expenditures declared in the register. According to the authors of the report, *‘this makes a mockery of financial disclosure, which is an essential element in lobbying transparency and indeed of ethical lobbying’*. The new Joint Transparency Register does not provide a solution to this problem, since it still does not postulate mechanisms such as clear guidance on disclosure requirements, regular checks on registrants to prevent under-reporting, or meaningful enforcement mechanisms in the event under-reporting is discovered.⁸⁸

⁸⁸ ALTER-EU, *The missing millions – how the new lobby register needs to tackle the ‘under-reporting’ by industry lobby groups*, Brussels 2011.

Wojciech Gagatek*

The Treaty of Lisbon, the European Parliament Elections, and Europarties: A New Playing Field for 2014?

Abstract: *At the mid-term of the European Parliament's 2009–2014 legislative session, two relatively recent developments have re-opened the discussion on the prospects for an increased role of Europarties in the 2014 elections to the European Parliament. The first concerns a proposal that Europarties nominate their own candidates for the President of the European Commission, whereas the second suggests creating a transnational EU constituency, from which a small percentage of Members of the European Parliament will be elected. This paper critically reviews these developments, both by surveying the past record of Europarties and the challenges that they will face in the event these innovations would be implemented. It is argued that while limited competition between the candidates for President of the European Commission is to be welcomed, the creation of a pan-European constituency would elevate the expectations of the role of Europarties to a level which many of them will simply not be capable of dealing with.*

Under what conditions should we expect political parties at the EU level to develop? This key question has always stood at the centre of academic and political discussions concerning party politics at the EU level, mainly in relation to the elections to the European Parliament (hereinafter also sometimes referred to as the 'EP'). Very often the weaknesses of Europarties¹ are attrib-

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¹ The term 'Europarties' is used in this article to mean transnational, extra-parliamentary federations of national political parties from several EU Member States, united by political affinity. These organizations are therefore not identical with political groups in the EP, although they closely cooperate with one another, being a part of the same political family. The two biggest and most well-known Europarties are the European People's Party (EPP) and Party of European Socialists (PES). See generally: S. Hix, C. Lord, *Political parties in the European Union*, Basingstoke 1996.

uted to the specific patterns of political representation at the EU level.² In particular, one of the key points is that, unlike national election results, the European electoral contest does not lead to any change in the composition of the European Commission, which goes some way toward explaining the lack of interest on the part of the voters. A proposed solution to change this state of affairs is to make the nominations for some key EU posts dependent on EP election results, and by doing so create room for an increased role of Europarties. Another proposal on the table is to create a transnational constituency, from which a percentage, albeit a small one, of the Members of the European Parliament (MEPs) will be elected. In this scenario, Europarties will become key players to coordinate the election efforts with regard to the transnational constituency. In either case however, the first question which arises is: how likely are these proposals to be implemented?

Two relatively recent events have woken up the hopes of Europarties for better days. The Treaty of Lisbon (in force since 1 December 2009) takes the first step toward linking the nomination of a candidate for President of the European Commission with the results of European Parliament elections. And the Duff report, adopted by the European Parliament Constitutional Committee on 1 February 2012 as a motion for an EP resolution, calls for, among other proposals, the creation of a pan-European constituency from which a small percentage of seats will be elected (presented in more detail below). However, the fact that the Duff report also ran into strong opposition from among the MEPs, even pro-European ones, speaks volumes about the still difficult and contested role of Europarties. So, in the event the above-discussed proposals are not implemented, what can be expected from the Europarties in the upcoming EP elections of 2014? This question will form the core of this paper.

The paper is organised into three parts. In the first part the role of Europarties in general and in the electoral arena in particular is characterised by looking at the systemic obstacles that hinder their full development. In the second part, in order to set up a benchmark a review is conducted based on a comparison of the role of the Europarties in the EP elections, focusing on the most recent European Parliamentary election of 2009. In the third part, the two most important and recent innovations and proposals that aim to institutionalise the role of Europarties within the EU political system and EP elections are reviewed. Finally, the paper discusses the actual prospects for Europarties in the 2014 EP election, taking into consideration selected challenges and opportu-

² For a recent discussion, see: L. Bardi, E. Bresanelli, E. Calossi, W. Gagatsek, P. Mair, and E. Pizzimenti, *How to Create a Transnational Party System*, Brussels 2010, retrieved from http://www.europarl.europa.eu/meetdocs/2009_2014/documents/afco/dv/etude-departement-thematique_/etude-departement-thematique_en.pdf (last visited 01.07.2011).

nities which they will need to cope with. Due to space considerations, the usual reviews of the second-order thesis and the overall characteristics of the European Parliament elections are omitted.³

The paper begins on a slightly pessimistic tone:

1. The electoral irrelevance of Europarties

While it would be an exaggeration to claim that Europarties do not bring added value, or that the national parties do not need a European party affiliation, the fact is that the role of Europarties in the elections to the EP to date has been very insignificant, to say the least.⁴ Not only do they not present lists of candidates, but even the so-called Euromanifestos that they adopt are rarely used by their own national member parties. The reasons for this state of affairs can be divided between external factors (depending on the EU institutional environment) and internal factors (depending on the Europarties and their member parties themselves). Three of these factors shall be examined in turn.⁵

First, one of the biggest systemic problems is the lack of a typical ‘government and opposition’ dynamic at the EU level. There is no government to be toppled, nor opposition to be elected into office to replace them. The nomination and ultimately the election of the President of the European Commission and the nominations of commissioners do not depend on the outcome of EP elections, but on the consensual decisions of the national governments. In fact, there is not a single EU office which depends directly on the results of EP elections, a situation that might be too difficult to explain to most EU citizens. Not only does this state of affairs limit the electoral relevance of Europarties, it generally hampers the development of an EU party system, an issue which will be examined in more detail later in this paper. Overall, in these conditions, even if some Europarties (but by no means all of them) would like to structure the political conflict along the left-right spectrum, the institutional environment makes it extremely difficult to do so.

³ See generally: *The 2009 Elections to the European Parliament*, ed. J. Lodge, Basingstoke 2010; see also A. Trechsel, *How Second-Order were the European Parliament Elections 2009?* in: *The 2009 Elections to the European Parliament – Country Reports*, ed. W. Gagatek, Florence 2010, p. 3–11.

⁴ For a review of the state of the art in the field of transnational party politics, see: S. Van Hecke, *Do Transnational Party Federations Matter? (...and Why Should We Care?)*, “Journal of Contemporary European Research” No. 6(3)/2010, p. 395–412.

⁵ For an elaborate analysis, see: S. Bartolini, *Restructuring Europe: Centre Formation, System Building, and Political Structuring between the Nation State and the European Union*, Oxford 2005, Chapter VI; W. Gagatek, *European Political Parties as Campaign Organizations. Toward a greater politicisation of the European Parliament elections*, Brussels 2009.

Secondly, these elections are not really 'European', because in fact we have to do with a number of national electoral contests that produce a European result, i.e., ultimately determining the political composition of the European Parliament. However, in each country different sets of issues are dealt with during the election campaign, and in almost every case these are national, rather than European, issues. The 2009 election campaign had a chance to slightly alter this situation, even if the opportunity was only thanks to the sudden and unexpected economic crisis that struck almost all EU member states at the same time, thus becoming a common election issue in every state. But the interpretation of, and proposed solutions to, this economic crisis had in almost all cases a national colouring.⁶ How then in such conditions could it be possible to conduct an even moderately unified pan-European campaign?

Thirdly, this phenomenon explains one of the reasons why the national political parties are so reluctant to use the common programmatic documents developed by their respective Europarties. In general, the national political parties, even those most pro-European, largely prefer to keep Europarties at a distance, with their role limited to the coordination of Brussels-based activities rather than in the arena of domestic politics, particularly with regard to matters of such high stakes as elections. This is one of the reasons why most EU citizens know next to nothing about the existence of Europarties. The other one is a lack of interest in the national media about the EU in general and Europarties in particular.⁷

This brief review has demonstrated that both external and internal factors influencing the patterns of trans-national party politics in the EU makes a breakthrough for the Europarties very difficult. Now it is worth taking a closer look at the most recent case of the role of Europarties during the 2009 elections to the European Parliament.

2. The 2009 election as a benchmark

If we try to draw a general picture, it can be shown that during the 2009 EP election campaign Europarties struggled with the same difficulties as in the past, such as the inherent inapplicability of their election manifestos, a lack of name recognition among voters, and last but not least, the lack of a classical govern-

⁶ J. Lodge, *op.cit.*, Chapter I.

⁷ C.H. de Vreese, E. Lauf and J. Peter, *The Media and European Parliament Elections: Second-rate Coverage of a Second-order Event?* in *European elections & domestic politics: lessons from the past and scenarios for the future*, ed. W. van de Brug, C. van der Eijk, Notre Dame 2007, p. 116–130.

⁸ For a general introduction to these themes, see: S. Hix, C. Lord, *Political parties...*, *op.cit.*; D. Hanley, *Beyond the Nation State: Parties in the Era of European Integration*, Basingstoke 2008.

ment and opposition dynamic at the EU level.⁸ It is worth examining separately, however, how the Europarties tried to overcome these three challenges.

Regarding the electoral manifestos, there were two observable patterns in attempts to make these manifestos more relevant.⁹ On the one hand, the European Liberal Reform and Democrats Party (ELDR) decided to adopt a very short manifesto, amounting to only three pages. This strategy was motivated by the conviction, shared by the ELDR leadership, that today's voters will not take the time to read long manifestos, and it is better to offer them a more accessible document. However, other Europarties attempted to go in a different direction. The Party of European Socialists (PES) was perhaps the most visible in its attempt to increase the relevance of its manifesto. Rather than focusing on the length, the PES leadership identified two main deficiencies of these manifestos in the past. First, not only did they tend to be based on the lowest common denominator, but also they were totally uncompetitive. So PES decided that their manifesto for 2009 must be, first, much more concrete, and second, much more competitive. The result was a list of seventy-one measures, and the manifesto was written as a very competitive, British-style type of electoral document.¹⁰ The EPP did not pick up the gauntlet, being aware that the outcome of the election is not decided in Brussels, but in the Member States. Indeed, EPP Secretary General Antonio López-Istúriz recognised the limits of EPP activities resulting from the lack of a common European constituency and a real transnational political debate. In an interview with the *EU Observer* held in early 2009, he acknowledged that 'we are producing a common programme, but in the end, it's about national campaigns. [All] we can do, is to be a service provider for national campaigns with European ideas'.¹¹

As far as the lack of name recognition is concerned, before the 2009 elections the EPP commissioned a Gallup survey which was to test its name recognition among Europeans. The results clearly confirmed what could have been expected – that in virtually every EU Member State the name recognition of the EPP was minimal, and in many cases non-existent.¹² The same could surely be said with regard to other European political parties. Given their limited resources, they could not run a profile-building campaign in even one Member State. Moreover, their own websites are still run in maximum two languages

⁹ I discuss this in greater detail in W. Gagatek, *European political parties...op.cit.*, Chapter III.

¹⁰ Party of European Socialists, *People First: A New Direction for Europe. PES Manifesto*, Brussels 2009, retrieved from http://elections2009.pes.org/files/u1/ManifestoBook_EN_Online.pdf (last visited 30.06.2010).

¹¹ V. Pop, *EU conservatives accuse left of 'agit-prop' over economy*, "EU Observer", 23.01.2009, retrieved from <http://euobserver.com/9/27457> (last visited 10.02.2010).

¹² Personal communication from an EPP insider, Brussels, June 2009.

(mostly French and English). And thirdly, their own member parties are usually rather reluctant to stress these transnational links. For example, with regard to the EPP, only three national member parties actually referred to the EPP logo in their campaign literature (French UMP, Greek ND and Cypriot DISY), and ELDR insiders admit that their logo was used more often on the websites of the candidates than of the parties. Unless their respective national member parties begin to mention their transnational, partisan links, not much can be expected to change with regard to the low name recognition of Europarties among the overall European electorate.

With regard to campaigning, almost all Europarties focused their activities on the extensive use of social media (Facebook, Twitter, etc.). The reasons for this were simple: it did not infringe on the field of national politics as an area of interest of national member parties and, compared to other campaign tools, was relatively cheap. A few Europarties, particularly the largest ones, organised a number of election conventions, in Brussels and elsewhere in EU member states. The EPP established its so-called 'Tell Barroso' initiative, which consisted of a simple on-line questionnaire regarding the future of the EU. Through the activities of its foundation, the Centre for European Studies, the EPP invited Europeans to express their views about what the EU should be doing directly to President Barroso. PES decided to extend its electoral activities beyond Brussels, and organised a few conventions in the Member States. It was also very active in preparing various electoral materials for its member parties, such as the 'election kit'. The European Green Party tried to mount the most integrated campaign of all mainstream Europarties, characterised by its ambition that its transnational programme to be used by Greens all over Europe. The Greens nominated five 'ambassadors' that were to travel across Europe and present the Green view(s). This however did not work out in practice, as these ambassadors were mostly pre-occupied with their own national campaigns to the European Parliament.¹³

In sum, one could observe a mix of traditional services provided by the Europarties to their national member parties, including organising seminars for campaign managers and producing electoral gadgets, an extensive use of the social media and Internet campaigning, and a few campaign novelties.

The biggest and most important difference between the 2009 campaign and previous campaigns lies perhaps in the intensity of political confrontation between the two main Europarties. This directly relates to the question of the personalization of EU politics and the future nomination of Europarty candidates for the post of President of the European Commission. Here again PES

¹³ W. Gagatsek, *European political parties...*, op.cit, p.41–53.

presented the most far-reaching approach, which could be subsumed into what the literature refers to as the politicisation of EU politics.¹⁴ In short, the PES leadership came to the conclusion that one of the biggest deficiencies in EP elections in the past has been its division into strictly pro- and anti-European camps, with the former usually uniting all mainstream parties (regardless of their ideological profile), and the latter usually grouping the extreme or Eurosceptic parties. In the opinion of the leadership of PES, this dynamic had to be reverted: instead of solely focusing on the pro- and anti-European issues, Europarties should also clearly distinguish themselves on the left-right political spectrum. As PES Secretary General Philip Cordery has argued since 2004, this is the way to make voters aware that the choices they make in the EP elections will be the same as those in the national and regional elections, i.e. between the left and the right, and that it matters which political family has the majority of seats in the EP and has the right to nominate a candidate for the President of the European Commission.¹⁵ Thus the campaign strategy of PES was to vehemently criticise not only the EPP, but also its main national leaders, such as Angela Merkel in Germany or Nicolas Sarkozy in France. Its whole campaign was driven by the need to criticise the then-existing state of affairs, for which, in the opinion of PES, the centre-right was responsible, and to contrast it with the proposal of the socialist ‘family’. For example, the PES manifesto argued that the choice that European citizens had to make in June 2009 was a ‘choice between a progressive European Union where Member States work together in the interests of all the people of Europe, or a conservative European Union which leaves our future in the hands of the market’.¹⁶ The Greens adopted a similar strategy, being even more combative by running the election under the motto ‘Stop Barroso’. Their manifesto contained a strong criticism of the ‘dominant neoliberal ideology in Europe’, and correspondingly of ‘the neoliberal majority in the European Parliament, the Council, and the European Commission’¹⁷

The EPP responded in its manifesto (adopted after the PES and the Greens’ manifestos were issued) that its positions were fundamentally different from those of both the socialists in Europe, who ‘see the financial and

¹⁴ See especially: S. Hix, *What's Wrong with the European Union, and How to Fix it*, London 2008.

¹⁵ P. Cordery, interview with the author, Brussels, 12.01.2009.

¹⁶ Party of European Socialists, *People First...*, op.cit.

¹⁷ European Green Party, *A Green New Deal for Europe. Manifesto for the European election campaign 2009*, Brussels 2009, retrieved from http://europeangreens.eu/fileadmin/logos/pdf/manifesto_EUROPEAN_GREENS.pdf (last visited 28.06.2010.).

economic crisis as a chance to push their age-old agenda of nationalisation, protectionism and permanent deficit spending', and from the positions of 'market fundamentalists who believe that markets alone should rule the world'.¹⁸

The existing political reality deprived the PES leadership of any hopes that its combative campaign strategy at EU level might bear electoral fruits: although the PES manifesto, strongly critical of the conservative policies symbolised by José Manuel Barroso, was supported by all PES member parties, three PES-affiliated EU governments – Portugal, Spain, and Britain—openly supported Barroso even before the European Parliament election, casting doubt on the unity of the socialist family, at least as far as this matter was concerned. In the end the very disappointing election results of the socialists deprived them of any legitimacy to think about proposing the Commission Presidency.

This is where the Europarties are at the moment, after the 2009 elections. Their weaknesses, both from the external perspective (depending on the EU institutional environment) and internal perspective (concerning the internal politics within the Europarties and their national members), have been pointed out. They have made some effort to show their relevance to the voters and to the national political parties, but they are far from having convinced their member parties that they are important to them and that the overall advantages of strongly correlating their activities with those of their Europarty outweighs the costs. Are there any chances for better days ahead for them? What are their solutions to the above deficiencies, problems and failures? Before moving to these questions, let me first discuss in detail the two above-mentioned institutional innovations, starting with the nomination of a candidate for President of the European Commission.

3. The institutional and electoral innovations

In order to provide a more direct link between the European Parliament election results and the nomination of the candidate for President of the European Commission, the drafters of the first, non-ratified, Treaty establishing a Constitution for Europe came up with the idea that the candidate should be selected from among the political family that, based on the election results,

¹⁸ European People's Party, *Strong for the People. EPP Election Document 2009 (adopted by the EPP Congress, Warsaw, 29–30 April 2009)*, retrieved from http://www.32462857769.net/EPP/e-PressRelease/PDF/08-05-2009%20EN-ELECTION-DOC-FINAL_copy_2.pdf (last visited 28.06.2010).

created the largest political group in the EP.¹⁹ This concept was finally elaborated in Art. I–27 of the Treaty establishing a Constitution for Europe, and a few years later copied verbatim into the Treaty of Lisbon. Thus, Article 17(7) of the consolidated version of the Treaty on European Union (TEU) states as follows:

Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.

The Declaration on Article 17(6) and 17(7) of TEU, which forms a constituent part of the Treaty, specifies that the European Council and the Parliament are ‘jointly responsible’ for the process leading to the nomination and election of the President of the European Commission. This declaration also defines the term ‘appropriate consultations’ contained in the first sentence of Article 17(7) TEU. These consultations should be held between the European Council and the European Parliament prior to the decision of the European Council nominating a candidate, and focus on the backgrounds of the candidates for President of the Commission. It is important to take note of the very interesting provision contained in Article 17(7) TEU specifying the solution in the event the Council’s proposed candidate does not obtain a majority of votes in the European Parliament. This, indeed, is a breakthrough, because the Member States in fact have agreed that the Parliament can reject the candidate, for example if there is a counter coalition against the official nominee. The consequences of this provision will be discussed later in this article.

Moving on to the question of creating a transnational constituency, it should be noted that this proposal has been in the air for more than fifteen years, being first mentioned officially in a 1997 EP report drafted by Georgios Anastasopoulos. In that report, the EP proposed the election of 10 per cent of MEPs from a transnational constituency, at that time envisaging the creation of such a constituency from 2009 onwards. However, not only is this a very

¹⁹ See: M. O’Neill, *The Struggle for the European Constitution: A Past and Future History*, London 2009, Chapter VI.

politically-sensitive issue, but also one requiring an amendment to Article 14 TEU and to the Act of 20 September 1976 concerning the election of the members of the European Parliament by direct universal suffrage.²⁰ In other words, it requires unanimity among the Member States. This goes a long way towards explaining why for so many years no agreement has been reached concerning the introduction of this innovation. The most recent report on the matter, drafted by liberal MEP Andrew Duff and adopted on 1 February 2012 by the EP Constitutional Affairs Committee as a motion for an EP resolution, contains a number of proposals to make these elections more interesting. By way of motivation for the proposal, it notes in recital H that ‘popular recognition of Parliament’s democratic function remains limited, political parties at the European level are still in the early stages of development, electoral campaigning remains more national than European, and media reporting of Parliament’s proceedings is irregular’. One of the solutions is to elect ‘some MEPs on pan-European lists, considering that this would impart a genuine European dimension to the campaign, particularly by entrusting a central role to European political parties’.²¹

Toward this aim, the report proposes to elect 25 MEPs (roughly 3.2 per cent of the total EP composition) from the transnational constituency comprised of the entire territory of the EU. Each voter would be enabled to cast one vote for the transnational list in addition to their vote for the national or regional list. Pan-European lists would be composed of candidates drawn from at least one third of the Member States, and are expected to be gender-balanced. Seats would be allocated without a minimum threshold in accordance with the D’Hondt method.²²

During the discussions concerning this report, two issues have created the most controversy. First, Euro-deputies cannot decide whether these 25 MEPs should be elected additionally or out of the total number of MEPs. This is of

²⁰ Decision 76/787/ECSC, EEC, Euratom of the representatives of the Member States meeting in the Council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage; OJ L 278, 8.10.1976, p. 1–4 as amended by Council Decision 93/81/Euratom, ECSC, EEC amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom of 20 September 1976; OJ L 33, 9.2.1993, p. 15–15 and Council Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to Decision 76/787/ECSC, EEC, Euratom; OJ L 283, 21.10.2002, p. 1–4.

²¹ A. Duff, *Second Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI))*, doc. ref. A7-0027/2012, recital V, available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2012-27&language=EN>

²² *Ibidem*, Article 2.

course related to the very important and sensitive issue of distribution of seats among the Member States. Although the first version of the Duff report, adopted by the EP Constitutional Committee in April 2011, called for the election of an *additional 25* MEPs from the transnational constituency, the rapporteur himself tabled an amendment calling for the election of 25 MEPs *out of the total number* of MEPs.²³ However, since MEPs could not agree on this issue, the solution adopted in the second Duff report was to remain silent and leave the issue open to further negotiations among the Member States.²⁴

Secondly, in the very first draft report adopted by the EP Constitutional Affairs committee on 5 November 2010, the proposal was to create ‘a preferential semi-open list system (whereby votes are allotted either to the party list or to individual candidates within a list); and seats were to be allocated in accordance with the Sainte-Laguë method’.²⁵ But in the version of the report adopted by the EP Constitutional Affairs Committee in April 2011 we find a call for the closed list proportional system and the D’Hondt method, without a minimum threshold. Such an amendment might be questionable from a number of viewpoints, but for sure it would strengthen the role of European political parties, who would have full control over who would be given winnable seats. Finally however, in the most recent, second Duff report of 1 February 2012, there is no reference to the list system, although the D’Hondt method without a minimum threshold has been maintained. The explanation for this change is similar to the one provided above: the MEPs could not agree on the issue, and the solution was to postpone the decision on the list system until negotiations with and between the Member States.

Having discussed both the current record of the Europarties in electoral arena, and having presented the main proposals designed to strengthen their institutional importance, we can now move to a discussion of the prospects for the 2014 elections, taking into account the practicalities related to these institutional innovations.

²³ A. Duff, *Report on a proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976 (2009/2134(INI))*, doc. ref. PE 440.210v04-00, retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A7-2011-0176&language=EN> (last visited 02.07.2011).

²⁴ Art. 2 of the *Second Report on a proposal...*, op.cit.

²⁵ A. Duff, *Draft report Proposal for a modification of the Act concerning the election of the Members of the European Parliament by direct universal suffrage of 20 September 1976*, doc. ref. PE440.210v03-00, Brussels 2010, retrieved from <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE440.210> (last visited 01.07.2011).

4. The prospects for the 2014 elections

As of the moment of updating this paper (written in July 2011 and updated in March 2012), it seems almost certain that the transnational constituency will not be established by the time of the 2014 elections. Apart from the important fact that this report has encountered many problems on the road to its adoption by the European Parliament, it also requires a Treaty change, which means a long process of intergovernmental negotiations, which are quite unlikely to be completed in the time remaining. Secondly, until the date of the 2014 elections, and quite likely even a few months later, we will not see whether any Europarty will indeed come up with its own candidate for President of the European Commission. Nonetheless, even in the light of the above considerations the practical aspects of these two innovations remain relevant and should be discussed. Thus this part of the paper focuses on the pros and cons of these proposals directly for Europarties, and examines the difficulties they will need to overcome.

4.1. A partisan candidate for President of the European Commission?

At first glance, it would seem to be an ideal scenario for the major Europarties if they could each come up with their own candidate for President of the European Commission. Not only might the citizens become more interested and even engaged in their activities, more importantly Europarties would become highly relevant to their national member parties. However, the list of practical problems concerning the organization of this process is quite long. It is easy to identify at least four obstacles to processing the nomination of a candidate by Europarties:

1. *The two-hat syndrome.* It is much easier for an opposition than for the government party to agree to support a partisan, transnational candidate. History demonstrates that many party leaders, when they become Prime Ministers, forget about their affiliated links with their Europarty and begin thinking only through the lenses of the national interest. It is therefore quite likely that it will be much easier to come up with a candidate and – even more important – to support him until the election, for the Europarty which will be likely to win the elections and which at the same time will have the majority in the European Council. In practice, if the EPP continues to be represented by about 60 per cent of EU Prime Ministers and Heads of State, and if, say, a few months before the election it will be quite likely to win the EP elections as well, then this should ensure that they will indeed come up with a candidate prior to the polling day, as they did in 2009. This line of reasoning makes the situation of the PES rather pessimistic. While it might come up with a candidate, it is not clear

whether all, and particularly the governing socialist parties, will support him or her in the intergovernmental negotiations. The most difficult to convince will be the British and Spanish PES Member Parties, which do not seem to be very happy with the idea of politicising the European Commission.

2. *The national unity syndrome.* Can you imagine an opposition party voting against the nomination of his or her fellow country citizen from the governing party running for President of the European Commission, or vice versa? While everything is possible, in many EU member states EU affairs are perceived of as a matter of national interest and unity, rather than a field for partisan conflict. Hence usually when a candidate from one Member State has a chance to be elected into a top EU position, all political parties from that state will support him or her, willingly or not. And while it would be less problematic if, for example, the Luxembourg Socialist Workers' Party defected from the PES candidate and instead supported the EPP one, in the case of the largest five EU member states such an eventuality could undermine the whole process.
3. *The former Prime Minister syndrome.* For both PES and especially for the EPP, it is expected that a candidate for the job of President of the European Commission should be one of the current or former EU Prime Ministers. However, can you imagine a current Prime Minister who decides to run for the nomination of a Europarty and risks putting him or herself at risk of a possible failure to obtain the nomination? Would any such candidate agree to be scrutinised by some non-elected representatives of Europarties? What successful politician would decide to run for the nomination without being certain that his or her political party will win the elections and will have the right to propose a candidate to the European Council? Once again, the political family likely to form the largest political group in the EP after the election is in a much more comfortable position to run an effective nomination process.
4. *The democratic and transparent mode of selection.* How should the nomination process itself be organised? Should it be a primary modelled on the US system, or one taking place in a closed room? How should the programme of the candidate be decided upon? Should it be formulated by the party leaders of a Europarty congress? These are very difficult questions which divide political parties not so much across an ideological, but rather a national, spectrum. Hence they are common to all Europarties. Above all, the key problem has to do with the typically consensual mode of work of most Europarties, which would be very difficult to apply if there were more than one candidate running for the nomination. On the other hand, such internal competition between, for example, two candi-

dates supported by two internal camps, may leave scars on the fragile unity inherent in Europarties. And since they do not have any means to discipline their members, this factor makes it more likely that some national parties may not stand by a finally selected nominee, and instead support one from another political family. On the other hand, unless there is a debate about the candidate within the national member parties, and unless the process itself is transparent, then the 'ownership' of the candidate and the whole issue of his or her nomination will be decided in non-transparent, closed Brussels' circles.

Given the above analysis, and taking into account insiders' views from both the EPP and the PES, it seems quite paradoxical that the party which is in the best position to actually run an effective nomination process (EPP) does not seem to be interested in the issue, whereas the one that has the theoretically more difficult ground (PES) has planned a very thorough and far-reaching process for selection of their candidate. We will need to wait until late 2013 to see in which direction their activities will develop.

4.2. Campaigning in a trans-national constituency

There are two main trends noted in the contemporary literature on political campaigning which shed interesting light on the possibilities of transnational campaigning in the EU.²⁶ On the one hand, there is a growing body of literature that argues that campaign practices have converged across countries. This is due in large part to the growing use of modern communication technologies, but also concerns the diminished role of party members and the heightened role of professional campaigners. In other words, parties no longer rely on members for their campaigns, but instead increasingly use external consulting and the advice of professional campaigners. Running an election campaign and winning an election should be, more or less, about the same in all democratic systems. If in fact this is the case, this would be a good sign for Europarties for two reasons. First, almost none of them (except for a quasi-membership of PES activists) have a grass-roots membership, and hence cannot rely on a core group of active voters to support them. Second, if the cross-national variety of campaign practices is low, it makes the transnational campaigning easier.

However, the second trend noted in the literature argues the opposite. The 2009 European Parliamentary election indicated that, far from waning, the cross-national variety determines current campaign practices to a large

²⁶ See generally: D.M. Farrell, P. Webb, *Political Parties as Campaign Organizations* in: *Parties without partisan: political change in advanced industrial democracies*, ed. R.J. Dalton, M.P. Wattenberg, Oxford 2002, p. 129–153; *Political Marketing: A Comparative Perspective*, ed. D.G. Lilleker, J. Lees-Marshment, Manchester 2005.

extent.²⁷ Across European democracies, we observe a large number of persistent differences, both of a legal, political and cultural nature, which stand in the way of convergence and trans-nationalisation. These national differences may concern restrictions on political campaigning (for example, with regard to the use of paid advertisements), restrictions on party financing (with regard to the acceptable donations), and last but not least, be rooted in a political culture (whether, for example, a national political culture favours door-to-door campaigning or not). If this is the case, it makes the future prospects for transnational campaigning difficult.

Elsewhere I described two possible scenarios for Europarties in the event transnational constituencies are ever introduced.²⁸ The first is more radical: Europarties will become relatively independent campaign players. The Euro-manifesto will be still adopted commonly by the national member parties, but the campaign strategy and its realisation with regard to the transnational constituency will be carried out by Europarties, with only a little help from their national counterparts. This would result in a greater focus on the so-called EU issues, and room for direct competition with other Europarties. At the same time, the national parties would continue to hold their own campaigns for the national EP seats, although in this case they would need to highlight their transnational affiliation in a more apparent manner. The effect would be what Andeweg has called a split-level party system, in which the national party system and a European one will co-exist, with two different, although connected, sets of parties.²⁹ However, apart from obvious political obstacles, such a change would require a massive increase of subsidies allocated to Europarties. Suffice to say that the EPP's budget for 2011 amounts to slightly more than 7 million euros and PES's to 4.7 million euros, out of which the biggest share is spent on day-to-day party functioning. Certainly this will be not enough to run a campaign in even in a few Member States, let alone the whole EU. This scenario assumes that the national differences in political campaigning do not stand in the way of organising a unified pan-European campaign for the transnational seats.

In the second scenario, there will be a decentralised campaign for the seats in the transnational constituency, run by the national member parties in each Member State. This would mean that even if there are some common themes and slogans, each national campaign will bear a national flavour, adapted to the specific national political context. Most importantly, in this scenario

²⁷ W. Gagatsek, *Campaigning in the European Parliament Elections* in: *The 2009 Elections to the European Parliament – country reports*, op.cit, p. 13–19.

²⁸ L. Bardi *et al.*, op.cit, Chapter III.

²⁹ R. Andeweg, *The reshaping of national party systems*, “West European Politics” Vol. 18(3)/1995, p. 58–78.

a greater effort would be required from the national, rather than European, parties. The latter could, for example, prepare a list of themes, options and tools; in other words continue to be a service provider to the national member parties, who for their part will have to choose a few of these services and use them in their national campaigns for the transnational seats. This scenario is more suited to a conclusion that the EU member states are not yet ready for a unified political campaign for the transnational seats.

There is of course a possibility that there will be other scenarios or some divergences in the two outlined above. However, both of them are based on an assumption that, indeed, there is a willingness at least on the part of the Europarties to go in the direction of the transnational lists. This, however, cannot be assumed, for at least two reasons. First, even the leadership of very pro-European parties, such as PES, do not seem to believe that the transnational seats are a priority. Rather, they believe that the key lies in the personalisation of the nomination for President of the European Commission.³⁰ Indeed, a survey of MEPs carried out by the European Parliament Research Group Survey reveals that almost half (47.1 per cent) of MEPs surveyed in 2005 were opposed to the establishment of the transnational constituency, with all Danish and Estonian MEPs being against, together with a large majority of Polish (94 per cent) and British (87 per cent) naysayers.³¹ On the other hand, 58 per cent of MEPs surveyed in 2010 agree or strongly agree that the President of the European Commission should be elected by the EP, rather than nominated by the national governments, whereas 29 per cent neither agree nor disagree (based on the replies of 172 respondents). This data indicates that the two institutional innovations discussed in this paper are not equally supported by the MEPs.

It seems, furthermore, that it is a mistake to assume that the creation of a pan-European constituency would make the road toward stronger Europarties easier. It may well be quite the contrary. While space considerations do not allow for an elaborate analysis, as a way of summary it can be noted that the creation of a pan-European constituency may in fact elevate the expectations of the role of Europarties to a level which many of them will simply not be capable of dealing with. The number of challenges that they would face is likely to surmount their capabilities as organizations, and also open up a Pandora's box of problems that so far have been hidden from the limelight. On the other hand, these reforms would be an important step to create a common structure of competition and lay the foundations for a future EU party system,

³⁰ Personal communication to the author, Brussels, June 2010.

³¹ D.M. Farrell, S. Hix and R. Scully, *EPRG MEP Survey Dataset: 2011 Release*, retrieved from <http://www2.lse.ac.uk/government/research/resgroups/EPRG/MEPsurveyData.aspx> (last visited 26.07.2011.).

in which Europarties will compete for a democratically accountable European executive and transnational seats. While this is a very distant prospect, it does not mean we should cross out the possibility of an indirect route towards competition at the European level, by which for example the major Europarties nominate a candidate for President of the European Commission prior to the EP elections.

Conclusions

This paper started from a review of the factors that make the development of Europarties very difficult. However, there are two other groups of factors which further complicate their prospects. One is the trend, visible already for a number of years, in which parties lose both their members and their support among the citizens.³² Another is the political and institutional crisis which struck the EU as a result of the immigration flows in 2011 and the risk of bankruptcy of some eurozone Member States. Overall, the concepts of both ‘party’ and ‘Europe’ are in defensive positions. And if the political crisis in the EU becomes even more acute, the chances for a greater role for Europarties will likely diminish.

Nevertheless, there is a chance that in 2014 we will witness for the first time at least a limited competition between the candidates of the two main Europarties for President of the European Commission. It all seems to depend whether PES will manage to unite around a single candidate. If they do, the EPP will be under pressure to choose its own candidate as well. The controversies and challenges that concern this development have been discussed in this article, together with the development of a list the important questions that must be answered. How such candidates will indeed ‘campaign’ is an even more complex problem, due to the divergence of national traditions of campaigning and different national expectations of whether Europe needs a partisan candidate, and if so, how he or she should campaign for the job.

It is a common misconception both among the experts and political elites to assume that the key to the development of Europarties is that they become independent, sovereign, or in some other way disconnected from their national member parties. In reality even the Europarties themselves do not see such a development as appropriate and useful. Hence we can expect that if any electoral role for the Europarties is ever to be developed, it will still involve to

³² I. Van Biezen, P. Mair and T. Poguntke, *Going, going, ...gone? The decline of party membership in contemporary Europe*, “European Journal of Political Research” No. 51(1)/2012, p.24–56.

a large extent the engagement of the national member parties. Europarties can certainly gain greater visibility in 2014, but this development does not depend only on them, e.g. how effectively they develop their communication tools, but also and maybe even mostly on the national political parties, especially with regard to the extent to which they will emphasise their transnational links. This observation highlights the limitations to the Europarties' capabilities to carry out independent political campaigns, and it indicates the boundaries of their campaign involvement. If nothing changes in this respect, there will be no new playing field for the Europarties, despite the changes introduced by the Treaty of Lisbon.

POLICY DOCUMENTS



**Speech by Mr Herman Van Rompuy,
President of the European Council
at University of Warsaw
‘The Great Challenges for the European Union’
Warsaw, 17 January 2011**

It is a pleasure and an honour to speak here at Warsaw University. Or should I say, in Latin, at the ‘*Universitas Varsoviensis*’? Having studied classics at a Jesuit College in Brussels, I quasi prefer your Latin name to the English one! Indeed, your University has a long and venerable history behind it, and no doubt a great future ahead, as a place of learning. Moreover, your institution has participated in the upheavals of recent Polish history.

I should also like to congratulate the University’s Centre for Europe on its 20th anniversary. Studying the European Union is a good way of feeling more at home within it. Founded, as it was, 20 years ago, back in 1991 (yes I am quite good at mathematics), the Europe Centre is just one example of how quickly many people in Poland seized the great European moment, immediately after that wonderful year 1989 when communism collapsed in Europe, the *annus mirabilis*.

Let me stress once more how important for the European Union as a whole the Polish contribution to that very special year of freedom and renewal was, the year 1989. To other audiences, I sometimes explain that the enlargement of the European Union to include the countries of Eastern and Central Europe in and after 2004 is NOT a bureaucratic process, driven by ‘Brussels’, but that enlargement should be seen instead as a deeply political enterprise, driven by a great historic event: the end of the Cold War and the unification of the European continent. In Poland, however, I suppose I do not have to explain this... You made this history yourselves!

Moreover, in 1989 the movement for change came from the people, from the grass roots up beginning with stirrings of freedom in your country, in Hungary and in Czechoslovakia. A fight against a totalitarian system which evolved into the rule of law. As soon as the Iron Curtain fell, salesmen and students, traders and tourists, men and women from East and West: all started to seize opportunities across borders.

Today, after the entry of your country and nine others into the Union, these flows of freedom have been secured. Free movement of people is more than an element of an economic union, as we often misunderstand the Union's role. It is a sign of civilization. In the fight for political freedom against the communist regimes, your country was each time in the avant-garde – in 1989, but also in 1956, in 1968, in 1970, in 1980... Here, at Warsaw University, let me say a word on the 1968 episode. I was a student myself that year – but, unlike so many other students in Louvain and elsewhere in Western Europe, I was already strongly anti-communist as a pupil in secondary school. Today I should like to honour those students and professors who participated in the revolt of 1968 at this University. In a democratic uprising which was crushed. Some professors who went into exile after those events carried their voices to Europe and the world.

From Oxford, the great Polish philosopher Leszek Kołakowski, who died two years ago: he was active in 1968. His wise writings on Marxism and religion have benefitted many readers, including myself. From Paris, the historian Krzysztof Pomian: he was also banned from Polish academic life. As scientific director of the 'Museum for Europe', he has written suggestively on 'Europe and its nations'¹. From Berkeley, California, a man from an earlier generation: the great poet and Nobel Prize winner Czesław Miłosz. He worked briefly at the library of this University, but was already in exile long before 1968. I deeply admire his poetry. And there are many more. At least in the form of their writings, these intellectuals all returned to Poland after 1968 – not least to your library!

In May last year, I was also impressed to hear Prime Minister Tusk, speaking in Aachen as the 2010 laureate of the Charlemagne Prize, on the events in his own city of Gdansk: December 1970, August 1980, 1989. 'We were joining Solidarity as a national uprising', he said, 'We were convinced that we were plainly dealing with the first victorious insurrection in generations. Victorious, as it was capable of self-limitation, that is combining courage with prudence'. These are moving and wise words. Later this afternoon I will meet Prime Minister Tusk again. The main subject of our discussion will be preparation for

¹ K. Pomian, *L'Europe et ses nations*, Paris 1990.

the European Councils in the months ahead. How to deal with the short-term and long-term challenges which we face.

Of course we will also address the upcoming Polish Presidency of the Council of the EU, during the second half of the year. 2011 will be an exceptional year for Poland in European affairs. It will be a huge challenge, an important responsibility and a privileged period. I will ensure Prime Minister Tusk of my full support in this undertaking and of my full intention to achieve close cooperation between the Council and the European Council. As I experienced in my first year in office with the Spanish and Belgian Council Presidencies, and now with the Hungarians, and also with the Presidencies of the Commission and the Parliament, working together is the only way to succeed.

As you know, the European Council brings the Union's highest executive leaders around the table: the 27 Heads of State or Government of the Member States (plus the President of the Commission and myself). Together we establish political priorities, we set the Union's strategic course and we take responsibility in crisis situations. Our meetings are always about finding a consensus, taking into account the positions and sensitivities of each partner. The oval table around which the 27 leaders are seated is one of the secrets of our success. Our Union is stronger when all Member States are united in supporting jointly agreed objectives.

It is just over a year now since I was chosen by my fellow prime ministers as the European Council's first longer-term president, bringing new continuity to an institution which previously had a new chairman every second or third meeting. My key task is to facilitate and steer the debate, helping to find common ground and to build the necessary compromises. I have also chaired two Euro zone summit meetings.

Previously, there were those who wondered what a full-time President would have to do in between the minimum 4 meetings a year which the Treaty requires. Well, now we know...The year 2010 was dominated by the public debt crisis in the Euro zone. Let me only briefly recall the series of decisions we have taken, most following the recommendations of the Task Force on economic governance which I chaired:

- strengthening the Stability and Growth Pact;
- establishing new forms of macro-economic surveillance;
- granting conditional emergency loans to two countries in difficulties, first, on an *ad hoc* basis, to Greece, and then, on the basis of the temporary crisis mechanism set up in the meantime, to Ireland;
- agreeing to set up a permanent mechanism to deal with such crises.

In my opinion, these decisions constitute the biggest reform of the Economic and Monetary Union since the euro was created. We have made our economies more crisis proof. If more needs to be done, we will do it. In

December last year, the Heads of State or Government of the 16 countries of the Euro zone and the European institutions declared that: 'they stand ready to do whatever is required to ensure the stability of the euro area as a whole'. People should not underestimate this determination.

In 2010, only sixteen member states shared the single currency. (Two weeks ago, we became seventeen, because Estonia joined on January 1st.) However, from all our discussions last year, it appeared crystal clear that all 27 members are fully convinced that the stability of the Euro zone is vital for the Union as a whole, and of all our citizens. ALSO those outside the euro, such as Poland, or Sweden, or the United Kingdom. The level of interconnect-edness, particularly in the financial markets, has been widely demonstrated by this crisis. I therefore welcome the fact that the Polish government wants to participate in the reflection on the strengthening of the economic pillar of our Economic and Monetary Union. It will be one of the main tasks in the weeks and months ahead.

Beyond the immediate issues, we also need to improve Europe's longer-term fundamentals and economic structure. First of all: we need to bring back growth and to create jobs. We also have to get ready for the great societal challenges of the decades ahead: attractive jobs, healthy ageing, a green economy and secure energy supply.

The European single market has been key to the EU's prosperity over the last few decades. It is quite an achievement. We have built the world's largest single market. We thus – voluntarily! – enhanced the economic, ecological and indeed political interdependence which has always existed between the countries on our small continent. Seven years ago, after accession to the EU, Polish entrepreneurs and consumers immediately discovered the market's benefits. The transition period regarding the free movement of labour is now almost over for all countries; the fears some people had in this regard have proven unfounded. I welcome the fact that full legal equality will also be effective in this respect.

Nevertheless there is a perception that the Single Market is less popular than in the past and that it is seen by many Europeans with suspicion and fear. We have to reconcile both citizens – citizens as consumers and as employees – and entrepreneurs with Europe. The ambitious Single Market Act which the Commission proposed last October is therefore more than welcome. It is a key element in the EU's strategy for competitiveness, growth and jobs. That's why I want the European Council to underline the single market's importance and to make sure that the 50 measures which have been proposed are prioritised – starting with those which yield the greatest results. Already in the February European Council, we will deal with two related fields: innovation and energy.

Innovation is the crucial factor to develop our economies, to achieve employment and growth and to improve living and working conditions. That's why I want European Heads of State and Government to take more ownership of innovation and research. Research and development spending in the EU is much too low: 1,84 per cent of EU GDP, compared with 2,6 per cent in the US and 3,4 per cent in Japan. It is sad to say, but if one looks at the figures for the money spent on higher education, the comparison is worse for us. A European Research Area could help to attract talent and thus investment; the mobility of researchers could thus also benefit the market. And, as you here at the University would no doubt acknowledge, such mobility could also further improve the vitality of academic life!

In the February European Council, we will also talk about innovation's twin theme: energy. It is definitely a field where we need smart ideas, where we need new techniques and discoveries. We need to provide our citizens and companies with safe, secure, sustainable and affordable energy. No Member State should be isolated from the European internal market for energy. An integrated European market is crucial for ensuring the competitiveness of Europe's economy, security of energy supply and sustainable development. Current rules need to be fully implemented to reap all the benefits in terms of diversity of supply and fairer prices. It is only with a proper infrastructure across Europe that the energy market will deliver on its promises, that solidarity between Member States will become operational, that alternative supply routes will materialise and that renewables will develop and compete on an equal footing with traditional sources. Within the Union, we should improve connections, both in the gas pipeline network and in the electricity grid. Another important issue is our determined action to deliver a 20 per cent increase in energy efficiency by 2020. Investment in energy efficiency is another means to enhance competitiveness and to support security of energy supply and sustainability at low cost.

Externally, we should work on stronger cooperation with the main producer, transit and consumer countries. Here lies a great challenge. The European energy market is the world's largest regional market and the largest energy importer. In practice, however, we do not yet leverage the strength and the size of the EU market in our common interest for all 27. This point brings me, Ladies and Gentlemen, to the Union's foreign relations. In this field as well, European Heads of State or Government have an important role to play: together defining strategic interests, deciding priorities and giving strategic guidance. The energy example, like others, makes clear that we could do more collectively to translate financial and economic clout into political influence.

That's why, upon my initiative, the September European Council was dedicated to our global strategic partnerships. All colleagues agreed that we have to strive for reciprocity and find mutual interests in dealings with global

partners. The EU has a certain number of cards which we can only play together, for instance in granting increased market access.

At the bilateral summits between the Union and key partners (at which Commission President Barroso and myself represent the Union) this approach already is starting to pay off. In October we established a strategic partnership with South Korea. In the summit with President Obama, on 20 November, we reconfirmed the importance of the Transatlantic relationship and opened new avenues of cooperation on the themes of growth, jobs and security. During the summit with President Medvedev, on 7 December, we reached an agreement on Russia's accession to the World Trade Organisation. It is an important step forward. Why? Because a modern Russia is a shared interest for all on the European continent. Building a true strategic partnership between the EU and Russia is a basic and obvious strategic interest for all EU countries, not least Russia's neighbours. Yet, historic experience, perceptions and misperceptions still have a strong influence on the EU-Russia relationship, on both sides.

Our main objective should be to promote Russia's integration into rules-based international economic structures and frameworks. It seems that a close relationship with the EU would give Russia the best chance of achieving good progress towards modernization. Modernisation is not just about the economy and infrastructure. Modernisation is also political. In the last few months we have made progress on the Partnership for Modernisation, on developing a common view on how to move forward toward an eventual visa-free travel regime, and most importantly (as I just mentioned) on Russia's accession to the WTO.

The European Union can only achieve this strategic objective if we play smart and work together. The Lisbon Treaty helps to build a longer-term relationship with our partners' political leaders. It increases trust. We also need to further strengthen the synergy between the national capitals and Brussels. The EU will not replace individual bilateral relationships with our strategic partners. In our foreign policy, the most important thing is not to speak 'with one voice', but to have common messages and a shared sense of direction. In this respect, recognizing the modernisation of Russia as a core interest for all 27 member states should be the pole star on our strategic compass.

A word on other neighbours. In the EU's eastern neighbourhood, six countries – two of which are Poland's neighbours – are grouped together under the Eastern Partnership. Its goal is to strengthen political and trade ties, and to promote human rights and the rule of law in these countries. (They are Ukraine, Belarus and Moldova, plus Armenia, Azerbaijan and Georgia.) Poland played an important role in establishing the partnership two years ago and moving it forward.

The recent fraud and violence during and after the elections in Belarus were a setback. Such events are not acceptable in today's Europe; the EU will not

let them pass unnoticed and will review the relationship with Belarus. Nevertheless, at the upcoming Eastern Partnership summit in Budapest next May, we hope to safeguard the political objectives and move the partnership forward. Poland can help to make this a success. It is clear: there is a lot of work to do. On the economy, both in the short-term and the long-term. And in defending our interests and values in the world. In the space of seven years, Poland has found its place in the European Union. I should like to congratulate successive Polish governments and the Polish people on that. We are looking forward to the contribution of your country during the Presidency later this year.

Since I have been talking about the importance of history in thinking about the European Union, I should like to address a final point. It seems that sometimes, in the heat of debate, the image of 'Brussels' is linked to the role of 'Moscow' in the Cold War. One should not accept this comparison. And the professors and students of this very University who fought in 1968, at the risk of exile or their life, to restore democracy and to bring their country back to its due place among free European nations, they also would no doubt disagree completely.

The European Union is the world's most evolved and subtlest project for building consensus amongst equal partners. It is the product of the shared will, confirmed day after day, to work together. The bloody battlefields of our history have been replaced by Brussels negotiating rooms. The Union's force of attraction accelerated the collapse of communism and the end of the Cold War. That is a victory. Europe is the best guarantee for peace. It was and is a work of peace. That's why I am so strongly in favour of a European perspective for the Western Balkans, the last remnant of the Cold War and the last place in Europe where war was waged. Europe has to be the fatherland of peace. We owe this to our history.

Sure enough, this successful history is not enough to build a common future. However, our 27 countries will keep working together. Their 27 governments are well aware that in today's globalised world they can no longer guarantee the welfare and security of their citizens on their own. Together, we defend something which is dear to us: a common civilization. Our countries are envied for their political stability, for their welfare and social-security systems, for the quality of European life. These are accomplishments to be proud of. Our achievements show our unique capacity to develop over time while securing our heritage. We still have that capacity.

So I say to the students of the next generation, we will face the great European challenges, in 2011 and beyond, together with optimism and with determination.

Thank you.



Joint Declaration of the Warsaw Eastern Partnership Summit

Warsaw, 29–30 September 2011

The Heads of State or Government and representatives of the Republic of Armenia, the Republic of Azerbaijan, Georgia, the Republic of Moldova and Ukraine, the representatives of the European Union and the Heads of State and Government and representatives of its Member States have met in Warsaw on 29–30 September 2011 to renew their commitment to the objectives and continued implementation of the Eastern Partnership. The President of the European Parliament and the representatives of the Committee of the Regions, the Economic and Social Committee, the European Investment Bank and the European Bank for Reconstruction and Development were also present at the Summit.

The Prague Summit in May 2009 launched a strategic and ambitious Eastern Partnership as a specific dimension of the European Neighbourhood Policy, to further support Eastern European countries' sustainable reform processes with a view to accelerating their political association and economic integration with the European Union. The agenda agreed in Prague contains the guiding principles of the Eastern Partnership, and the participants of the Warsaw Summit re-affirm their commitment to implement them fully.

The Warsaw Summit recognises that reinforced reform efforts serve a common interest, and need therefore to be applied in a spirit of shared ownership and mutual accountability. The Eastern Partnership is based on a community of values and principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. All countries participating in the Eastern Partnership are committed to these values through the relevant international instruments. Any European Union Member State is also committed to them through the Treaty on European Union. The participants of the Warsaw

Summit acknowledge the European aspirations and the European choice of some partners and their commitment to build deep and sustainable democracy. They highlighted the particular role for the Eastern Partnership to support those who seek an ever closer relationship with the EU.

Much has been achieved already. Political and economic reforms have been implemented in partner countries and relations between the EU and its Eastern European partners have deepened significantly. There is more trade and economic interaction between the EU and its Eastern European partners than ever before. In order to consolidate this trend, the EU and most of its partners are engaged in negotiations on Association Agreements which will also lead to Deep and Comprehensive Free Trade Areas as soon as the conditions are met. At the same time, they are engaged in progressing towards increased mobility across the continent. Dialogues on visa-free regimes have been launched with Ukraine and the Republic of Moldova. Visa-facilitation and readmission agreements are being implemented with Georgia and similar agreements will be sought with the Republic of Armenia, the Republic of Azerbaijan and the Republic of Belarus.

It is part of the essence of the Eastern Partnership to engage with all strands of societies, beyond governments. The Warsaw Summit welcomes the establishment of the Euronest Parliamentary Assembly, as well as the increased role of civil society, through the Civil Society Forum. It welcomes the creation of an Eastern Partnership Business Forum and of the Conference of Regional and Local Authorities of the Eastern Partnership.

Recognising and welcoming the progress made so far, the participants of the Warsaw Summit underlined that much remains to be done to reach the goals of the Eastern Partnership, including by adapting existing instruments of co-operation. In this regard, they welcomed the publication of the Communication of the High Representative and the Commission on the review of the European Neighbourhood Policy. Greater differentiation and mutual accountability will allow individual partners to better meet their aspirations, needs, and capacities. According to these principles, the pace of reforms will determine the intensity of the cooperation, and partners most engaged in reforms will benefit more from their relationship with the European Union, including closer political association, deeper gradual economic integration in the EU Internal Market and increased EU support. This entails support for civil society and social and economic development, as well as comprehensive institution-building, strengthening respect for human rights and the rule of law, greater market access, increased EIB financing in support of investments and greater facilitation of mobility in a well-managed and secure environment. The resolution of conflicts, building trust and good neighbourly relations are essential to economic and social development and cooperation in the region.

The participants agree that the Eastern Partnership must be significantly strengthened and commit to stepping up its implementation, with the objective of building a common area of democracy, prosperity, stability and increased interactions and exchanges. They also agree that the achievements and the progress of the Eastern Partnership must bring direct and clearly perceived benefits to the citizens of partner countries, and they commit to enhancing their efforts to make the Eastern Partnership visible to all.

The Heads of State or Government and representatives of the Republic of Armenia, the Republic of Azerbaijan, Georgia, the Republic of Moldova and Ukraine, the representatives of the European Union and the Heads of State or Government and representatives of its Member States, are committed to the success and the development of the Eastern Partnership, and have therefore agreed to the following:

**A deeper bilateral engagement:
Political association, Socio-Economic integration and mobility**

1. The Eastern Partnership aims to create the necessary conditions to accelerate political association and further economic integration between the European Union and interested partner countries, recognising the economic benefits of enhancing trade in goods and services, the potential for increased investment flows and the importance of progressive economic integration with the EU Internal Market. The Eastern Partnership will seek to further support political and socio-economic reforms in the partner countries, facilitating comprehensive approximation towards the European Union, leading progressively to economic integration in the EU Internal Market, and therefore to the creation of an economic area between the EU and partner countries.
2. Progressive approximation with EU rules and practices require a high degree of commitment from partner countries to complex and broad-ranging reforms, underpinned by strong institutional capacity. This will necessitate sustained commitment and support by the EU to help partner countries engaged in undertaking challenging reforms, according to the principle of mutual accountability and differentiation.
3. The Association Agreements with comprehensive reform agendas and, where appropriate, with Deep and Comprehensive Free Trade Areas (DCFTAs) as an integral part, are the cornerstones of relations under the Eastern Partnership. Productive negotiations have taken place with Ukraine. In this context, the participants of the Warsaw Summit look forward to the possible finalisation of negotiations by the time of the EU-

Ukraine Summit in December 2011. Good progress has been made in the Association Agreement negotiations with the Republic of Moldova, and significant progress were made in the negotiations with the Republic of Armenia, the Republic of Azerbaijan, and Georgia. As far as the DCFTA part of Association Agreements with Georgia and the Republic of Moldova are concerned, it is envisaged that such negotiations could start by the end of this year, provided sufficient progress has been made in fulfilling a number of remaining key recommendations. Building on the substantial work accomplished, Armenia is pursuing its efforts to become ready for DCFTA negotiations as soon as possible.

4. In order to facilitate the implementation of Association Agreements, Eastern Partnership Association Agendas will progressively be established. A limited number of priority areas for cooperation will be jointly identified and accompanied by measurable benchmarks. Monitoring of progress and assistance to partner countries will focus more particularly on these benchmarks and priorities.
5. The participants of the Warsaw Summit welcome the launch of an Eastern Partnership Business Forum on 30 September in Sopot and the support it can provide to accompany in particular negotiations on Association Agreements and DCFTAs and establish a competitive and inclusive market economy. In this regard, the promotion of investment and a vibrant and innovative SME sector is of significant importance.
6. The participants of the Warsaw Summit welcome the Macro-Financial Assistance provided by the EU to some partner countries during the recent economic crisis. The EU macro-financial assistance instrument may also be mobilised in the future to assist partner countries to address short-term balance-of-payments difficulties when the pre-conditions are met and when the programmes are linked to a meaningful reform agenda.
7. The participants of the Warsaw Summit agree to strengthen cooperation in areas related to freedom, security and justice, and coordination between the relevant frameworks, both at the bilateral and regional levels. Further cooperation and coordination will include in particular the prevention of and the fight against illegal migration, the promotion of secure and well managed migration and mobility and integrated border management, the fight against drugs, organised crime, trafficking in human beings and money-laundering, the fight against terrorism as well as the fight against corruption and further work towards a fully independent judiciary. Convening meetings at ministerial level will help to ensure appropriate political guidance and coordination. Moreover, bringing the Söderköping Process under the aegis of the Eastern Partnership multilateral track will allow enhancing the dialogue and cooperation on the broader migration

agenda. The participants of the Warsaw Summit encourage the cooperation of the EU specialised agencies active in the areas related to freedom, security and justice with interested partner countries.

8. It remains a core objective of the Eastern Partnership to enhance mobility of citizens in a secure and well-managed environment. This objective entails visa facilitation and readmission agreements as a first step. Once these agreements are concluded and effectively implemented, the EU and the partner countries will take gradual steps towards visa-free regimes in due course on a case-by-case basis provided that conditions for well-managed and secure mobility set out in two-phase action plans for visa liberalisation are in place. In this context, the participants of the Warsaw Summit take stock of progress made by the Republic of Moldova and Ukraine in the implementation of their respective Action Plans on visa liberalisation. These Plans could serve as models for other partner countries bearing in mind the specificity and progress of each country.
9. The participants of the Warsaw Summit also welcome the effective implementation to date of the visa facilitation and readmission agreements with Georgia. They look forward to the launch of negotiations of such agreements with the Republic of Belarus for the benefit of the population at large, the Republic of Armenia and the Republic of Azerbaijan. They underline the opportunities opened by the EU Visa Code for improving visa delivery for *bona fide* travellers, in particular for students, researchers and businesspeople. They welcome the establishment of Mobility Partnerships, in line with the global approach to migration, with the Republic of Moldova and Georgia and good progress made by the Republic of Armenia in this respect, and look forward to establishing similar frameworks with other partners.
10. The participants of the Warsaw Summit welcome the launch of Comprehensive Institution Building programmes to support the implementation of the future Association Agreements including DCFTAs as well as to support the implementation of the action plans towards visa liberalisation. They also welcome Pilot Regional Development Programmes which will assist partners in addressing economic, social and regional imbalances.

Participation in EU programmes and Agencies and enhanced sector cooperation

1. The participants of the Warsaw Summit agree to facilitate, including through continued co-financing, participation by partner countries in EU programmes and agencies. They also look forward to the signature of

a Memorandum of Understanding on the association of the Republic of Moldova to the 7th Framework Programme for Research and Technological Development. The participants of the Warsaw Summit welcome the entry into force of a protocol enabling the participation of the Republic of Moldova in EU programmes and the recent signature by Ukraine of a similar protocol and look forward to other partner countries' concluding such protocols. They also welcome the increased interaction of partner countries in EU agencies in various areas, including aviation safety, food safety and the fight against drugs. They agree to establish a priority list to facilitate participation of partner countries in programmes and agencies.

2. The participants of the Warsaw Summit welcome the fact that since the launch of the Eastern Partnership, sector cooperation has increased in a wide range of sectors. They call for enhancing sector cooperation and dialogue including through ministerial or senior officials meetings, as appropriate.
3. Recalling their energy interdependence, the participants of the Warsaw Summit agree to strengthen their energy partnership. They welcome the existing bilateral and multilateral cooperation on energy. They will promote an inclusive and open policy on energy security, transportation and supply. The participants of the Warsaw Summit agree to work further towards integrating their energy markets, including by closer involvement of the interested Eastern Partnership countries in the Energy Community Treaty. They welcome the recent membership of the Republic of Moldova and Ukraine in the Energy Community Treaty, and encourage other partner countries to join it. The participants of the Warsaw Summit agree to further strengthen long term energy security, including through cooperation on stable and secure energy supply and transit, nuclear safety, competitive energy markets, and through enhancement of physical infrastructure according to market principles, to enhance energy efficiency and the use of renewable energy sources and welcome the launch of the Eastern Europe Energy Efficiency and Environment Partnership with Ukraine and agree to work toward extending its membership to other interested partners. With regard to the development of strategically important infrastructure to ensure the diversification of the routes of the supply of energy to the European market from the Caspian Sea, the EU and partners concerned take note of the concrete steps taken towards the realisation of the Southern Corridor. Underlining the importance of nuclear safety, also as concerns the possible construction of new nuclear plants, they welcome the increased cooperation in this area and encourage transparency, accessibility of information and full compliance with international nuclear

- safety and environmental agreements, and take note of the recent endorsement of the Declaration on stress tests.
4. In the transport sector, the infrastructure network of EU and partner countries should be linked more tightly in order to facilitate exchanges of people and goods. This can be achieved through closer market integration and improved infrastructure links. The participants of the Warsaw Summit further agree to enhance cooperation on transport, in particular in the framework of the Eastern Partnership multilateral track. The participants of the Warsaw Summit take note of the good progress being made in developing a wider European Common Aviation Area. They welcome the signature of the Common Aviation Area Agreement between the EU and Georgia and the recent start of negotiations with the Republic of Moldova and look forward to finalising negotiations with Ukraine. They encourage other interested partners to negotiate similar agreements.
 5. The participants of the Warsaw Summit recognise that progress towards a Green Economy which is environmentally sustainable and efficiently uses resource and energy is a key shared objective. They remain committed to comply with international environmental law standards. They agree to take urgent action to address climate change and combat environmental degradation, including caused by obsolete pesticides and other hazardous chemicals. They also agree to promote climate change dialogue and sharing of best practices, which should help implement international climate agreements and enable partner countries to actively use fast-start and long-term support to reach their climate policy aims. They welcome the on-going development of a Shared Environment Information System.
 6. The participants of the Warsaw Summit agree to develop cooperation on agriculture and rural development including in the framework of the European Neighbourhood Programme for Agriculture and Rural Development (ENPARD). They welcome the conclusion of the Agreement on protection of geographical indications of agricultural products and foodstuff with Georgia, they look forward to the signature of a similar agreement with the Republic of Moldova, and encourage other partners to conclude such agreements.
 7. In the light of the increasing role of information and communication technologies in the democratization of societies, the participants of the Warsaw Summit agree to enhance the liberalisation of electronic communications and welcome the work toward a network of Eastern Partnership electronic regulators.
 8. Co-operation and policy dialogue under the Eastern Partnership on education, research, youth and culture should be further enhanced, including through the launch of an Eastern Partnership Youth Programme, the con-

tinuation of the Eastern Partnership Culture Programme and expanding participation in relevant programmes, including the successor of the Lifelong Learning, Culture and Youth in Action programmes. **A Common Knowledge and Innovation Space linked to Smart Growth** and the EU innovation agenda will be established in order to give the policy more impact and visibility.

Strengthening of multilateral co-operation

1. The participants of the Warsaw Summit welcome the progress made in the multilateral track of the Eastern Partnership. The multilateral Platforms will further help advance partner countries' legislative and regulatory approximation to the EU *acquis* by allowing exchanges of experiences and best practices. The work programme of the platforms and panels will be reviewed to allow flexibility in responding to the needs of partner countries and to take into account new areas of cooperation. The participants of the Warsaw Summit further agree to focus on a swift implementation of the five Eastern Partnership Flagship Initiatives which support concrete cooperation projects between the EU and partner countries. They welcome and look forward to complementary and reinforcing national programmes, such as the Estonian Centre of Eastern Partnership focused on administrative capacity, as well as the Eastern Partnership Academy of Public Administration in Warsaw.
2. The participants of the Warsaw Summit acknowledge the significance of multilateral cooperation which is being enhanced through the Eastern Partnership and stress the importance to ensure coherence between various relevant regional initiatives and networks. They recall that the Eastern Partnership could help to develop closer ties among the partner countries themselves.
3. The participants of the Warsaw Summit welcome the establishment of the Euronest Parliamentary Assembly which will play an important role in supporting progress towards the realisation of the objectives of the Eastern Partnership. They welcome the launch of a yearly Conference of Local and Regional Authorities of the Eastern Partnership held under the auspices of the Committee of the Regions. They call upon the Committee of the Regions to work with the local and regional authorities from Eastern partners to establish a permanent institutional framework of cooperation.
4. The participants of the Warsaw Summit underline the important role civil society plays in pursuing the goals of the Eastern Partnership. They com-

mit themselves to fully support the work of civil society and promote the development of civil society's role in support of democracy, sustainable socio-economic development, good governance and the rule of law. The Eastern Partnership Civil Society Forum and its National Platforms are essential to promote democratic values on which the Eastern Partnership is based. The Forum's involvement in the implementation of the Eastern Partnership should be strengthened, including through reinforced capacity and enhanced participation in the Eastern Partnership multilateral track. Targeted support has been, and will strongly continue to be, provided to civil society in partner countries in full coherence with existing instruments and structures, and possibly through the establishment of a Civil Society Facility and a European Endowment for Democracy.

5. The participants of the Warsaw Summit welcome the EIB and EBRD financial contributions to the Eastern Partnership, including through the EIB Eastern Partners Facility. They also welcome the establishment of the Eastern Partnership SME Facility to support the development of the SME sector and the contributions made through the Neighbourhood Investment Facility to support infrastructure projects which help connect the EU with Eastern partners, implemented in cooperation with European Financial Institutions. The European Union has allocated considerable financial resources of up to EUR 1900 million in the period 2010–2013 in order to advance the implementation of the Eastern Partnership in the framework of bilateral and regional programmes. Risk capital and guarantee schemes are important financing instruments to promote economic development, in particular to support SME which are key drivers for job creation and innovation. Building on the success of previous experiences both in the Mediterranean region and in the Eastern partner countries, the participants of the Warsaw Summit stress the need to explore possible options to further support risk capital operations in the Eastern Neighbourhood. As stipulated in the conclusions of the EU Foreign Affairs Council of the 20 June 2011, the allocation of additional resources from the European Union will be decided for the period 2012–2013 to support the implementation of the European Neighbourhood Review and, in this framework, the follow-up of the Warsaw Summit, for the benefit of partners committed to reforms. The participants of the Warsaw Summit look forward to the European Commission's proposal to establish under the next multi-annual financial framework a new European Neighbourhood Instrument which will, inter alia, reflect the new level of ambition of the European Neighbourhood Policy.
6. The participants of the Warsaw Summit take note of the cooperation with IFIs and third countries interested in donor coordination and more gener-

ally in the development of the Eastern Partnership, including through the informal Information and Coordination Group, without prejudice to the principles of cooperation with third states, as defined in the Prague Declaration.

7. The participants of the Warsaw Summit agree to develop political co-operation and dialogue between the EU and partner countries, including as regards governance reforms, joint efforts to enhance regional security and resolve conflicts, as well as relevant global and regional foreign and security issues of common interest.
8. The participants of the Warsaw Summit reaffirm that the Eastern Partnership should further promote stability and multilateral confidence-building and that conflicts impede cooperation efforts. They therefore emphasise the need for their earliest peaceful settlement on the basis of the principles and norms of international law and the decisions and documents approved in this framework. They welcome the EU's strengthened role in conflict resolution and confidence building efforts in the framework or in support of existing agreed formats and processes, including through field presence when appropriate. They also welcome the appointment of the new EU Special Representative for the South Caucasus and the crisis in Georgia. They stress the importance of the presence on the ground of the EU Monitoring Mission in Georgia. They also welcome the recent decision to resume official negotiations in the "5+2" format aiming at a viable and comprehensive political settlement of the Transnistrian conflict.
9. Stronger dialogue and cooperation on international security issues will be sought, including with a view to partners' possible participation in civilian and military EU-led operations. Cooperation between the EU and partner countries, as well as regional cooperation projects and EU assistance programmes, will place greater emphasis on peaceful conflict resolution and confidence building measures.
10. The participants of the Warsaw Summit emphasize the need to promote and disseminate the key principles and activities of the Eastern Partnership among the public, and agree to take additional action to increase its visibility including by using the Eastern Partnership label widely to identify relations and activities between the EU and the partner countries.
11. The participants of the Warsaw Summit welcome the intention of the High Representative and the European Commission to propose by the end of this year a road map, in consultation with partners, that would list the objectives, instruments and actions and guide and monitor their implementation until the next Summit in the second half of 2013.

**Declaration on the Situation in Belarus
Adopted on the Occasion
of the Eastern Partnership Summit in Warsaw,
30 September 2011**

The Heads of State and Government and representatives of the EU and its member states express their deep concern at the deteriorating human rights, democracy and rule of law situation in Belarus, deplore the continuing deterioration of media freedom in Belarus and call for the immediate release and rehabilitation of all political prisoners, an end to the repression of civil society and media and the start of a political dialogue with the opposition. The EU is also deeply concerned about reports that prisoners are denied access to their families and lawyers as well as to medical care while being put under psychological and physical pressure. The European Union has consistently offered to deepen its relations with Belarus and, while reaffirming its policy of critical engagement, reiterates that such a deepening is conditional on progress towards respect by the Belarusian authorities for democracy, the rule of law and human rights.



**Speech by Mr Radosław Sikorski,
Foreign Minister of Poland,
'Poland and the Future of the European Union'
Berlin, 28 November 2011**

Mr Presidents, Minister – dear Guido, Ladies and Gentlemen,

Let me start with a story. 20 years ago, in 1991, I was a reporter, visiting what was then the Federal Republic of Yugoslavia. I was interviewing the chairman of the Republican Bank of Croatia when he received a phone call with an obscure piece of news. Namely, that the parliament of another Yugoslav republic, Serbia, had just voted to print unauthorized amounts of dinars, the common currency. Putting down the phone the banker said: *'This is the end of Yugoslavia'*. He was right. Yugoslavia collapsed. So did the 'Dinar zone'. We know what followed. Issues of money can be issues of war and peace, the life and death of federations.

Today Croatia, Serbia and FYROM each have their own currency. Montenegro and Kosovo are not in the Euro zone but simply use the Euro. Bosnia and Herzegovina even has the 'Convertible Mark', pegged to the Euro. A striking story. Not of European integration. Of European disintegration. Disintegration with appalling human cost. Only now is the region slowly moving back to the European mainstream.

The fate of Yugoslavia reminds us that money, as well as being a technical device, a 'means of exchange', symbolises unity – or disunity. Why is this? Money exists because communities exist. A community in which people live and trade – they exchange freely – creates value. Their money symbolises that value. This moral significance of money intrigued Immanuel Kant, who wrote that the entire practice of lending money presupposed at least the honest intention to repay. If this condition were universally ignored, the very idea of lending and sharing wealth would be undermined. For Kant, honesty and

responsibility were categorical imperatives: the foundation of any moral order. For the European Union, likewise, these are the cornerstones. I would point to the two fundamental values: Responsibility and Solidarity. Our responsibility for decisions and processes. And Solidarity when it comes to bearing the burdens.

Today, as the first Polish Presidency is drawing to a close, I will tackle basic questions: How did we get into this crisis? Where do we go from here? How to get there? What does Poland bring? What do we ask of Germany?

**First question:
how has the Euro zone got into its current difficulties?**

Let me first say what this crisis is not about. It was not caused – as some have suggested – by enlargement. Enlargement has created growth and wealth all over Europe. The EU15 exports to the EU10 countries rose almost twofold in the last ten years. It's even more striking if you break it down by countries. Britain's export to the 10 countries that joined after 2004 rose from €2.2 bln in 1993 to €10 bln last year; France's, from €2.7 bln to €16 bln, Germany's, wait for this – from €15bln to 95 billion Euros. The total volume of trade between EU15 and EU10 amounted to €222 bln last year, up from €51 bln in 1995. A tidy sum. I guess it sustains a job or two in Old Europe. So, enlargement – far from causing the crisis, has arguably delayed the economic turmoil. Thanks to the advantages of trading in an enlarged market, West European welfare states have been forced to face reality only now.

If the upheaval is not about enlargement, then perhaps it is a currency crisis? Not exactly. The Euro is doing fine versus the dollar and other currencies. It is of course partly about debt, the need to deleverage our economies from the crazy heights caused by government overspending, accounting chicanery and irresponsible financial engineering. And the deleveraging is occurring beyond the Euro zone: look at the UK with its debt of 80 per cent of GDP and the US, with 100 per cent. But if it were only a question of debt, you would expect ratings and spreads to be affecting countries in proportion to their indebtedness. But, very strikingly, this is not the case. Some countries, such as the UK and Japan, with high debt in proportion to GDP, pay low premiums. Others, with lower debt – like Spain, pay high ones.

The inevitable conclusion is that this crisis is not only about debt, but primarily about confidence and, more precisely, credibility. About investor perception where their funds are safe. Let us be honest with ourselves and admit that markets have every right to doubt the credibility of the Euro zone. After

all, the Stability and Growth Pack has been broken 60 times!¹ And not just by smaller countries in difficulty, but by its founders in the very core of the Euro zone. If credibility is the problem, then restoring credibility is the answer. Institutions, procedures, sanctions that will convince investors that countries will be capable of living within their means. Hence, that the bonds they buy will be repaid, preferably with honest interest.

Second question: where do we want to go?

We have two fundamental options. Before I say what they are, let me say that Euro zone's failings are not the exception but, rather, are typical of the way we have constructed the EU. We have a Europe with a dominant currency but no single Treasury to enforce it. We have joint borders without a common migration policy. We are supposed to have a common foreign policy, but it is divorced from real instruments of power and often weakened by member states cutting their own deals. I could go on.

Most of our institutions and procedures depend on the goodwill and sense of propriety of member states. It works tolerably well when the going is good. But then a wave of migrants shows up on the EU's border, or a civil war blows up in our neighborhood, or markets panic. And then, what do we habitually do? We run for cover in the familiar framework of the nation state. The Euro zone crisis is a more dramatic manifestation of the European malaise because its founders created a system in which each of its members has the capacity to bring it down, with appalling costs to themselves and the entire neighborhood.

The break up would be a crisis of apocalyptic proportions beyond our financial system. Once the logic of 'each man for himself' takes hold, can we really trust everyone to act communitarian and resist the temptation to settle scores in other areas, such as trade? Would you really bet the house on the proposition that if the Euro zone breaks up, the single market, the cornerstone of the European Union, will definitely survive? After all, messy divorces are more frequent than amicable ones. I have heard of a case in California in which a couple spent \$100,000 disputing custody of the family cat.

If we are not willing to risk a partial dismantling of the EU, then the choice becomes as stark as can be in the lives of federations: deeper integration, or collapse. We are not unique in facing the fundamental question of the future of our federation over the issue of debt. Two successful federations tread this way

¹ http://www.monstersandcritics.com/news/europe/news/article_1675056.php/LEAD-Merkel-affirms-demand-for-financial-transaction-tax

before us. Americans passed the point of no return in creating the United States when the federal government assumed responsibility for debts that states incurred in the War of Independence. Solvent Virginia bargained with more indebted Massachusetts, which is why the capital was fixed on the banks of the Potomac. Alexander Hamilton fathered a compromise under which everybody's debts were jointly guaranteed and a revenue stream created to service them. Switzerland also became a real federation when rules were established for incurring debt and transfers between her richer and poorer cantons.

So, we also have to decide whether we want to become a proper federation, or not. If renationalization or collapse is unacceptable, then only one way remains: making Europe, as Europe, governable at last, and hence – in due course – more credible. Politics is often the balancing between the urgent and the important. What's urgent is that we save the Euro zone. What's important is that in so doing we preserve Europe as a democracy that respects the autonomy of its member states. This new European deal will need to balance Responsibility, Solidarity and Democracy as the cornerstones of our political union.

Question three: how to get there?

The so-called 'six pack' which the Polish Presidency helped to negotiate was a good beginning, a bundle of five regulations and one directive that bring more transparency and discipline to the finances of member states. In the process of drawing up national budgets, finance ministers of member states will now have to show their books to their peers and to the Commission very early, even before national parliaments. The Commission will recommend corrective action when a member state's macroeconomic position shows imbalances. Members of the Euro zone who break the Stability and Growth Pact will be subject to sanctions that are almost impossible to block by political pressure. Moreover, the 'six pack' confirms that rules may be introduced not as directives – which require enactment into national laws – but as regulations, which apply universally and instantly.

More ambitious measures have been proposed. In order to strengthen economic convergence the Commission and the Euro group would get the right to scrutinize in advance all major economic reform plans with potential spillover effect in the euro area, impose sanctions on countries failing to effect policy recommendations, and permission for groups of countries to synchronize their labour, pensions and social policies.

Financial discipline would be strengthened by giving access to rescue funds only to members abiding by macro fiscal rules, by making sanctions automatic and giving the Commission, the Council and the Court of Justice powers to en-

force the 3 per cent ceiling on deficit and 60 per cent ceiling on debt. Countries in excess deficit procedure would have to present their national budgets for approval by the Commission. The Commission would get powers to intervene in the policies of countries that could not fulfill their obligations. Countries persistently violating rules would have their voting rights suspended.

Provided the European Council sets tough new rules in stone, the European Central Bank should become a proper central bank, a lender of last resort that underpins the credibility to the entire Euro zone. The ECB needs to act soon, in anticipation of irreversible legal enactments. This would avert disaster but more is needed. Poland has all along supported the idea of a new treaty that would make the EU more effective.

The European Commission needs to be stronger. If it is to play the role of an economic supervisor we need commissioners to be genuine leaders, with authority, personality – dare I say charisma – to be true representatives of common European interests. To be more effective, the Commission should be smaller. Any one of us who has chaired a meeting knows that they are most productive when up to a dozen people participate. The EC now has 27 members. Member States should rotate to have their commissioner.

The more power we give to European institutions, the more democratic legitimacy they need to have. The draconian powers to supervise national budgets should be wielded only by agreement of the European Parliament. The Parliament needs to stand up for its role and tasks. Euro-sceptics are right when they say that Europe will only work if it becomes a polity, a community in which people place a part of their identity and loyalty. ‘Italy is made, we still have to make Italians’, Massimo D’Azeglio said in the first meeting of the parliament of the newly united Italian kingdom in 19th century. For us in the EU it’s easier: we have a united Europe. We have Europeans. What we need to do is to give political expression to the European public opinion. To help it along we could elect some seats in the European Parliament from a pan-European list of candidates. We need more ‘politische Bildung’ for citizens and political elite. The parliament should have its seat in a single location.

We could also combine the posts of the President of the European Council and that of the European Commission. Chancellor Angela Merkel has even suggested that he or she should be elected directly by the European demos. What is crucial is that we maintain coherence between the Euro area and the EU as a whole. Community institutions must remain central. As the Presidency, we are guardians of our unity. And the unity must not be hypothetical. In this case: it’s not enough to say that countries may participate once they join the Euro zone. Instead of organising separate Euro summits or exclusive meetings of finance ministers we can continue the practice from other EU fora where all may attend, but only members vote.

The more power and legitimacy we give to federal institutions, the more secure member states should feel that certain prerogatives, everything to do with national identity, culture, religion, lifestyle, public morals, and rates of income, corporate and VAT taxes, should forever remain in the purview of states. Our unity can survive different working hours or different family law in different countries.

Which brings me to the issue of whether an important member, Britain, can support reform. You have given the Union its common language. The Single Market was largely your brilliant idea. A British commissioner runs our diplomacy. You could lead Europe on defence. You are an indispensable link across the Atlantic. On the other hand, Euro zone's collapse would hugely harm your economy. Also, your total sovereign, corporate and household debt exceeds 400 per cent of GDP. Are you sure markets will always favour you? We would prefer you in, but if you can't join, please allow us to forge ahead. And please start explaining to your people that European decisions are not Brussels' diktats but results of agreements in which you freely participate.

Fourth question: what does Poland bring?

Today Poland is not the source of problems but a source of European solutions. We now have both the capacity, and the will, to contribute. We bring a recent experience of a successful transformation from dictatorship to democracy and from an economic basket case to an increasingly prosperous market economy. We were helped by friends and allies: United States, UK, France and, above all, Germany. We appreciate the strong and generous support – the solidarity – which Germany has extended to us over the last two decades. Ich danke Ihnen als Politiker und als Pole. I hope you appreciate that it's been a good investment. In 2010 German exports to Poland have exceeded 1990 levels nine fold, and they are growing despite the crisis.² Germany's trade with Poland is bigger than with the Russian Federation, although you would not always know it from the German political discourse.

From last year Poland is ranked as a highly developed country in the Human Development Index. Between 2007 and 2011 we went up 10 positions in the Global Competitiveness Index.³ In the same period we improved our standing by 20 positions in the Corruption perception Index⁴, ahead of some

² Source: Central Statistical Office of Poland.

³ Source: World Economic Forum: http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf

⁴ Source: Transparency International: http://www.transparency.org/policy_research/surveys_indices/cpi/2010/results

Eurozone members. In the last four years, the accumulated GDP growth in Poland amounted to 15,4 per cent. The second result in the EU, with 8 per cent? Yes, a member of the Euro zone – Slovakia. The EU average is minus 0,4 per cent. To those who would like to divide Europe, I say: how about a natural division into growth-Europe and non-growth Europe? But be forewarned. Their shapes would not conform to stereotypes.

It did not happen by itself. Successive Polish government took painful decisions and the Polish people made big sacrifices. Privatisation, pension reform, opening our country to globalisation produced losers as well as winners. We were one of the first countries to introduce a public debt anchor in our constitution. And we are not resting on our laurels. Presenting his new government to parliament a fortnight ago, Prime Minister Donald Tusk said that: ‘to go safely through the year 2012, to improve our of financial security for years and decades to come, we shall have to take measures that call for sacrifice and understanding of everyone, without exception’. Next year alone we intend to cut our budget deficit to 3 per cent of GDP and the overall debt to 52 per cent of GDP. By 2015 the deficit will be brought down to 1 per cent of GDP and public debt to 47 per cent. The retirement age will be lifted to 67 years for both genders. Pension privileges for soldiers, policemen and priests will be cut. The disability pension contribution will increase by 2 per cent. Child-benefits will be taken from the rich and given to the poor.

By the end of this parliament, Poland will fulfill the criteria of membership in the Euro zone. That’s because we want the Euro zone to survive and flourish. And we plan to be in it. By approving our Accession Treaty, the people of Poland have given us the authority to join as soon as the Euro zone and we are ready. Poland also brings Europe a willingness to make compromises – even to pool sovereignty with others – in return for a fair role in a stronger Europe.

Fifth question: What does Poland ask of Germany?

We ask, first of all, that Germany admits that she is the biggest beneficiary of the current arrangements and therefore that she has the biggest obligation to make them sustainable. Second, as you know best, you are not an innocent victim of others’ profligacy. You, who should have known better, have also broken the Growth and Stability Pact and your banks also recklessly bought risky bonds. Third, because investors have been selling the bonds of exposed countries and flying to safety, your borrowing costs have been lower than they would have been in normal times, so you may be benefitting in the short term, but... Fourth, that if your neighbours’ economies stall or implode, you will suf-

fer greatly, too. Fifth, that despite your understandable aversion to inflation, you appreciate that the danger of collapse is now a much bigger threat. Sixth, that because of your size and your history you have a special responsibility to preserve peace and democracy on the continent. Jurgen Habermas has wisely said that 'If the European project fails, then there is the question of how long it will take to reach the *status quo* again. Remember the German Revolution of 1848: When it failed, it took us 100 years to regain the same level of democracy as before'.

What, as Poland's foreign minister, do I regard as the biggest threat to the security and prosperity of Poland today, on 28th November 2011? It's not terrorism, it's not the Taliban, and it's certainly not German tanks. It's not even Russian missiles which President Medvedev has just threatened to deploy on the EU's border. The biggest threat to the security and prosperity of Poland would be the collapse of the Euro zone. And I demand of Germany that, for your own sake and for ours, you help it survive and prosper. You know full well that nobody else can do it. I will probably be first Polish foreign minister in history to say so, but here it is: I fear German power less than I am beginning to fear German inactivity. You have become Europe's indispensable nation. You may not fail to lead. Not dominate, but to lead in reform. Provided you include us in decision-making, Poland will support you.

Dangers of 'just after time' reform

I started with a story of one experiment in political union, communist Yugoslavia. Let me end with another: Europe's least-known federation, the common state between Poland and the Grand Duchy of Lithuania which began in 1385 and lasted for over four centuries. Which is to say, longer, so far, than federations such as the United States, United Kingdom or Bundesrepublik Deutschland, to say nothing of the EU.

It was a Commonwealth which, like the EU, raised the standards of its time. It had a joint parliament and an elected head of state. Its political nation – those entitled to vote – comprised 10 per cent of the population – the height of inclusiveness at the time. Religiously tolerant, it saved its people from the horrors of the Thirty Years' War. Cities were founded on the Magdeburg law, many of them – like my home city of Bydgoszcz – by German settlers. Jews, Armenians and dissenters of all kinds from all over Europe voted with their feet to seek their fortunes there. Liberty went hand in hand with military prowess. At Grunwald in 1410 its troops crushed the Teutonic Knights, whose heraldry lives on in the symbols of the German military. In 1683, at the gates of Vienna, we prevented the Ottoman Empire from uniting Europe under the banner of Islam.

And then, at the turn of 17th and 18th centuries, something changed. Elected kings, separate armies and currencies – couldn't compete with unified, mercantilist, authoritarian nation states. The Commonwealth's most democratic feature – the deputy of a single province could block legislation – became its biggest vulnerability. The principle of unanimity – admirable in a federal state – proved open to irresponsibility and corruption.

Poland eventually reformed itself. Our 3rd May Constitution of 1791 abolished unanimity, unified the state and created a permanent government. But reform came too late. We lost the war to defend the Constitution and in 1795 Poland was partitioned for over a century. Moral of the story? When the world is shifting and new competitors arise, standing still is not sufficient. Institutions and procedures that have worked in the past are not enough. Incremental change is not enough. You have to adapt fast enough even to retain your position. I believe we have the duty to save our great union from the fate of Yugoslavia, or the old Polish Commonwealth.

Conclusion

There is nothing inevitable about our decline. Provided we overcome our current malaise, we have sources of excellence and of strength that are the envy of the world. We are not only by far the world's biggest economy but the largest area of peace, democracy and human rights. Peoples in our neighborhood – both East and South – look to us for inspiration. If we get our act together we can become a proper superpower. In an equal partnership with the United States, we can preserve the power, prosperity and leadership of the West. But we are standing on the edge of a precipice. This is the scariest moment of my ministerial life but therefore also the most sublime. Future generations will judge us by what we do, or fail to do. Whether we lay the foundations for decades of greatness, or shirk our responsibility and acquiesce in decline. As a Pole and a European, here in Berlin, I say: the time to act is now.



**Proposal for the Amendment of the Polish Constitution
in view of Poland's Membership in the EU
– the President's Proposal¹**

(Draft)

**ACT
of ... 2010
amending the Constitution of the Republic of Poland**

Article 1

The following amendments shall be introduced to the Constitution of the Republic of Poland of 2 April 1997 (Dz.U. – Journal of Laws No. 78, Item 483, of 2001 No. 28, Item 319, of 2006 No. 200, Item 1471 and of 2009 No. 114, Item 946):

- 1) Article 90 shall be repealed;
- 2) in Article 103, Section 1, the words ‘a member of the Monetary Policy Council’ shall be deleted;
- 3) in Article 144, Section 3, Point 25 shall be deleted;
- 4) in Article 198, Section 1, the words ‘the President of the National Bank of Poland’ shall be deleted;
- 5) in Article 203, Section 1, the words ‘the National Bank of Poland’ shall be deleted;
- 6) in Article 204, Section 1, Point 1 shall read as follows:
‘1) an analysis of the implementation of the State Budget’;;
- 7) Article 227 shall read:

¹ Translation by M. Wolsan. The present draft of the law amending the Constitution of Poland as proposed by the President of the Republic of Poland is currently in the pipeline and after the 2nd reading in the parliamentary commission.

- ‘Article 227. 1. The central bank of the State shall be the National Bank of Poland, which belongs to the European System of Central Banks. The National Bank of Poland shall ensure the stability of prices and perform the tasks and competences specified in the Treaties constituting the basis of the European Union and by statute. In its activities, the National Bank of Poland shall be independent from other State bodies.
2. The Supreme Audit Office shall monitor the activities of the National Bank of Poland in the context of their legality, thrift, appropriateness and diligence so as this does not concern the execution of tasks and competences specified in the Treaties constituting the basis of the European Union.
3. The organs of the National Bank of Poland shall be: the President of the National Bank of Poland, as well as the Board of the National Bank of Poland.
4. The Sejm, on request of the President of the Republic, shall appoint the President of the National Bank of Poland for a period of 6 years.
5. The President of the National Bank of Poland shall not belong to a political party, a trade union or perform public activities incompatible with the dignity of his office.
6. The organization and principles of activity of the National Bank of Poland, as well as detailed principles for the appointment and dismissal of its organs, shall be specified by statute’;

8) Chapter Xa shall be added after Chapter X, reading as follows:

‘Chapter Xa

Membership of the Republic of Poland in the European Union

Article 227a. The Republic of Poland is a member of the European Union which respects the sovereignty and national identity of its Member States, the rules of subsidiarity, democracy, the rule of law, the innate and inalienable human dignity, freedom and equality, as well as ensures the protection of human rights and freedoms comparable with the protection of these rights and freedoms in the Constitution.

Article 227b. The Republic of Poland may pass the competences of state authorities in certain matters to the European Union.

Article 227c. 1. The ratification by the Republic of Poland of the international agreement constituting the basis for passing the competences referred to in Article 227b, shall require previous consent expressed either by statute or by way of a national referendum.

2. The resolution on the choice of the form of expressing consent to the ratification of the international agreement referred to in Section 1 shall be made by the Sejm by an absolute majority of votes in the presence of at least the half of the statutory number of members of parliament.
3. The statute expressing the consent to the ratification of the international agreement referred to in Section 1 shall be passed by the Sejm by a two thirds majority in the presence of at least the half of the statutory number of members of parliament, as well as the Senate by an absolute majority in the presence of at least the half of the statutory number of senators.
4. The consent to the ratification shall be given, if in the national referendum the majority of voters supported it.
5. The validity of the national referendum shall be pronounced by the Supreme Court.
6. The rules and mode of conducting the referendum shall be specified by statute.

Article 227d. 1. The provisions of Article 227c shall also apply in the case the provisions of the Treaties constituting the basis of the European Union should be changed in a manner other than by an international agreement, as long as this change does involve the passing of competences to the European Union. The rules of procedure shall be specified by statute.

2. The rules and form of expressing the consent by the Republic of Poland to an amendment to the Treaties constituting the basis of the European Union other than specified in Section 1, as well as the procedure in these matters shall be specified by statute.

Article 227e. A citizen of the European Union shall enjoy in the territory of the Republic of Poland the freedoms and rights guaranteed by the European Union law within the scope of its competence.

Article 227f. 1. A citizen of Poland and a citizen of the European Union not being a citizen of Poland resident in the territory of the Republic of Poland shall enjoy the franchise and eligibility to stand for election in the elections to the European Parliament under the rules specified in the European Union law and by statute.

2. A citizen of the European Union not being a citizen of Poland resident in the territory of the Republic of Poland shall enjoy the franchise and eligibility to stand for election in the elections to the bodies of the territorial self-government under the rules specified in European Union law and by statute.

Article 227g. The Republic of Poland shall take actions necessary for ensuring that European Union law is effective in the national legal order.

Article 227h. 1. The Council of Ministers shall conduct the policy of the Republic of Poland in the European Union.

2. The Sejm and the Senate shall perform the competences entrusted to national parliaments in the Treaties constituting the basis of the European Union within the scope and in forms specified in these Treaties.
3. In relation to the policy of the Republic of Poland in the European Union, the President of the Republic of Poland shall co-operate with the President of the Council of Ministers and the relevant minister.
4. The organs of official authority shall perform their competences and co-operate in matters pertaining to the European Union under rules specified by statute.

Article 227i. 1. The Council of Ministers shall submit to the Sejm the draft statute implementing the European Union law within a deadline allowing that statute to enter into force in accordance with the requirements specified in European Union law. Detailed deadlines shall be specified by statute.

2. The draft statute implementing a European Union law which is considered urgent by the Council of Ministers shall not be subject to the limitations referred to in Article 123, Section 1.

Article 227j. Proceedings concerning the statute implementing a European Union law which are not completed before the end of the term of office of the Sejm shall be subject to continuation in the following term of office under the rules specified by statute.

Article 227k. 1. The Council of Ministers shall make the decision on leaving the European Union by the Republic of Poland upon consent expressed under the procedure referred to in Article 227c.

2. The ratification of the international agreement specifying the conditions of leaving the European Union by the Republic of Poland shall require consent expressed under the procedure referred to in Article 227c.
3. The procedures pertaining to leaving the European Union by the Republic of Poland shall be specified by statute'.

Art. 2

1. With the date of entry into force of Article 1, Points 2–7, the Monetary Policy Council shall be dissolved.

2. The term of office of the members of the Monetary Policy Council shall expire upon the date referred to in Section 1.

Art. 3

The Act shall enter into force 3 months from its announcement, except for Article 1, Points 2–7, which enter into force on the date on which the common currency of the Member States of the European Union – the euro – becomes the currency of the Republic of Poland.

REASONING

1. The current legal situation

Establishing the Constitution of 1997, the constitutional legislative body restricted itself to introducing minimum constitutional provisions allowing Poland to access the European Union. These provisions consist of two constitutional regulations:

- 1) Article 90 of the Constitution constitutes the basis for passing on competences of state authorities,
- 2) Article 91, Section 3 of the Constitution specifies the place of laws established by international organisations in the national judicial system.

The constitutional provisions were meant to allow the accession to the EU, however, in 1997, no relevant constitutional regulations were established to ensure effective operation of the State within the structures of the European Union. The constitutional legislative body failed to specify many important issues pertaining to European integration, such as the axiological foundations of the State's participation in this integration, the procedure of adopting the position of Poland in the European Union, the functioning of the state administration bodies within the competences of the EU, or the legal status of the citizens of the European Union.

After Poland's accession to the European Union, the deficiencies in the constitutional regulations introduced in 1997 very soon became obvious. The incomplete constitutional regulations caused competence-related disputes arising between the principal state organs, hindering their effective acting in the European arena. Increasing delays are registered in the establishment of the laws necessary to implement European Union law by Poland. Extending some rights guaranteed only to Polish citizens by the Constitution onto the citizens of the EU gives rise to many doubts with lawyers. Moreover, the existing

regulations prevent full execution by Poland of its commitments under the Treaty of Accession concerning the participation in the Economic and Monetary Union, hindering the introduction of the common currency – the euro.

2. The need for and aim of the draft Act amending the Constitution

Significant political changes in the European Union were introduced under the Treaty of Lisbon, which entered into force on 1 December 2009. The EU was transformed into an international organisation. The Treaty of Lisbon contributed to a radical strengthening of the role of national parliaments with respect to EU affairs. New procedures of amending important provisions of the Treaties constituting the basis of the European Union without the need to conclude a revision treaty (so called the Passerelle Clause) were also introduced. Finally, the procedures of calling member States to account in the case of infringing upon EU law were simplified.

In the present situation, the creation of legal foundations of Poland's membership in the European Union as a reliable and respected partner, as well as an active actor in European policy, co-shaping the direction of EU policy in accordance with the will of Polish citizens and the interests of the Polish state, is of utmost importance. To achieve this, the highest state organs must co-operate with each other in the process of shaping and expressing Poland's position in EU bodies so that this position has a sufficiently strong democratic legitimisation and that it is adopted in appropriate time, as well as in order to ensure that the Polish voice is heard in Europe.

In the new conditions which arose after the entry into force of the Treaty of Lisbon, there is a need to introduce a triple type of changes in the Polish constitution. Firstly, it is necessary to amend certain constitutional provisions hindering the performance of Poland's commitments and to establish more effective national mechanisms ensuring the implementation of European Union law. Secondly, it is absolutely essential to establish regulations which will ensure the effectiveness of the activities of Polish organs of official authority in the European Union and will allow for effective protection of the fundamental constitutional values in the process of European integration. The changes introduced by the Treaty of Lisbon result in the need to strengthen the co-operation between the Council of Ministers and the Sejm and Senate in EU affairs, as well as to define the role of both these chambers in this respect anew. Constitutional solutions must facilitate the articulation and protection by the Republic of Poland of its interests and of the interests of its citizens in EU institutions.

Thirdly, it is necessary to create regulations specifying the mode of adopting the state's position expressed in new procedures introduced by the Treaty of Lisbon (the Passerelle Clause, the decision on leaving the European Union).

The present draft answers these three needs. Firstly, it introduces solutions facilitating effective implementation of European Union law. It contains, among others, the proposals of amendments allowing Poland to fully perform its commitments taken in the Treaty of Accession regarding the participation in the in the Economic and Monetary Union and the adoption of the common currency – the euro. Secondly, the proposed regulations should raise the effectiveness of Polish organs of official authority in the EU arena in order to effectively protect Polish national interests. Thirdly, the draft Act regulates the procedure of adopting Poland's position in the new EU procedures, includes provisions concerning the adoption by Poland of amendments to the Treaties in simplified revision procedures and proposes a regulation of the procedure of making the decision on withdrawing from the European Union.

3. Differences between the current and drafted legal situation and the main results of the drafted regulation

The draft Act contains regulations which, on the one hand, amend some existing constitutional provisions and, on the other hand, introduce new regulations, which have had no equivalent in constitutional regulations so far. There are two possible solutions with introducing this type of regulations. On the one hand, it is possible to include the new constitutional provisions in the relevant chapters of the Constitution. On the other hand, it is possible to add to the Constitution a new chapter concerning the relations with the European Union. The new provisions have been presented in one constitutional chapter. Such a solution facilitates a comprehensive and coherent regulation of various issues connected with Poland's membership in the European Union.

The new chapter specifies the axiological basis of the membership of the Republic of Poland in the European Union, the rules governing further passing of competences to the EU, the status of EU citizens, the fundamental rules of adopting Poland's position in EU institutions and of exercising this right by Polish public authorities. The procedure of potential withdrawal from the European Union by the Republic of Poland has also been regulated.

Article 1, Point 1

So far, the constitutional basis for passing competences of state authorities to international organs and organisations was Article 90 of the Constitution. This provision has been used for Poland's accession to the European Union

and later for the ratification of the Treaty of Lisbon and had in practice no use in relation to international organisations other than the European Union, although such a possibility was discussed in the context of the ratification by Poland of the statute of the International Criminal Court. Article 1, Point 1 of the draft Act repeals Article 90 of the Constitution, which concerns the passing on of competences of state authorities. It should be noted that the basis of passing on competences to the European Union is to be the new Article 277b of the Constitution and Article 227d.

Repealing of Article 90 of the Constitution does not imply that Poland may not become member of international organisations having executive competence directly affecting private entities in its member states. Under the Constitution, as it reads after the amendments introduced by the Act amending the Constitution, the Republic of Poland may entrust other international organs and organisations with some very narrowly defined executive competences directly affecting private entities – without any explicit constitutional authorisation – provided that such an act of passing on competences is consistent with the Constitution, and in particular, fits within the limits specified by constitutional provisions dividing the tasks and competences between the highest state authorities. In this case, Article 89, Section 1 of the Constitution, concerning the conclusion of international agreements regarding membership in international organisations and of international agreements regulating matters reserved for statute is a sufficient constitutional basis. Differently than in the case of passing on competences to the European Union, the constitutional limits of entrusting other international organisations with executive competences are much narrower. However, at the same time, an agreement ratified under the procedure specified in Article 89, Section 1 of the Constitution, that is by consent expressed in statute, is sufficient for such passing of particular competences.

The repealing of Article 90 of the Constitution implies the abolition of the legal basis for general passing on of competences as it takes place only in the case of the membership of the Republic of Poland in the European Union.

Article 1, Points 2–7

In Points 2–7, Article 1 introduces amendments necessary for full performance of Poland's commitments regarding the participation in the Economic and Monetary Union, allowing for the future introduction in Poland of the common currency – the euro.

In accordance with the existing constitutional provisions, the National Bank of Poland has the exclusive right to issue money and to set and execute the monetary policy. Furthermore, the current constitutional provisions regulate issues connected with the responsibility of the President of the National

Bank of Poland and with the supervision of this Bank in a different way than in the provisions of EU law which will be applicable after the introduction of the euro in Poland.

In accordance with the Treaty of Accession, Poland is now a member of the Economic and Monetary Union, it does not, however, apply the derogation with respect to the common currency – the euro. The introduction of the euro in Poland requires passing on certain constitutional competences of the National Bank of Poland and the Monetary Policy Council. At the same time, the National Bank of Poland may retain certain competences outside the field of monetary policy, regulated by EU primary law.

One of the conditions necessary for joining the euro area is, additionally, to fulfil the so called convergence criteria as well as, in consequence, removing from the Polish legal system all and any provisions which could hinder the effectiveness of European Union law and regarding monetary policy and in any way infringe on the independence of the National Bank of Poland. In light of the unambiguous position of EU institutions, before joining the euro area, it is necessary to adjust the provisions on the responsibility of the President of the National Bank of Poland and on the supervision of the National Bank of Poland to comply with European Union law. For this reason, the provisions concerning the constitutional responsibility of the President of this Bank, the exclusive competences of the National Bank of Poland and the competences of the Monetary Policy Council are repealed. The issue of the responsibility of the President of the National Bank of Poland should be regulated in ordinary statutes, in accordance with the Treaties constituting the basis of the European Union and the rules of procedure of the European System of Central Banks.

It is also necessary, in the situation of integration within the European System of Central Banks, which results in the loss of the right to create the principles of the monetary policy by the Monetary Policy Council, to make a decision regarding this organ. Because of the above, the proposal has been put forward to abolish this organ. It will be possible to create, by statute, an analytical-advisory body which will operate in the National Bank of Poland (such a solution has been adopted in France; a body analogical to the Monetary Policy Council has lost its competences regarding the setting of monetary policy and presently has an advisory role as the Monetary Committee of the General Council of the Banque de France). Article 2 of the draft Act refers to this amendment and includes the interim provision abolishing the Monetary Policy Council and ending the terms of office of its members upon the date of entry into force of the provisions concerning the National Bank of Poland (this date is connected with the introduction of the euro by the Republic of Poland). Until then, the Monetary Policy Council will be operating under the present rules.

Article 227, Section 1 of the Constitution concerns the National Bank of Poland. This Article shall have the wording consistent with the Treaty on the Functioning of the European Union. The proposed Article defines the new role of the National Bank of Poland in the political system. Under the new constitutional Article, which will enter into force upon joining the euro area by Poland, the National Bank of Poland is part of the European System of Central Banks. This organ executes the tasks and performs the competences specified in the Treaties constituting the basis of the European Union and by statute. At the same time, the new Article 227, Section 1 strengthens the guarantees of independence of the Polish central bank from other state organs.

The draft Act proposes crossing out the National Bank of Poland from Article 203, Section 1 of the Constitution, enumerating the bodies and entities subject to control by the Supreme Audit Office. Instead, it is proposed to introduce a new Section 2 in Article 227, specifying the extent of the control of the Supreme Audit Office over the National Bank of Poland in accordance with the provisions of European Union law pertaining to the status of national central banks. The Supreme Audit Office's control will be limited to the tasks and competences not subject to the regulations included in the Treaties constituting the basis of the European Union.

It should be noted that Article 227, just as some other Articles of the draft Act, includes the term 'Treaties constituting the basis of the European Union'. This phrase constitutes a reference both to particular treaties to which the Republic of Poland is a party at the moment (in particular to the Treaty on European Union, to the Treaty on the Functioning of the European Union and the Treaty of Accession) and to treaties which may be concluded in future. The term used refers to the fact that international agreements currently constituting the basis of the European Union have been named 'treaties' in the titles of these legal acts. Moreover, the use of the term 'treaties' stresses the specificity of European Union law.

Because of the fact that the introduction of the euro in the Republic of Poland involves the issue of separate establishment of the principles of monetary policy (the competences in this respect will be performed under the European System of Central Banks), the draft Act will give a new wording to Article 204, Section 1, Point 1 of the Constitution. The amendment consists in repealing the regulation concerning the requirement for the Supreme Audit Office to present the Sejm with an analysis of the principles of the monetary policy.

Article 1, Point 8

Article 1, Point 8 introduces a new chapter to the Constitution entitled 'Membership of the Republic of Poland in the European Union'.

Article 227a

The new Article 227a specifies the axiological basis of Poland's participation in the processes of European Integration. In light of Article 227a of the Constitution, Poland's Membership in the European Union is constitutionally legitimate, if this organisation respects the sovereignty and national identity of the Member States, respects the rules of subsidiarity, democracy, rule of law, respects the human dignity, freedom and equality, as well as ensures the protection of human rights and freedoms comparable with the protection of these rights and freedoms in the Constitution. The proposed regulation does not modify in any way the present constitutional axiology; on the contrary, in the constitutional system of values it indicates these which the Polish Nation considers particularly important and therefore it strengthens the constitutional protection of these values in the process of European integration. At the same time, it should be noted that the values enumerated in Article 227a are identical with the values listed in Article 2 of the Treaty on European Union. A high level of axiological convergence of both judicial systems – Polish and EU law – will prevent collisions between the norms of the Constitution and the norms of European Union law.

It should be stressed that Article 227a of the Constitution is addressed to the Polish organs of official authority, in particular to the Sejm, Senate, the President of the Republic of Poland, the Council of Ministers and the Constitutional Tribunal. The proposed regulation has several important functions. Firstly, this regulation is an explicit constitutional basis for Poland's membership in the European Union. Secondly, the said regulation sets the essential directions of Poland's European policy, ordering the Polish organs of official authority to undertake actions in the EU arena to aimed at protecting the fundamental values specified in this regulation. In other words, the Polish organs of official authority should try, as far as possible, to have the European Union respect the fundamental constitutional values enumerated in Article 227a. Thirdly, Article 227a sets the constitutional limitations for Poland's membership in the European Union. Poland does not have a constitutional obligation to participate in a European Union which would not respect the values enumerated in Article 227a of the Constitution. Poland also does not have a constitutional obligation to implement EU law which would infringe on the fundamental values listed in Article 227a.

It should be pointed out that Article 227a mentions the European Union by name. In constitutional meaning, the European Union does not have the nature of a state, but is an international organisation which respects the sovereignty and identity of its Member States. The provisions pertaining to the European Union refer also to the European Atomic Energy Community, which despite its separate legal identity is closely connected with the European

Union by means of the rules of institutional identity and consistency of the decision-making process.

In Article 227a, the term ‘democratic rule of law’ is intentionally avoided and democracy and rule of law are mentioned separately, as the purpose is not to characterise the European Union as a state, but to indicate the principles which should be respected at the stage of specifying the principles of functioning of this organisation.

Article 227b

Article 227b constitutes the constitutional basis for passing on competences to the European Union in future. This regulation is the authorisation to conclude new revision treaties, reforming the European Union, in particular the treaties passing on additional competences to the European Union.

Article 227c

Article 227c specifies the procedure of passing on competences of the state to the European Union, while taking into account the amendments introduced by the Treaty of Lisbon. This regulation concerns passing on competences under an international agreement.

Two problems arose in relation to the present regulations. Firstly, in 1997, the constitutional legislative body established higher qualified majorities for the passing of an act authorising the ratification of an agreement being the basis for passing on competences than for an amendment of the Constitution. Secondly, in the case of announcing a referendum, a situation might have occurred in which the referendum would not bring a binding result because of not meeting the required voter turnout.

The proposed regulation solves both these problems. Firstly, the draft Act stipulates qualified majorities required for passing an act expressing the consent to the ratification analogical to those in the case of the procedure of amending the Constitution: a two thirds majority of votes in the Sejm and an absolute majority of votes in the Senate. Secondly, the reference to Article 125 of the Constitution has been removed. The consent to the ratification of an international agreement is expressed if the majority of voters in a national referendum supports it, as is the case with a constitutional referendum. With this, the proposed regulation eliminates the possibility of a situation in which the referendum would not bring a binding result due to not meeting the required voter turnout.

Article 227d

The Treaties constituting the basis of the European Union include provisions allowing for amendments of these Treaties in simplified procedures, the so called Passerelle Clause (Article 31 Section 3 and Article 42 Section 2, Ar-

title 48 Section 6 and Section 7 of the Treaty on European union; Article 25 Section 2, Article 153 Section 2, Article 192 Section 2, Article 218 Section 8, Article 223 Section 1, Article 262, Article 311 Section 3, Article 312 Section 2, Article 333 Sections 1 and 2 of the Treaty on the Functioning of the European Union). The Treaties provide for simplified amendment procedures which require ratification and simplified procedures without such requirement. Article 227d specifies the simplified procedures of amending the Treaties. On the basis of this regulation, we can single out two types of amendments to the Treaties: amendments which involve passing on competences and amendments which do not involve passing on competences of organs of state authority. The provisions of Article 227c are also applicable if the amendments to the Treaties involve passing on competences, with the rules of procedure specified by statute.

In other cases, the procedure of expressing consent to the amendments of the Treaties by the Republic of Poland shall be specified by statute.

Article 227e

Article 227e regulates the status of citizens of the European Union, strengthening the guarantees of fundamental rights. This regulation pertains to both Polish citizens and other citizens of the European Union. So far, practice has shown that Polish organs of administration and courts are not always willing to guarantee the rights resulting from EU law to all Polish citizens. The new regulation confirms that Polish citizens enjoy the rights guaranteed in European Union law to the citizens of the European Union.

On the other hand, Article 227e stipulates explicitly that the provisions of the Constitution which guarantee certain rights to Polish citizens provide only the minimum group of subjects of these rights and do not prevent extending them to include citizens of other EU Member States when this is required by European Union law.

It should be stressed that Article 227e does not limit in any way the significance and effects of the so called UK/Poland Protocol pertaining to the application of the Charter of Fundamental Rights of the European Union. It is obvious that in the draft Act amending the Constitution the term ‘European Union law’ means European Union law, also in the reading shaped by the contents of the UK/Poland Protocol.

Article 227f

The current text of the Constitution lacks regulations concerning the elections to the European Parliament. The Constitution does not solve the issue of participation of citizens of other states in the elections to the self-government. Article 227f introduces regulations pertaining to the franchise and eligibility

to stand for election in relation to the elections to the European Parliament and to the territorial self-government. Section 1 guarantees the franchise and eligibility to stand for election in the elections to the European Parliament: 1) to Polish citizens and 2) to citizens of the European Union not being a citizens of Poland and resident in the territory of the Republic of Poland.

Section 2 guarantees franchise and eligibility to stand for election in the elections to the organs of territorial self-government to citizens of the European Union not being citizens of Poland. This regulation settles explicitly that franchise and eligibility to stand for election rights may and should be granted to citizens of other EU Member States in the extent provided for in EU law. The Republic of Poland does not have the obligation to grant citizens of foreign states franchise and eligibility to stand for election in a broader extent than provided for in European Union law. The principles of franchise and eligibility to stand for election rights are specified by European Union law and by statute in the extent regulated in EU law.

Article 227g

The Treaty of Lisbon simplifies and quickens the procedure of imposing sanctions against Member States which infringe on European Union law. In relation to this, it is of key importance that Polish organs of official authority implement European Union law properly and on time, so as to avoid very high financial sanctions provided for in European Union law.

Article 227g constitutionalises the obligation for the Polish state to undertake the actions necessary to ensure effectiveness of European Union law in the national legal order and compliance of the national law with European Union law. For in this case, of essential importance is not only the negative obligation for organs of official authority to refrain from activities infringing on EU law, but also the undertaking of positive activities aimed at implementing European Union law.

The new regulation combines the imperative of protecting the sovereignty of the state with the commitments taken by Poland in connection with the accession to the European Union.

Article 227h

Article 227h regulates the competences of organs of official authority in relations with the European Union. This regulations has several functions.

Article 227h, Section 1, specifies the organ competent in conducting the policy of the Republic of Poland in the European Union. It is the Council of Ministers. The adopted solution is consistent with Article 146 of the Constitution, which stipulates that the Council of Ministers conducts the internal and foreign policy of the Republic of Poland.

Section 2 refers to the role of the Parliament in relations with the European Union. The Treaty of Lisbon granted new competences to national parliaments and under this treaty, the Sejm and the Senate have equal competences in the matters specified therein. The proposed regulation confirms the competences of the Sejm and the Senate granted to these organs in the Treaties. This regulation is necessary for explicit allowing of the exception to the rule expressed in Article 227h, Section 1, that conducting state policy in relations with the European Union belongs to the competences of the Council of Ministers. At the same time, the proposed regulation establishes an exception from the general constitutional principles, according to which Polish bicameralism is in principle unequal bicameralism with the competences of the Senate being narrower than the competences of the Sejm.

Section 3 deals with the co-operation of organs of executive authority in the relations with the European Union. The decision of the Constitutional Tribunal of 20 May 2009 (No. Kpt 2/08) concerning the function of the President of the Republic of Poland and the Council of Ministers regarding the relations between the Republic of Poland and the institutions of the European Union specifies that in performing their constitutional tasks and functions in this respect, the President of the Republic of Poland and the Council of Ministers are guided by the rule of co-operation. As the highest representative of the Republic, the President of the Republic of Poland may, under Article 126, Section 1 of the Constitution, make the decision on participating in the meetings of the European Council and the co-operation of the President with the Government allows the President, in matters related to the execution of the tasks specified in Article 126, Section 2, to express his opinion on the position determined by the Council of Ministers. Due to the introduction of a separate chapter pertaining to the membership of the Republic of Poland in the European Union, it is justified to include in this chapter the regulation concerning the co-operation between the organs of executive authority pursuant to the provisions of Article 133, Section 3, which concerns the co-operation between these state bodies regarding foreign policy.

Section 4 contains two types of regulations. Firstly, it expresses the general constitutional rule of co-operation of official authority in EU-related issues (to the extent not covered by the regulation included in Section 3). Violation of this rule constitutes an infringement on the Constitution. The concept of official authority includes here not only the highest state organs, but also the field organs of government administration and the organs of the territorial self-government which participate in the procedures of co-operation in EU-related issues, depending on the particular situation and the competences granted them. Secondly, this regulation commits the regular law-maker to specify the detailed rules of co-operation of the organs of official authority in EU-related issues.

Article 227i and Article 227j

One of the key problems related to the membership in the European Union is the execution and implementation of European Union law by the Polish lawmaker within the deadlines set in EU law. The delays occurring in this respect put the state at risk of severe financial sanctions and damages for infringing on European Union law. For this reason the project provides for new solutions favouring quicker execution of European Union law:

- 1) constitutionalisation of the obligation of the Council of Ministers to put forward legislative proposals in such a way so as to ensure implementation of European Union law on time,
- 2) broadening the extent of the urgent procedure of adopting laws,
- 3) repealing the rule of discontinuation in respect to proposals of acts implementing EU law.

In its Section 1, Article 227i constitutionalises the obligation of the Council of Ministers to put forward proposals for acts in such a way so as to ensure implementation of European Union law on time. The deadlines will usually result from the secondary laws of the European Union. Failing to perform the said obligations constitutes an infringement on the Constitution and may lead to calling the members of the government to account under the Constitution.

Furthermore, in relation to draft acts implementing EU law, Article 227i repeals the subjective limitations regarding the application of the urgency procedure, set in Article 123, Section 1 of the Constitution. This means that in the case of draft acts implementing European Union law, the urgency procedure may be applied in all matters within the scope of the competences of the European Union. The adopted solution could facilitate, in particular, quick introduction of amendments to the tax law which adjust the Polish law to EU law to such an extent as to which the European Union has competences to regulate tax-related issues and under the condition of respecting the standards of the rule of law.

Please bear in mind that it is only the Council of Ministers who make the decision on applying the urgency procedure. Determining procedural differences in the case of the urgency procedure is up to the regulations of the Sejm and the Senate and possible doubts regarding the observance of laws regulation the procedure of lawmaking will be finally settled by the Constitutional Tribunal.

The Polish constitutional law contains the rule of discontinuation of parliamentary works. This means that lawmaking proceedings end with the expiry of the term of office of the Sejm and the newly elected Sejm does not examine legislative proposals put forward during the previous term of office. Article 227j repeals the application of this rule in reference to the act implementing European Union law. Such a solution will allow Poland to meet the deadline for implementing EU law.

It should be stressed that the term ‘proceedings concerning the statute’ was used in the draft Act. This term pertains to all the stages of the lawmaking proceedings from the moment of putting forward the proposal to the signing of the act by the President. As a result, the rule of continuation of lawmaking proceedings will apply regardless of the advancement of the lawmaking proceedings at the moment the term of office of the Sejm expires. The Constitution requires that detailed rules of continuing the lawmaking proceedings in the new term of office be specified by statute. These issues could be regulated by, in particular, an act specifying the rules of co-operation between the organs of official authority in matters belonging to the competence of the European Union, as well as the regulations of the Sejm and Senate.

Article 227k

The Treaty of Lisbon clearly grants Member States the right to leave the European Union and regulates in detail the procedure in such a case. Article 227k of the draft Act regulates the issues connected with Poland leaving the European Union in accordance with the provisions of the Treaties constituting the basis of the European Union. Pursuant to the Treaties, the process of a Member State leaving the European Union consists of three essential stages: 1) the Member State making the decision on leaving the European Union, 2) the Member State announcing its intent to leave the European Union, and then, 3) the conclusion of an international agreement specifying the conditions of leaving the European Union by the given state.

The Decision on leaving the European Union by the Republic of Poland requires a consent expressed under the procedure analogical to the passing on of competences to the European Union. After obtaining such a consent, the Council of Ministers may announce the intent to leave the European Union. Ratification of the international agreement specifying the conditions of leaving the European Union by the Republic of Poland requires consent expressed under the procedure analogical to the passing on of competences to the European Union. Such a solution is justified by the fact that the agreement specifying the detailed conditions of leaving the EU can have considerable financial, economic and social consequences. The rules of procedure in the case of leaving the European Union by the Republic of Poland shall be specified by statute.

Article 2

This Article contains the regulation concerning the Monetary Policy Council. The abolition of this state body shall take place on the date of entering into force of the regulation pertaining to the National Bank of Poland allowing the Republic of Poland to join the euro area. The term of office of the members of the Council expires upon this date.

Article 3

Article 3 specifies the date of the new constitutional regulations entering into force. In the regulation, three-month-long *vacatio legis* is proposed as a general rule, which should be absolutely sufficient for the organs of official authority to adjust to the new regulations. Only certain provisions, concerning the Economic and Monetary Union, will enter into force on the date of introducing the euro in Poland. In particular, this refers to the new constitutional status of the National Bank of Poland. Such a solution will, on the one hand, allow for meeting the legal conditions of introducing the euro in Poland, and on the other hand, give the organs of official authority the time required to prepare them for joining the euro area.

4. Financial consequences of the draft Act

The adoption of the Act will not cause any significant financial burdens for the State Budget or the budgets of organs of local and regional governments. On the contrary, the Act amending the Constitution should, in fact, significantly improve the operation of the organs of official authority regarding the relations with the European Union and limit the risk of the state being held responsible for infringing on European Union law.

5. Compliance with European Union law

The aim of the Act amending the Constitution is to adapt the Polish fundamental law to the legal requirements and the actual situation resulting from the membership in the European Union. This draft Act is consistent with European Union law.

JUDGMENTS
OF THE POLISH
CONSTITUTIONAL
TRIBUNAL IN EU
MATTERS



**Judgment of the Polish Constitutional Tribunal
of 24 November 2010 concerning the Treaty of Lisbon**

(File Ref. No. K 32/09, selected excerpts)¹

**On behalf of the Republic of Poland
The Constitutional Tribunal,
composed of the following members of the bench:**

Marek Mazurkiewicz – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Marian Grzybowski
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Andrzej Rzepliński
Sławomira Wronkowska-Jaśkiewicz
Mirosław Wyrzykowski
Bohdan Zdziennicki – Judge Rapporteur

(Recording Clerks: Grażyna Szałygo and Krzysztof Zalecki),

¹ The operative part of the judgment was published on 6 December 2010 in the Journal of Laws – Dz.U. No. 229, item 1506. Selection – M. Grzywacz.

having considered, at the hearing on 10 November 2010, in the presence of the applicants, the Sejm, the President of the Republic of Poland, the Minister of Foreign Affairs and the Public Prosecutor-General:

- 1) an application by a group of Sejm Deputies to determine the conformity-of:
 - a) Article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws – Dz. U. of 2009 No. 203, item 1569), to the extent it specifies the content of:
 - Article 9 C(3); Article 15b(2), first subparagraph; Article 28(3), third subparagraph; Article 28 D(2), second sentence; as well as Article 28 E(2), second sentence; Article 28 E(3), second subparagraph, second sentence; and Article 28 E(4), second subparagraph, first sentence, of the Treaty on European Union, to the extent they allow the Council of the European Union to enact – by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland – legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,
 - Article 15b(3); Article 28 A(2), first subparagraph, second and third sentences; and Article 28 A(3), first subparagraph, first sentence; as well as Article 48(6), second subparagraph, and Article 48(7) of the Treaty on European Union,
 - b) Article 2 of the Treaty of Lisbon, to the extent it specifies the content of:
 - Article 188 C(4), first subparagraph; Article 188 K(1), first sentence; Article 188 N(8) as well as Article 251(8), (10) and (13) of the Treaty on the Functioning of the European Union, to the extent they allow the Council to enact – by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland – legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,
 - Article 22, second subparagraph; Article 65(3), second and third subparagraphs, Article 69 A(2), second subparagraph, point (b); Article 69 B(1), third subparagraph; Article 69 E(4); Article 137(2), fourth subparagraph; Article 175(2), second subparagraph; Article 188 N(8), second subparagraph, second sentence; Article 190(1), second subparagraph; Article 229a; Article 245, second subparagraph; Article 266, third subparagraph, second sentence; Article 269, third subparagraph; Article 270a(2), second subpara-

graph; Article 280 H(1) and (2); as well as Article 308(1) of the Treaty on the Functioning of the European Union, to Article 90(1)-(3) in conjunction with Article 2, Article 4 and Article 8(1) of the Constitution of the Republic of Poland as well as in conjunction with the principle of the Polish Nation's sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble of the Constitution,

c) the Declaration No. 17 concerning primacy, annexed to the Final Act of the Conference of the Representatives of the Governments of the Member States, which adopted the Treaty of Lisbon, to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution,

as the alternative to the above:

d) Article 1 of the Act of 1 April 2008 on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws – Dz. U. No 62, item 388)

to the extent the legislator's consent to bind the Republic of Poland with the indicated provisions of the Treaties is not accompanied by the statutory regulation stipulating the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland in every case of possible adoption, by the European Council or the Council of the European Union, of a legal act on the basis of any of the said provisions – to Article 2, Article 4, Article 8(1), Article 10 and Article 95(1) of the Constitution,

2) an application by a group of Senators to determine the conformity of Article 1(56) of the Treaty of Lisbon, to the extent it amends Article 48 of the Treaty on European Union in conjunction with Article 2(12), (13) and (289) of the Treaty of Lisbon, as regards Article 2 A(2), Article 2 B(2), and Article 2 F, which have been inserted in the Treaty on the Functioning of the European Union, and the new wording of Article 308 of the Treaty on the Functioning of the European Union, to Article 8 and Article 90(1) of the Constitution,

has adjudicated as follows:

1. Article 1(56) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws – Dz. U. of 2009 No. 203, item 1569), specifying the wording of Article 48 of the Treaty

on European Union, in conjunction with Article 2 of the Treaty of Lisbon specifying the wording of Article 2(2), Article 3(2) and Article 7 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland.

2. **Article 2 of the Treaty of Lisbon, specifying the wording of Article 352 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution.**

Moreover, the Tribunal has decided:

on the basis of Article 39(1)(1) of the Tribunal Constitutional Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375 as well as of 2010 No. 197, item 1307), to discontinue the proceedings on the grounds that the pronouncement of a judgment is inadmissible.

REASONS FOR THE RULING:

I

1. A group of Sejm Deputies referred an application of 27 November 2009 to the Constitutional Tribunal for it to determine the conformity of:
 - a) Article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws – Dz. U. of 2009 No. 203, item 1569; hereinafter: the Treaty of Lisbon), to the extent it specifies the content of:
 - Article 16(3); Article 31(2), first subparagraph; Article 41(3), third subparagraph; Article 45(2), second sentence; as well as Article 46(2), second sentence; Article 46(3), second subparagraph, second sentence; and Article 46(4), second subparagraph, first sentence, of the Treaty on European Union, to the extent they allow the Council of the European Union to enact – by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland – legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,

- Article 31(3); Article 42(2), first subparagraph, second and third sentences; and Article 42(3), first subparagraph, first sentence; as well as Article 48(6), second subparagraph and Article 48(7) of the Treaty on European Union,
- b) Article 2 of the Treaty of Lisbon, to the extent it specifies the content of:
 - Article 207(4), first subparagraph; Article 215(1), first sentence; Article 218(8), the paragraph part; as well as Article 294(8), (10) and (13) of the Treaty on the Functioning of the European Union, to the extent they allow the Council of the European Union to enact – by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland – legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,
 - Article 25, second subparagraph; Article 81(3), second and third subparagraphs; Article 82(2), second subparagraph, point (b); Article 83(1), third subparagraph; Article 86(4); Article 153(2), fourth subparagraph; Article 192(2), second subparagraph; Article 218(8), second subparagraph, second sentence; Article 223(1), second subparagraph; Article 262; Article 281, second and third subparagraphs; Article 308, third subparagraph, second sentence; Article 311, third subparagraph; Article 312(2), second subparagraph; Article 333(1) and (2); as well as Article 352(1) of the Treaty on the Functioning of the European Union, to Article 90(1)-(3) in conjunction with Article 2, Article 4 and Article 8(1) of the Constitution of the Republic of Poland as well as in conjunction with the principle of the Polish Nation’s sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble of the Constitution;
- c) the Declaration No. 17 concerning primacy, annexed to the Final Act of the Conference of the Representatives of the Governments of the Member States, which adopted the Treaty of Lisbon, to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution of the Republic of Poland.

Moreover, as the alternative to the above, the applicant requested the examination of conformity to Article 2, Article 4, Article 8, Article 10 and Article 95(1) of the Constitution with regard to Article 1 of the Act of 1 April 2008 on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws – Dz.U. No. 62, item 388; hereinafter:

the Act on the Ratification of the Treaty of Lisbon) to the 5 extent the legislator's consent to bind the Republic of Poland with the indicated provisions of the Treaties is not accompanied by the statutory regulation stipulating the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland in every case of possible adoption, by the European Council or the Council of the European Union, of a legal act on the basis of any of the said provisions.

The fundamental constitutional doubts of the applicant concern the mechanism for enacting the law of the European Union and for taking other serious decisions.

First of all, the applicant challenges the principle, introduced by the Treaty of Lisbon, that the Council of the European Union enacts legal acts, by a qualified majority, independently or jointly with the European Parliament. The application is limited to the situation where the stance of the Republic of Poland on a given matter is different than the stance of the majority. The conferral of competences (by the Republic of Poland) which may be exercised against Poland's will, and in accordance with the will of other Member States being able to summon a required majority, without Poland's participation, is tantamount – in the opinion of the applicant – to conferring (contrary to the provisions of Article 90(1) of the Constitution) the competences on other Member States, which impose their will on our state. Additionally, enacting legal acts which are legally binding for the Republic of Poland by the Council of the European Union, without Poland's consent, does not give any guarantee of conformity of such legal acts to the Constitution, and thus it is contrary to Article 8(1) of the Constitution.

What raises the applicant's doubts as regards the Treaty of Lisbon is the introduction therein of authorisation to confer competences – which they recognise as *carte blanche* authorisation – bypassing the requirement of democratic determination of the scope of competences in the ratification procedure pursuant to Article 90(2) or (3) of the Constitution, which implements the principles expressed in Article 2 and 4 of the Constitution.

The applicant points out that in the case of possible initiatives with regard to enacting legal acts on the basis of the authorisation in the Treaties indicated in Part I point 1 point (b) and point 2 point (b) in the *petitum* of the application, the stance of the Republic of Poland would be determined solely by the Council of Ministers; neither the Sejm nor the Senate would have an opportunity to firmly decide on those issues due to the lack of a treaty-related competence regulation. The issues concerning the competences of organs of the state, which are to be conferred outside the system of the said state organs, may not be determined solely by the executive branch; and the mechanism for taking a stance by the Council of Ministers, after consultation with relevant Sejm and

Senate committees, does not guarantee – in the opinion of the applicant – the conformity of the result to the Constitution, as the said mechanism functions outside the scope of constitutional review conducted by the Constitutional Tribunal.

The applicant also challenges the conformity of the Declaration No. 17 to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution. In the opinion of the applicant, the said declaration is a normative act, since it constitutes the first official document issued in the name of all the Member States – being the parties to the Treaties constituting the Union – which proclaims the principle of primacy in a general and abstract way. In the view of the applicant, the use of a declaration for a general and abstract way of proclaiming that principle does not deprive the challenged act of a normative character, although the applicant himself recognises that, pursuant to Article 51 (consolidated version) of the Treaty on European Union, the Declaration No. 17 does not have the rank of a treaty norm.

In the opinion of the applicant, declaring the provisions indicated in the *petitum* of the application to be consistent with the Constitution means the necessity for issuing a treaty-related statutory regulation which will enable the Sejm and the Senate to be involved in determining the stance of the Republic of Poland with regard to the matters of authorisation arising from those provisions.

2. [Omitted: Points 2–7, description of the proceedings]

II

[Omitted: Description of the hearing]

III

The Constitutional Tribunal has considered as follows:

1. The object and scope of constitutional review.
 - 1.1. The object of review versus the scope of jurisdiction of the Constitutional Tribunal.

The application by the group of Senators, submitted on 18 December 2009, as the object of review, indicates the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European

Community, signed at Lisbon, 13 December 2007 (Journal of Laws – Dz.U. of 2009 No. 203, item 1569; hereinafter: the Treaty of Lisbon). The numbers and content of the cited provisions of the Treaties, the Tribunal provided on the basis of the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union published in the OJ EU C 290 of 30.11.2009, p. 1 (Polish version).

- 1.1.1. Granted to the Constitutional Tribunal in Article 188(1) of the Constitution, the jurisdiction to adjudicate regarding ‘the conformity of statutes and international agreements to the Constitution’ does not differentiate among the indicated competences of the Tribunal, depending on the manner of granting consent to ratification. The Constitutional Tribunal is therefore competent to examine the constitutionality of international agreements whose ratification requires prior consent granted by statute. Neither Article 188(1) of the Constitution nor any other provision excludes that type of agreements from the scope of jurisdiction of the Constitutional Tribunal. This also pertains to the regulations which are subject to constitutional review in this case.
- 1.1.2. The object of examination of conformity to the Constitution is the text of the Treaty of Lisbon, to the extent it was ratified by the President of the Republic of Poland, published on 2 December 2009 in the Journal of Laws of the Republic of Poland.

The Constitutional Tribunal carries out the assessment of constitutionality of the Treaty of Lisbon, ratified by the President of the Republic of Poland, upon consent granted by statute enacted in accordance with the requirements specified in Article 90 of the Constitution. The Treaty of Lisbon, ratified in accordance with that procedure enjoys a special presumption of constitutionality. It should be emphasised that enacting the statute granting consent to the ratification of that Treaty occurred after meeting the requirements which were more stringent than those concerning amendments to the Constitution. The Sejm and the Senate acted under the conviction that the Treaty was consistent with the Constitution. The President of the Republic of Poland, who is responsible for ensuring observance of the Constitution, ratified the Treaty, without exercising his powers with regard to referring the application to the Constitutional Tribunal for it to determine the constitutionality of the Treaty prior to its ratification. As it follows from the previous jurisprudence of the Constitutional Tribunal, the President of the Republic of Poland is obliged to commence the procedure for preventive review with regard to the statute which

he considers to be inconsistent with the Constitution (cf. the decision of 7 March 1995, Ref. No. K 3/95, OTK of 1995 r., Part 1, item 5). The President of the Republic of Poland acts within the scope of and in accordance with the law, and ensures observance of the Constitution, which obliges him to undertake all possible actions in this regard, due to the provisions of Article 7 and Article 126 of the Constitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested his conviction that the ratified legal act was consistent with the Constitution.

Based on the above grounds, the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution. The Constitutional Tribunal may not overlook the context of the effects of its judgment, from the point of view of constitutional values and principles, as well as the consequences of the judgment for the sovereignty of the state and its constitutional identity.

1.2. Inadmissibility of adjudication on the constitutionality of some of the norms indicated by the applicant.

[omitted]

1.3. The essence of the applicant's allegations. Higher-level norms for review. The Constitutional Tribunal states that the essence of the applicant's allegations amounts to challenging the competences of EU bodies, in the light of the new decision-making mechanisms and revision procedures of the Treaties. The applicant indicates that the application of those mechanisms 'leads to *carte blanche* competences of the European Union to extend its competences, infringing on the internal constitutional procedures of Poland as a Member State. As a result, what takes place is an infringement on the constitutional requirements of conferring the sovereign rights of the Polish state on the European Union' (p. 8 of the substantiation in the application by the Senators), and consequently an infringement of Article 8(1) and Article 90(1) of the Constitution, which have been indicated as higher-level norms for review in the application by the Senators.

The judgment of the Constitutional Tribunal concerning the Treaty of Accession contains the view that there is a close relation between the principle of primacy of the Constitution with the sovereignty of the Republic of Poland (cf. K. Działocha, commentary to Article 8 of the Constitution

of the Republic of Poland, in: *Konstytucja RP. Komentarz*, L. Garlicki (ed.), Vol. 5, p. 34, Warszawa 2007). In the opinion of the Constitutional Tribunal, the norms of the Constitution constitute ‘the manifestation of the sovereign will of the nation’, and therefore ‘they may not lose their binding force or undergo a change due to an irremovable contradiction between certain provisions (EU legal acts and the Constitution)’ (as stated in the statement of reasons for the judgment dated 11 May 2005, Ref. No. K 18/04, OTK ZU No. 5/A/2005, item 49). The view of the relation between the primacy of the Constitution and the principle of sovereignty is concurrent with the stance of the doctrine, according to which the preservation of the primacy of the Constitution in the context of European integration must be considered tantamount to preservation of the sovereignty of the state (as in K. Wójtowicz, *Suwerenność w procesie integracji europejskiej*, in: *Spór o suwerenność*, W. Wołpiuk (ed.), Warszawa 2001, p. 174), and Poland’s accession to the European Union changes the point of view as regards the principle of the supreme legal force of the Constitution (its primacy), but it does not challenge it (cf. K. Działocha, *op.cit.*, p. 22).

Thus, the assessment of constitutionality of the challenged Treaty norms requires the Constitutional Tribunal to specify the constitutional principles concerning the state of Poland’s sovereignty in the context of European integration, in the light of Polish *acquis constitutionnel*, and also from the perspective of the jurisprudence of the EU Member States’ constitutional courts referring to the Treaty of Lisbon.

2. The concept of conferral of competences ‘in certain matters’ versus the primacy of the Constitution in the light of the jurisprudence of the Constitutional Tribunal.
- 2.1. Sovereignty, independence, constitutional identity, national identity versus European integration.

The question of sovereignty constitutes the object of numerous analyses in the doctrine of international and constitutional law. In the view of the Constitutional Tribunal, the concept of sovereignty as the supreme and unlimited power, both as regards the internal relations within the state and its foreign relations (cf. K. Działocha, commentary to Article 4 of the Constitution of the Republic of Poland, *op. cit.*), is subject to changes corresponding to developments that have been taking place in the world in the last few centuries. The changes stem from the democratisation of the decision-making process in the state, due to the replacement of the principle of sovereignty of the monarch with the principle of supremacy of the nation, bound by the human rights which arise from the inviolability of

human dignity. They also stem from the increase of the role of international law, as a factor shaping international relations; they result from the development of the process institutionalisation of international community, as well as they are a consequence of globalisation and a consequence of European integration. As a result of the said changes, sovereignty is no longer perceived as an unlimited possibility of exerting influence on other states or as manifestation of power that is free from external influences – on the contrary, freedom of activity of a state is subject to international law restrictions. At the same time, however, from the perspective of the contemporary Polish doctrine of international law, sovereignty is an indispensable quality of the state which allows to distinguish it from other subjects of international law. The attributes of sovereignty include: having the exclusive power of jurisdiction as regards the territory of a given state and its citizens, conducting foreign policy, deciding about war and peace, freedom as to recognising other states and governments, maintaining diplomatic relations, deciding about military alliances and membership in international political organisations, conducting an independent financial, budget and fiscal policies (cf. W. Czapliński, A. Wyrozumka, *Prawo międzynarodowe publiczne*, Warszawa 2004, p.135 and subsequent pages). In the doctrine of international law, there is the view that the concept of absolute, unrestrained sovereignty is a thing of the past. A distinction is drawn between the limitation of sovereignty, arising from the will of the state, being in accordance with the international law, and the infringements of sovereignty which occur against the will of the state and which are inconsistent with international law. In the literature on the subject, it has been stressed that, due to incurring liabilities, the state does not necessarily limit its freedom of activity, but at times it extends its activity on the fields where it has not been present before, and the ability to incur international liabilities is what international law implies in the legal character of the state, and what constitutes the identity of the state in international law. Therefore, this is not a factor that limits sovereignty, as it originally serves as the proof of sovereignty (cf. R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym*, Kraków 2004, p.128). Viewed from that perspective, it is debatable whether the procedure of majority vote limits sovereignty, since this neither limits nor infringes on the sovereignty of the Member States, but it merely channels the conducting of the duties of the state (*ibidem*, p. 141).

From the point of view of the influence of integration processes on the scope of sovereignty, what differentiates the legal order of the European Union, when juxtaposed with the law enacted by international organisations, is the broader scope of competences of the Union in comparison

with other international organisations, the binding character of substantial part of the EU law, and direct impact of the EU law in internal relations between the Member States. The Constitutional Tribunal shares the view expressed in the doctrine that, as regards the conferred competences, the states have renounced their powers to take autonomous legislative actions in internal and foreign relations, which however does not lead to permanent limitation of sovereign rights of these states; as the conferral of competences is not irrevocable, and the relations between exclusive and competitive competences have a dynamic character, the Member States merely assumed the obligation to jointly conduct state duties in areas of cooperation, and as long as they maintain full ability to specify the forms of conducting state duties, which is concurrent with the competence to ‘determine competences’, they remain – in the light of international law – sovereign subjects. There are complicated processes of mutual dependences among the Member States of the European Union, related to conferring part of the competences of state organs on the Union. However, these states remain the subjects of the integration process, maintain ‘the competence of competences’, and the model of European integration retains the form of an international organisation.

In the view of the Constitutional Tribunal, incurring international liabilities and managing them do not lead to the loss or limitation of the state’s sovereignty, but it is its confirmation, and the membership in the European structures does not, in fact, constitute a limitation of the state’s sovereignty, but it is its manifestation. For the assessment of the state of Poland’s sovereignty after its accession to the European Union, it is vital to create the basis for the membership in the Constitution, as a legal act of the nation’s sovereign power. Moreover, the basis of the membership in the European Union is an international agreement, ratified – in accordance with the constitutional requirements – upon consent granted in a nationwide referendum. In Article 90, the Constitution provides for conferring the competences of state organs only relation to certain matters, which – in the light of the Polish constitutional jurisprudence – means a prohibition to: confer all the competences of a given organ of the state, confer competences in relation to all matters in a given field and confer the competences in relation to the essence of the matters determining the remit of a given state organ; a possible change of the manner and object of conferral requires observance of the requirements for amending the Constitution (as the Constitutional Tribunal stated in the statement of reasons for the judgment in the case K 18/04).

The Constitutional Tribunal shares the view expressed in the doctrine of constitutional law that accession to the European Union is perceived as

some sort of limitation of sovereignty of a given state, but it does not mean its loss and is related with the compensatory effect in the form of a possibility of partaking in the decision-making process in the European Union (as stated, in particular, in L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2009, p. 57). The EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the state's sovereignty, retain their significance.

In the view of the Constitutional Tribunal, the sovereignty of the Republic of Poland and its independence – construed as the separateness of Poland's statehood within its present borders, in the circumstances of the membership in the EU in accordance with the rules specified in the Constitution – mean confirmation of the primacy of the Polish Nation to determine its own fate. The normative manifestation of that principle is the Constitution, and in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1), in the light of which the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the state, constituting the constitutional identity of the state. The principle of sovereignty has been reflected in the Constitution, not only in the provisions of the Preamble. The manifestation of that principle is the sole existence of the Constitution, as well as the existence of the Republic of Poland as a democratic state ruled by law (Article 2 of the Constitution). Article 4 of the Constitution stipulates that supreme power in the Republic of Poland 'shall be vested in the Nation', which excludes the possibility of conferring it to another entity. Within the meaning of Article 5 of the Constitution, the Republic of Poland safeguards the independence and integrity of its territory, and ensures the freedoms and rights of persons and citizens. The provisions of Articles 4 and 5 of the Constitution in conjunction with the Preamble set the fundamental relation between sovereignty and the guarantee of the constitutional status of the individual, and at the same time exclude the possibility of surrendering sovereignty, the regaining of which the Constitution regards as the premiss of the Nation's independence to determine its own fate.

The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on (cf. L. Garlicki, *Normy konstytucyjne relatywnie niezmiennalne*, in: *Charakter i struktura norm Konstytucji*, J. Trzcinski (ed.), Warszawa 1997, p. 148). Therefore, constitutional identity is a concept which determines the scope of 'excluding – from the competence to confer competences – the matters which constitute (...) «the heart of the matter», i.e.

are fundamental to the basis of the political system of a given state' (cf. K. Działocha, *op. cit.*, s. 14), the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences (cf. K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 284 and subsequent pages).

The guarantee of preserving the constitutional identity of the Republic of Poland has been Article 90 of the Constitution and the limits of conferral of competences specified therein. Article 90 of the Constitution may not be understood in a way that it exhausts its meaning after one application. Such an interpretation would arise from the assumption that conferral of competences on the European Union in the Treaty of Lisbon is a one-time occurrence and paves the way for further conferral, bypassing the requirements specified in Article 90. Such understanding of Article 90 would deprive that part of the Constitution of the characteristics of a normative act. The provisions of Article 90 should be applied with regard to the amendments to the provisions of the Treaties constituting the basis of the European Union, which take place in a different manner than by virtue of international agreements, if the amendments lead to the conferral of competences on the European Union (as in the draft amendment to the Constitution, prepared by a team led by Prof. K. Wójtowicz; cf. *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej*, the Bureau of Research of the Chancellery of the Sejm, Warszawa 2010, p. 28).

An equivalent of the concept of constitutional identity in the primary EU law is the concept of national identity. The Treaty of Lisbon in Article 4(2), first sentence, of the Treaty on European Union, stipulates that: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (...)'. The constitutional identity remains in a close relation with the concept of national identity, which also includes the tradition and culture.

One of the objectives of the European Union, indicated in the Preamble of the Treaty on European Union, is to satisfy the desire ‘to deepen the solidarity between their peoples while respecting their history, their culture and their traditions’. The idea of confirming one’s national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union, in the light of the Treaty of Lisbon.

2.2. The membership in the European Union and the sovereignty of Poland. The principle of protection of the state’s sovereignty in the process of European integration.

The Constitutional Tribunal states that Poland’s membership in the European Union is linked with the complex political and economic transformations which have occurred in the last two decades. The accession to the European Union creates unique possibilities, in our history, of carrying out modernisation projects in the conditions of stability arising from the membership in the community of values and traditions, in which the Polish national identity is rooted.

The Constitution of 2 April 1997 constitutes the basis of accession to the European Union; the Constitution specifies ‘the scope and essence of integration’ (L. Garlicki, *op. cit.*, p. 410), allowing for conferral of the competences of state organs with regard to certain matters upon the subjects indicated in the Constitution. The National Assembly, when enacting the Constitution, provided for a possibility of limited and conditioned conferral of competences, with all its consequences, also related to the conferral on international organisations which, ‘due to founding agreements, have the competences interfering with the scope of competences of the Polish state organs, especially the power to enact law which will be directly applied in the national legal order’ (K. Działocha, commentary to Article 90 of the Constitution, *op. cit.*, p. 5). Creating constitutional bases of the accession to the European Union, with the preservation of the state’s constitutional and national identity, as a solemn constitutional clause, but without connections with the content of a particular international agreement in that regard – was accepted by the Nation in the nationwide referendum held on 25 May 1997, and then was again approved by the Nation in the nationwide referendum concerning consent to the ratification of the Treaty of Accession, which was held on 7 and 8 June 2003. The Treaty establishing the European Community stipulated that ‘the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein’ (Article 5, first subparagraph). Analogical provision is contained in the binding Treaty on European Union, which stipulates in Article 5(2), that ‘(...) the Union shall act only within

the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein'. The conferral of competences is the basic consequence of the process of European integration, being supported by the provisions of the Constitution, and the directly expressed will of the Nation. Generally, the process of European integration meets the standards of constitutionality as well as the requirements related to the democratic legitimacy of such actions. They also have a historical dimension and context, connected with the European roots of our national identity.

The Treaty of Lisbon, with regard to amendments to be made to the provisions of the Treaties in a different manner than by means of an ordinary revision procedure, preserves the principle of unanimity as a guarantee of respect for the sovereignty of the EU Members States, to some extent manifested in the possibility of notifying opposition, within a set time limit, by the Parliaments of the Members States. The provisions of the Treaty in that regard constitute a compromise between the efforts to enable the EU to react to transformational challenges which require modification of the primary law and the preservation of constitutional identity of the Member States. The said provisions of the Treaty of Lisbon should strike balance between preserving the subjectivity of the Members States and the subjectivity of the EU. The guarantees of that balance in the Constitution are 'normative anchors', which serve the protection of the state's sovereignty, in the form of Article 8(1), Article 90 and Article 91 of the Constitution. In the view of the Constitutional Tribunal, the indicated constitutional provisions have not been infringed by the provisions of the Treaty of Lisbon challenged in the application.

The accession to the European Union and the relevant conferral of competences do entail surrendering sovereignty to the European Union. The limit of conferral of competences is determined in the Preamble of the Constitution by recognising the state's sovereignty as a national value; and the application of the Constitution – *inter alia* with regard to the realm of European integration – should correspond to the meaning which the introduction to the Constitution assigns to regaining sovereignty understood as a possibility of determining the fate of Poland. The Preamble determines the manner of interpretation of the provisions of the Constitution of the Republic of Poland concerning the independence and sovereignty of the state and the Nation (Article 4, Article 5 and Article 8, as well as Article 104(1), Article 126(2) and Article 130 of the Constitution), and also the provisions applicable to the membership in the European Union (Article 9, 90 and 91 of the Constitution), which allows the Constitutional Tribunal, adjudicating in this case, to derive from the provisions of the Consti-

tution – the principle of protection of the state’s sovereignty in the process of European integration. The bases for formulating such a principle are the said Articles of the Constitution as well as the provisions of the Preamble confirming the value of sovereign and democratic determination of our Homeland’s fate.

The provisions of the Preamble of the Constitution concerning the position of Poland in the contemporary world are, as it is stated in constitutional law studies, ‘of significance as regards determining the rules for and limits of the processes of Poland’s integration with the EU bodies (as in L. Garlicki, *Commentary to the introduction to the Constitution of the Republic of Poland*, in: L. Garlicki, *op cit.*, p. 14). It is on the basis of those provisions and Article 9 of the Constitution that the Constitutional Tribunal, in the statement of reasons for the judgment in the case K 11/03, has recognised the existence of ‘the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States’ and has stated that ‘the constitutionally correct and preferred interpretation of law is the one which serves the implementation of the indicated constitutional principle’. In the statement of reasons for the judgment in the case K 18/04, the Constitutional Tribunal has emphasised that the basic constitutional principles indicated in the Preamble (democracy, respect for the rights of the individual, cooperation between the public powers, social dialogue as well as the principle of subsidiarity) ‘are at the same time among the fundamental assumptions of the functioning of the European Communities and Union’. In constitutional law studies, there is a view that ‘this allows to derive from the provisions of the Introduction, general reference to the common tradition of European states (as in L. Garlicki, *op.cit.*, p. 14)

In its jurisprudence, the Constitutional Tribunal has, on numerous occasions, made reference to the provisions of the Preamble, in particular when reviewing the conformity of specific provisions to the provisions of the Preamble, within the scope of the principles that arise from the Preamble: the sovereignty of the Polish Nation, cooperation between the public powers, social dialogue, subsidiarity as well as diligence and efficiency in the work of public bodies (cf. the judgments of the Constitutional Tribunal of: 11 May 2005, Ref. No. K 18/04; 18 July 2006, Ref. No. U 5/04, OTK ZU No. 7/A/2006, item 80; 3 November 2006, Ref. No. K 31/06, OTK ZU No. 10/A/2006, item 147; 12 March 2007, Ref. No. K 54/05, OTK ZU No. 3/A/2007, item 25; 16 December 2009, Ref. No. Kp 5/08, OTK ZU No. 11/A/2009, item 170; also cf.: *Preambuła Konstytucji Rzeczypospolitej Polskiej*, in: *Studia i Materiały Trybunału Konstytucyjnego*, Vol. 32).

The principle of protection of the state's sovereignty in the process of European integration requires respecting, during that process, the constitutional limits of conferral of competences set by limiting the said conferral only to certain matters, and thus striking proper balance between the conferred competences and the retained ones; the balance entails that, in the case of competences constituting the essence of sovereignty (including, in particular, the enactment constitutional rules and the control of observance thereof, the judiciary, the power over the state's own territory, armed forces and the forces guaranteeing security and public order), the deciding powers are vested in the relevant authorities of the Republic of Poland. Making this principle more specific consists in not assigning 'a universal character' to the conferral of competences, in prohibiting conferral of 'all the most vital competences' (L. Garlicki, *op. cit.*, p. 56) and, moreover, in making the conferral of competences contingent upon observance of special procedure, specified in Article 90 of the Constitution. The said principle excludes the statement that the subject, upon which the competences have been conferred, may independently extend the scope of the competences. In the doctrine it has been stressed that 'the Constitution does not grant authorisation to confer, in a general way, control in a given regard, leaving the subject (onto which the competences have been conferred) to exhaustively specify the competences on its own' (K. Wojtyczek, *op. cit.*, p. 120).

Both the modifications of the scope of the conferred competences and its extension are possible 'only by means of signing an international agreement and on the condition of its ratification by all the states concerned' (L. Garlicki, *op. cit.*, p. 57), if they have not renounced this in the content of the signed agreement, which implies the necessity of approval of possible changes in the scope of competences, in accordance with the requirements specified in Article 90 of the Constitution.

As it has been indicated in the reasoning of the decision by the Constitutional Council of the French Republic, the provisions of the Treaty are not a proper basis of conferral of competences on the Union. In France, there is necessity for an amendment to the French Constitution (the amended European clause stipulates that the Republic 'participates in the European Union on the conditions provided for in the Treaty of Lisbon'). In Poland – due to the provisions of Article 90 of the Constitution – this role is fulfilled by a statute, on the basis of which the competences of state organs may be conferred on an international organisation, which is enacted pursuant to the requirements specified in Article 90 of the Constitution. The consent to the ratification of an international agreement in that regard may be granted in a referendum.

The limit of conferral of competences is also axiologically determined in that sense that the Republic of Poland and ‘an organisation’ or ‘an institution, onto which the competences have been conferred, must embody ‘common system of universal values, such as the system of democratic governance, observance of human rights’ (K. Działocho, *op.cit.*, p. 5).

The values being expressed in the Constitution and the Treaty of Lisbon determine the axiological identity of Poland and the European Union. The draft of economic, social and political systems contained in the Treaty, which stipulates the respect for dignity and freedom of the individual, as well as respect for the national identity of the Member States, is fully consistent with the basic values of the Constitution, confirmed in the Preamble of the Constitution, which includes the indication of historical, traditional and cultural context that determines national identity, which is respected in the EU within the meaning of Article 4(2) of the Treaty on European Union. These values include the most important aims which the Constitution serves, i.e. the concern for ‘the existence and future of our Homeland’. The aim of the Union – within the meaning of Article 3(1) of the Treaty on European Union – aim is to promote peace, its values and the well-being of its peoples. The Preamble enumerates the following aims which the Constitution is to serve: ‘to guarantee the rights of the citizens for all time’ and ‘to ensure diligence and efficiency in the work of public bodies’, as well as to pay ‘respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others’. These aims, and at the same time the basic constitutional values, fully correspond to the aims of the Union, specified in the Preamble of the Treaty on European Union as well as in Articles 2, 3 and 6 of that Treaty, and in particular correspond to the preoccupation with ‘the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’ and the desire to ‘enhance further the democratic and efficient functioning of the institutions’, as well as the approach that the EU is based on the foundation of ‘values of respect for human dignity’ (Article 2), the inclusion of the national security within the scope of ‘the sole responsibility of each Member State’ (Article 3), the assumption that the fundamental rights which are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and which arise from the constitutional traditions common to the Member States, ‘shall constitute general principles of the Union’s law’ (Article 6(3)). The Treaty on European Union stipulates, in Article 6(1), that ‘the Union recognises the rights, freedoms and principles’ set out in the Charter of Fundamental Rights of the European Union, ‘which shall have the same legal value as the Treaties’. Within the meaning of Article 6(2) of the Treaty on European

Union, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The provisions of the Preamble of the Constitution are also, at the same time, a premiss of formulating the principle of favourable predisposition towards the process of European integration and the cooperation between States. From that perspective, the interpretation of constitutional provisions concerning the membership in the EU should be carried out.

Adjudicating with regard to the application requires taking into account both the principle of protection of the state's sovereignty in the process of European integration and the principle of favourable predisposition towards the process of European integration and the cooperation between States (see the statement of reasons for the judgment dated 27 May 2003, Ref. No. K 11/03). From the point of view of that principle, reconstructing a higher-level norm, in the light of which the assessment of constitutionality is carried out, one should not only refer to the text of the Constitution, but also – to the extent the said text refers to the terms, concepts and principles present in the EU law – refer to those meanings (see the statement of reasons for the judgment dated 28 January 2003, Ref. No. K 2/02, OTK ZU No. 1/A/2003, item 4). However, on no account may an interpretation which favours the EU law lead to 'the results which are contrary to the explicit wording of constitutional norms and are impossible to reconcile with the minimum of the guarantee functions fulfilled by the Constitution' (the statement of reasons for the judgment in the case K 18/04).

The model of the European Union, which has been presented in the Treaty of Lisbon, is to ensure respect for the principle of protection of the state's sovereignty in the process of integration, as well as respect for the principle of favourable predisposition towards the process of European integration and the cooperation between States. This finds confirmation in the full compatibility of values and aims of the Union, determined in the Treaty of Lisbon, as well as the values and aims of the Republic of Poland, determined in the Constitution of the Republic of Poland, and in specifying the principles of allocation of competences between the Union and its Member States.

Article 3 of the Treaty on European Union, which sets out the aims of the Union, mentions 'peace, its values and the well-being of its peoples'. Working for 'the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment', the Union 'shall combat social exclusion and discrimination, and shall pro-

mote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child'. The aims of the European Union fully correspond to the aims of the Republic of Poland, indicated in the Constitution.

The basis of full axiological compatibility comprises identical axiological inspiration of the Union and the Republic of Poland, confirmed in the Preamble to the Treaty on European Union and the Preamble to the Constitution, identical focus on the observance of the principles of freedom and democracy, human rights and fundamental freedoms, as well as social rights, and also the efforts to enhance the democratic character of institutions and the effectiveness of their activities. Part of the EU law is constituted by fundamental rights, as general legal provisions, guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and which are also reflected in the Constitution. Both Article 3 of the Treaty on European Union and Article 2 of the Constitution show equivalent preoccupation with social justice. The Constitution explicitly states in Article 1 that the Republic of Poland is 'the common good of all its citizens'.

As regards the allocation of competences between the Union and the Member States, the most significant, from the point of view of the Treaty of Lisbon, is the statement in Article 3(6) of the Treaty on European Union that the Union 'shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties' and competences 'not conferred upon the Union in the Treaties remain with the Member States' (Article 4(1) of the Treaty on European Union). Therefore, the principle of conferral, in its essence, constitutes the confirmation of the sovereignty of the Member States in relation to the Union, which may not act outside the competences conferred upon it and thus, in its activities, enhances the sovereignty of the Member States, since its aim is to promote the well-being of its peoples. Pursuant to Article 4(2) of the Treaty on European Union, the Union respects the equality of Member States before the Treaties as well as 'their national identities, inherent in their fundamental structures, political and constitutional'; it respects 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'. However, the Member States 'shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives' (Article 4(3), third subparagraph, the Treaty on European Union). Moreover, Article 2(5) of the Treaty on the Functioning of the European Union indicates that when the Union car-

ries out actions to support, coordinate, or supplement the actions of the Member States, it does so 'without thereby superseding their competence in these areas'. Also, it should be stressed that the Protocol on the exercise of shared competence stipulates that when the Union has taken action in a certain area, 'the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.

Therefore, in the view of the Constitutional Tribunal, from the point of view of the basic principles of the Union, an interpretation of the Treaty provisions aimed at undermining the state's sovereignty or endangering national identity, and at taking over sovereignty – in a non-contractual manner – within the scope of the competences which have not been conferred, would be inconsistent with the Treaty of Lisbon. The Treaty clearly confirms the significance of the principle of protection of the state's sovereignty in the process of European integration, which fully corresponds with the principles determining the culture of European integration in the Constitution.

A vital characteristic of the culture of European integration is mutual loyalty between the Member States and the Union, which they cherish. European integration proves its value, providing balance between modernity, which is indispensable in the contemporary world, and the preservation of national traditions based on supranational cultural community.

2.3. Constitutional bases of cooperation among the subsystems of legal regulations developed in different legislative centres.

The membership in the European Union causes a constitutional problem for each Member State – the question of relation between the national law and the EU law. This is connected with the limits of opening the national legal order to the EU law, and the ensuing constitutional doubts as to the guarantees of sovereignty, which is also the basis of the application in this case.

The Constitutional Tribunal states that at present the legal order in Europe is – for the states belonging to the Union – a multi-faceted order which comprises treaty norms, norms enacted by the EU institutions, and those enacted in the national legal order. At the same time, this is a dynamic system – the relation between the EU order and the national order is subject to evolution, together with changes in the EU law.

Legislative competences constitute an attribute of a sovereign state. This fact – in conjunction with a dynamic character of European integration, which results in changes in the EU law, especially those concerning the changes in the ways of enacting that law – is a source of fears whether

the system of guarantees, specified and regarded in the Member State as effective at a given point in time (e.g. at the time of accession to the Union), is sufficiently efficient to safeguard the national legal order against actions going beyond the limit and scope endangering sovereignty. Therefore, it is logical that the accession to the Union itself as well as particular subsequent changes in the procedures (mechanisms) for enacting EU law cause the Member States to commence constitutional review in the light of the national constitutions. The relation between the EU law and the national law is a mechanism, within which the authorities of the Member States operate (in different ways and at different stages), by formulating the future EU law, on the one hand, and by taking decisions on enforcement of the said law, on the other. Hence, at the EU level, on the one hand, and in the national order, on the other hand, what emerges are bases for competences, mechanisms and procedures which ensure involvement in creating EU law and, at the same time, provide guarantees of maintaining the desirable balance. Each change of an EU mechanism requires checking the system of mechanisms and guarantees in the national law, which is correlated therewith. Review of constitutionality provides such verification which is confirmed by the jurisprudence of European constitutional courts and tribunals (cf. point 3 of that part of the reasons of statement).

In Poland, the Treaty of Accession passed the test of constitutionality (see the judgment K 18/04). The constitutional review conducted on the basis of the present application concerns the Treaty of Lisbon, which *inter alia* changes the mechanism for enacting EU law, both the primary and secondary law. In that situation, a question arises whether the existing national guarantee mechanisms are sufficiently efficient and effective in order to provide desirable balance, both as to the principle of sovereignty itself, and as to the guarantee of Poland's (its authorities') impact on the content of draft EU law under the new rules. This requires answering the following question: does the principle of sovereignty allow for conferral of legislative competences as regards its scope, object and manner, as it has been done in the Treaty of Lisbon.

At the same time, it should be remembered that the issue of accession to the European Union and conferral of competences, pursuant to Article 90 of the Constitution, has already been the object of constitutional review, in the case K 18/04. Thus, in the present case, the issue is only 'normative novelty' which the Treaty of Lisbon introduces, to the extent it has been challenged by the applicants.

The statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04 includes the view that the constitution-maker

ensures the uniformity of the legal system, regardless of the fact whether the legal acts constituting that system result from the activities of the national legislator, or whether they have originated as international regulations (of various scope and character) set out in the constitutional catalogue of sources of law.

The Constitutional Tribunal maintains the view presented in the previous jurisprudence and, in particular, in the statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04, that the legal consequence of Article 9 of the Constitution is the assumption that, in the territory of the Republic of Poland, apart from the norms (provisions) enacted by the national legislator, the regulations (provisions) originating outside the national (Polish) system of legislative bodies also apply. The constitution-maker has decided that the system of law which is binding in the territory of the Republic of Poland will have a multi-faceted character, and will encompass, apart from legal acts constituted by Polish legislative bodies, acts of international and Community law (cf. E. Łętowska, '*Multicentryczność*' systemu prawa i wykładnia jej przyjazna, in: *Rozprawy prawnicze* L. Ogiegło, W. Popiołek, M. Szpunar (eds.), Kraków 2005).

In the light of the doctrine, (cf., e.g., S. Biernat, *Prawo Unii Europejskiej a prawo państw członkowskich*, in: *Prawo Unii Europejskiej. Zagadnienia systemowe*, J. Barcz (ed.), Warszawa 2006) and jurisprudence (cf. the statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04), the Community law is not completely external law with regard to the Polish state. As regards the primary law, the Treaty law is created when the Treaties, concluded by all the Member States (including the Republic of Poland), are approved. As regards the secondary Community law (derivative law), it is created with the participation of the representatives of governments of the Member States (including Poland) – in the Council and the representatives of EU citizens (including Polish citizens) – in the European Parliament.

It is the legislator's task to indicate – within constitutional limits – the principles, in accordance with which the Polish government will determine its stance on European matters, in cooperation with the Sejm and the Senate. The Constitutional Tribunal maintains the view expressed in the statement of reasons for the judgment of 12 January 2005, with regard to European matters, it is crucial that 'the Polish stance, whenever possible, should be a result of cooperation between the legislative powers', which entails that 'the prerogatives of the constitutional organs constituting the legislative power should be properly adjusted'.

What should be emphasised is the significance of the of the Protocol on the role of national parliaments in the European Union (OJ EU C 115

of 9.5.2008, p. 201), annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. The Protocol indicates that the Union aims at enhancing the ability of the national Parliaments ‘to express their views on draft legislative acts of the European Union’ (the Preamble).

Pursuant to Article 2 of the said Protocol, draft legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments, which may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality (Article 3). Moreover, if the European Council intends to make reference to Article 48(7), first or second paragraphs, the national Parliaments shall be notified about such initiative of the European Council at least 6 months before any decision is adopted (Article 6). Those considerations allow the Polish Parliament to affect the content of the EU law, to the extent it is possible to narrow down the scope of its ‘external character’ in relation to the Polish state. It is not the Constitutional Tribunal’s task to propose possible legal solutions in that regard.

Consequently, as the Constitutional Tribunal has stated, in particular, in the judgment in the case K 18/04, in the territory of Poland, subsystems of legal regulations, coming from different legislative centres, coexist. They should coexist in accordance with the principle of mutually friendly interpretation and cooperative coexistence. This circumstance sheds different light on the potential clash of norms and the primacy of one of the indicated subsystems. The assumption about the multi-faceted structure of the binding legal system in Poland has a general character. Due to the regulations contained in Article 9, Article 87(1) and Articles 90 to 91, the Constitution recognises the multi-faceted structure of the binding regulations in the territory of the Republic of Poland, and provides for a special procedure for its introduction. The said procedure resembles the procedure for amending the Constitution.

The views of the Constitutional Tribunal, presented in the judgment in the case K 18/04, have remained valid, regardless of the changes that have occurred in the primary EU law, due to the validity of the higher-level norms for constitutional review. Pursuant to the predictions of the representatives of the doctrine, the said judgment has considerable impact on subsequent jurisprudence of the Constitutional Tribunal’ (as in S. Biernat, commentary to the judgment of the Constitutional Tribunal of 11.05.2005 [conformity of the Treaty of Accession to the Constitution of the Republic

of Poland] K 18/04, *Kwartalnik Prawa Publicznego* No. 4/2005, p. 205), primarily due to ‘the explicit wording of Article 8 and its place in the Constitution’, and also due to the fact that emphasis on the primacy of the Constitution may not endanger ‘the uniform binding force and application of the EU law, and harmonious performance of duties by Poland as a Member State’ (S. Biernat, *ibidem*).

2.4. The constitutional rules for ratification of international agreements concerning the conferral of competences by the organs of the state.

Within the meaning of Article 91(1) of the Constitution, a ratified international agreement, after its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), constitutes part of the domestic legal order of the Republic of Poland. It is also applied directly (unless its application depends on the enactment of a statute). Provided for in Article 90(1) of the Constitution, international agreements on conferring the competences of organs of the state ‘in relation to certain matters’ upon an international organisation or international institution constitute one of the categories of international agreements that are subject to ratification.

The ratification of those agreements is carried out pursuant to a procedure with substantially stringent requirements in comparison with the procedure for ratification of other agreements, carried out upon prior consent of the Sejm and the Senate expressed by statute. The Constitution requires, in that case, consent of a qualified majority (at least two-thirds majority) of the national representative bodies: the Sejm and the Senate of the Republic of Poland, representing the Nation (being vested with supreme power) or – alternatively – gaining consent of the Nation, expressed by way of a relevant nationwide referendum. Substantial safeguards have been introduced against conferring competences too easily or without proper legitimacy outside the system of state organs of the Republic of Poland. These safeguards concern all the cases of conferring competences on the bodies of the European Union.

2.5. Conferral of competences in certain matters in the light of the Constitution.

The Constitutional Tribunal maintains the view presented in the well-established jurisprudence, and in particular in the statement of reasons for the judgment in the case K 18/04, that the conferral of competences ‘in relation to certain matters’ should be understood as prohibition against the conferral of all the competences of a given state organ, the conferral of competences in relation to all the matters in a given area, and also the conferral of competences regarding the nature of matters specifying the remit

of a given organ of the state. Thus, it is necessary to precisely determine the areas and indicate the scope of competences which are subject to conferral.

Also, it is not possible to understand the conferral of competences in such a way that would entail allowing a possibility of determining any competences that may be presumed to be conferred. In its jurisprudence, the Constitutional Tribunal has stressed a number of times that it is impossible in a democratic state ruled by law to create presumed competences. This also refers to the relations within the European Union, which not being a state, uses the law, and therefore must meet relevant standards in that regard. The conferral of competences may not result in gradual deprivation of the state of its sovereignty, due to allowing the possibility of conferring the competences ‘in relation to certain matters’. As an exception to the principle of independence and sovereignty (cf. L. Garlicki, *op. cit.*, p. 55 and subsequent pages), the conferral of competences may not be interpreted in a broad sense.

On no account may the conferral of competences be understood as a premiss of allowing for a presumed amendment to the Constitution which consists in a possibility of bypassing the requirements set out in Article 90(1) of the Constitution. Such a bypass of constitutional rules would take place in the case of recognising a broad interpretation of the scope of conferred competences, in particular by allowing for a possibility of conferring competences to a subject other than an international organisation or international institution, alternatively including, within the scope of conferred competences, the competences which are not subject to conferral to be recognised as conferred. The institution of conferral of competences does not create a possibility of amending the Constitution in accordance with the interpretation which favours European integration.

The Constitutional Tribunal maintains its stance presented in the statement of reasons for the judgment in the case K 18/04, pursuant to which neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or adopt decisions which would be inconsistent with the Constitution of the Republic of Poland upon an international organisation or international institution. In particular, the provisions indicated here may not be used to confer competences within the scope which would prevent the Republic of Poland from functioning as a sovereign and democratic state.

As it has been stated in the statement of reasons for the judgment in the case K 18/04, guaranteed in Article 91(2) of the Constitution, precedence of agreements on conferral of competences ‘in relation to certain matters’ over the provisions of statutes if such statutes cannot be recon-

ciled with such agreements, does not lead to recognising analogical precedence of those agreements over the provisions of the Constitution. Thus, the Constitution remains – due to its unique status – ‘the supreme law of the Republic of Poland’ with regard to all international agreements which are binding for the Republic of Poland. This also concerns ratified international agreements about conferral of competences ‘in relation to certain matters’. Due to the primacy of the binding force of the Constitution, which arises from its Article 8(1), the Constitution enjoys precedence as to the binding force and application in the territory of the Republic of Poland.

2.6. Article 90(1) of the Constitution versus the issue of systemic changes in the European Union and the question of binding the Republic of Poland with the law enacted by a majority vote.

Needless to say, the system of the European Union has a dynamic character, which may lead to changes in the rules of its functioning. However, this does not mean that the conferral of competences provided for in the Constitution implies unconditional acceptance of the future systemic changes and, in particular, that may be understood as the premiss of adjustment of Article 90(1) of the Constitution to those changes, by means of interpretation which assumes giving up the restriction consisting in allowing the conferral of competences only ‘in relation to certain matters’.

An amendment to an international agreement being a basis of conferral of competences, as referred to in Article 90(1) of the Constitution, requires consent pursuant to the provisions of Article 90 of the Constitution. The ratification of such an agreement would not be possible without meeting constitutional requirements. The essence of Article 90 of the Constitution is the safeguarding character of the restrictions contained therein, as regards the sovereignty of the Nation and the state. In accordance with the restrictions, conferring the competences of state organs is admissible: 1) only on an international organisation or international institution, 2) only in relation to certain matters, and 3) only upon consent by the Polish Parliament, alternatively the Nation by way of a nationwide referendum. The said triad of constitutional restrictions must occur in order to ensure the conformity of conferral to the Constitution. Article 90(1) of the Constitution provides for the conferral of competences ‘by virtue of international agreements’. This means that the conferral of competences may be done by an international agreement, as well as by an international agreement which amends the provisions of that agreement. It is also possible to confer competences in accordance with a simplified revision procedure of the provisions of the agreement, provided the triad of constitutional require-

ments occurs, being the *sine qua non* requirement of constitutionality of the conferral. An international agreement – allowing for a simplified revision procedure of its provisions which concern the competences of state organs – will be deemed constitutional, provided that the said procedure does not exclude the possibility of applying the requirements constituting the triad of constitutional restrictions on conferral of competences. Therefore, the agreement allowing for a simplified procedure for conferral of competences will be consistent with the Constitution if the fact of allowing does not exclude granting consent to the conferral of competences, in relation to certain matters, by statute, pursuant to the requirements specified in Article 90(1) of the Constitution, or by way of a nationwide referendum.

However, within the scope of conferral, the Republic of Poland allows for legal acts to be enacted, by the EU bodies, in accordance with the rules set out in the Treaty of Lisbon, which will be in force in the territory of the Republic of Poland or which will bind Poland in foreign relations. Understanding the conferral of competences in a different way would entail that Article 90 of the Constitution is void of legal content and does not provide for conferral of competences at all, whereas it follows from its content that conferral is possible – pursuant to the rules set out in the Constitution and specified in the Treaty.

In the statement of reasons for the judgment in the case K 18/04, the Constitutional Tribunal has pointed out that, by approving the binding Constitution, the Nation itself decided that it agrees to the possibility of binding the Republic of Poland with the law enacted by an international organisation or international institution, i.e. with the law other than the treaty law. This is carried out within the limits provided for in ratified international agreements. Moreover, the Nation also granted its consent, in the said referendum, to the fact that the said law would be directly binding in the territory of the Republic of Poland, taking precedence over statutes in the event of a clash of laws. The consent to bind the Republic of Poland with the law enacted in accordance with the rules specified in the primary law has been expressed in the Treaty of Accession, accepted by way of a nationwide referendum; and the constitutionality of the Treaty of Accession was the object of assessment carried out by the Constitutional Tribunal in the case K 18/04.

The conferral of competences may not infringe on the provisions of the Constitution, including the principle of primacy of the Constitution in the system of sources of law. The Constitutional Tribunal maintains the view, presented in the statement of reasons for the judgment in the case K 18/04, that the Constitution remains – due to its unique status – ‘the

supreme law of the Republic of Poland' with regard to all international agreements which are binding for the Republic of Poland. This also concerns the ratified international agreements on conferral of competences 'in relation to certain matters'. Due to the primacy of the binding force of the Constitution, which arises from its Article 8(1), the Constitution enjoys precedence as regards binding force and application in the territory of the Republic of Poland. The Constitutional Tribunal holds the view that neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or make decisions which would be inconsistent with the Constitution of the Republic of Poland on an international organisation or international institution. In particular, the provisions indicated here may not be used to confer the competences in the regard in which they would prevent the Republic of Poland from functioning as a sovereign and democratic state. From the point of sovereignty and the protection of other constitutional values, what is significant is the limitation of conferral of competences 'in relation to certain matters' (and thus without infringing the 'core' competences, which allow for sovereign and democratic determination of the fate of the Republic of Poland, pursuant to the Preamble of the Constitution).

The provisions of the Treaty of Lisbon indicate which competences are subject to conferral. With regard to conferred competences, the EU bodies may constitute law which is binding for the Member States, in accordance with the rules set out in the Treaty.

The Constitutional Tribunal shares the view, expressed in the doctrine that accession to an international organisation entails conferring competences for the exercise of power necessary to carry out the activities of the organisation, by relevant national bodies, on the bodies of the organisation (cf. C. Mik, *Przekazanie kompetencji przez Rzeczpospolitą Polska na rzecz Unii Europejskiej i jego następstwa prawne* (commentary to Article 90(1) of the Constitution), in: *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej*, C. Mik (ed.), Toruń 1999, p. 145). At the same time the stance of the Constitutional Tribunal, formulated in the statement of reasons of the judgment in the case K 18/04, remains relevant: 'the Polish legislator should make a decision either about amending the Constitution or amending the Community regulations, or – ultimately – about seceding from the European Union'.

The allegations of the applicant regard the possibility of applying the provisions of the Treaty in a way that broadens the scope of competences that have already been conferred, and therefore they refer to the ideas of the applicants concerning the way of applying the Treaty in the future. The Constitutional Tribunal is not competent to assess hypothetical way of ap-

plying the Treaty of Lisbon. Such practice remains outside the jurisdiction of the constitutional court as long as it does not take the form of concrete regulations subject to review by the Constitutional Tribunal, pursuant to Article 188 of the Constitution. The conclusions concerning the potential application of the Treaty, in a way which would be inconsistent with the Treaty, fall outside the jurisdiction of the Constitutional Tribunal.

It should be emphasised that the Constitution provides for conferral of competences by means of an international agreement, and this means that the object of conferral may only be the competences indicated in the agreement. Despite the allegations of the applicant, conferral of competences may not have *carte blanche* nature, although the limits of competences are not, and may not, be sharp. Within the meaning of the Constitution, it is possible to confer competences ‘in relation to certain matters’, which excludes conferral of competence to determine competences. And therefore, each instance of extending the catalogue of conferred competences requires an appropriate basis in the content of an international agreement and consent, as referred to in Article 90(1) of the Constitution.

It is not the task of the Constitutional Tribunal to specify the content of the statute granting consent to ratification of an international agreement, as referred to in Article 90 of the Constitution, neither is it to specify the rules of participation of the parliament and government as regards the implementation of the Treaty of Lisbon. The applicant has voiced an expectation that the Constitutional Tribunal – by analogy to the Federal Constitutional Court of Germany, which adjudicated that the Treaty of Lisbon was consistent with the Basic Law for the Federal Republic of Germany, whereas some of the provisions concerning the powers of the Parliament with regard to European matters, which had been challenged together with the Treaty, did not meet the constitutional standards – will specify the tasks of the legislator related to the ratification of the Treaty of Lisbon. However, this expectation does not take into account the vital differences between the Constitution of the Republic of Poland and the Basic Law for the Federal Republic of Germany, when it comes to regulating the systemic foundations of European integration. It is the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty, applied by the competent bodies of the Union.

A democratic state ruled by law, as referred to in Article 2 of the Constitution, being an EU Member State, fully retains its constitutional identity, due to the fundamental homogeneity of the role the law fulfils in the political systems of the Member States and in the organisations they form. Article 90 of the Constitution, understood in the light of the principles and

values derived from Article 2 of the Constitution, and concerning the assumption that there are no competences that do not arise from an explicit legal provision (as the Constitutional Tribunal stated in the Resolution of 10 May 1994, Ref. No. W 7/94, OTK of 1994, Part 1, item 23), excludes conferral of competences without conformity to a legal basis provided for therein and the democratic procedure for enacting it. Amendments to the content of the Treaties, without observing the procedure for ratification which leads to the conferral of competences on the Union, require – due to the fact that Article 2 of the Constitution is binding – a relevant statutory basis pursuant to the rules contained in Article 90 of the Constitution.

The object of cooperation of public powers, with regard to European matters, also comprises the issues going beyond the scope of granting new EU competences and modifying the already existing ones, which are regulated in the Act on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union.

The application alleges that there is no proper regulation of the manner of expressing the stance of the Republic of Poland which would be presented at the forum of the European Union, by the representatives of Poland in the Council and the European Council, and in particular that there is insufficient participation of the legislative branch.

The ratification of the Treaty of Lisbon was carried out in accordance with Article 90 of the Constitution. It also encompassed the approval of the provisions which make the decision-making processes more flexible in the EU institutions. At the same time, the changes to the decision-making procedures require approval by the Polish constitutional organs of the state. The Treaties provide for several forms of such approval. Some of those forms, falling within the scope of the provisions challenged by the applicants, are going to be presented in greater detail below, in point 4 of that part of the statement of reasons. For the time being, it can be mentioned that the issues here are as follows: first of all, the requirement of unanimity when taking decisions on introducing changes to the decision-making procedures; secondly, the competences of the Member States as regards approving certain decisions of the European Council and the Council; thirdly, the competences of the national Parliaments to notify their opposition; fourthly, the procedures of the so-called safety break applied when adopting a decision by a qualified majority, in the case where a given Member State recognises that the draft of a legal act infringes on important aspects of its legal system.

The Constitutional Tribunal points out that, already after the applications had been submitted in this case, there was a significant change in the

legal system. It involved the enactment of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union (Journal of Laws – Dz. U. No. 213, item 1395; hereinafter: the so-called Cooperation Act). The Act shall enter into force 3 months after its publication. The said Act repeals the Act of 11 March 2004, with the identical title (Journal of Laws – Dz. U. No. 52, item 515, amended). The Cooperation Act is not the object of review by the Constitutional Tribunal. However, the tribunal takes it into account as an element of the legal order which will be binding in a few weeks' time from the date of adjudication in this case. Its enactment and subsequent entrance into force entail that the allegations of the applicants, concerning the lack of a treaty-related regulation, will cease to be up-to-date. After its entrance into force, the Cooperation Act will enjoy the presumption of conformity to the Constitution. Obviously, this does not rule out the possibility of subjecting its provisions to constitutional review.

It should be noted that the new Cooperation Act considerably strengthens, in comparison with the previous Act, the role of the Sejm and the Senate in the matters concerning the object of adjudication in this case. The Act of 2004 granted both houses of the Polish Parliament the competences to provide opinions on the drafts of EU law acts and on the stances presented by the Republic of Poland at the forum of EU institutions, whereas the Act of 2010 also grants the legislative branch, to some extent, the powers of enactment. This undoubtedly remains in connection with strengthening the role of the national Parliaments and representative democracy (cf. Article 12 of the Treaty on European Union as well as the Protocol on the role of national Parliaments in the European Union and the Protocol on the application of the principles of subsidiarity and proportionality).

The Cooperation Act imposes on the Council of Ministers the obligations of notification and reporting related to Poland's membership in the European Union (Articles 3-10 of the Cooperation Act), as well as provides the Sejm and the Senate with the instruments which allow the two houses of the Polish Parliament to influence the process of enacting EU law. In this context, one should also mention the requirement that the Council of Ministers should seek consultation, the result of which will constitute the basis of the stance of the Republic of Poland (Article 7(4), Article 10(2), Article 11(1), Article 12(1) and (2), as well as Article 13 of the Cooperation Act).

It should be noted that the requirement, arising from the Cooperation Act, that there should be consent expressed by statute or ratification before the Republic of Poland takes a stance at the forum of the European Union

– concerns, in many cases, the instances of decisions adopted on the basis of the challenged solutions.

Guaranteeing the participation of the Republic of Poland (and its constitutional organs of the state) in decision-making process in the Union is based both on the Treaty on European Union and the Treaty on the Functioning of the European Union, as well as on the Polish law.

3. The Treaty of Lisbon in the jurisprudence of European constitutional courts.

[Omitted]

4. Assessment of the conformity of the Treaty provisions challenged in the application to the Constitution.

4.1. General remarks.

The allegations of the applicant amount to the statement that the Treaty of Lisbon entails granting the EU bodies the competence to freely determine their own competences, which infringes on Article 90(1) and Article 8(1) of the Constitution.

The applicant states that there is a need for enacting provisions in the Polish law, the lack of which – in his opinion – causes the unconstitutionality of the Treaty of Lisbon. Sharing the view of the applicant as to the necessity for amendments in the national law in relation to Poland's membership in the European Union in the EU present systemic shape, the Constitutional Tribunal emphasises that it is the legislator's task to shape the rules of the internal law which concern the procedural rules of public authorities with regard to European matters. The application reflects the fears of the Senators that the ratification of the Treaty of Lisbon will undermine the strong position of the national legislative branch. However, the addressee of those fears should be the Sejm and the Senate, and not the Constitutional Tribunal. As it is known, the work on the Commission's draft led to the enactment of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union.

Determining the unconformity of an international agreement to the Constitution may not consist in determining negligence or omission in the national legislation, or in the Constitution, since the agreement does not contain the obligation to amend the Constitution. Consequently, such an obligation does not constitute the object of adjudication.

Enacting a statute which grants consent to the ratification of an international agreement is an element of the national ratification procedure. Stating the unconstitutionality of the statutory omission or negligence may not be effective, with regard to the consequences of binding the Republic of Poland with that agreement (until the time of its expiry, withdrawal from the agreement or its termination) due to the provisions of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (Journal of Laws – Dz. U. of 1990 No. 74, item 439), pursuant to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27).

The allegations of the applicant amount to the statement that some of the decisions-making procedures, provided for in the Treaty of Lisbon, and in particular those concerning a possibility of changing the provisions of the Treaties, are without appropriate democratic legitimacy. However, in the view of the Constitutional Tribunal, in the light of the Constitution, it is the constitution-maker and legislator who have the power to take actions aimed at reducing that deficit by enacting the national law.

The Treaty of Lisbon contains provisions aimed at strengthening the position of national Parliaments as a basis for strengthening the democratic legitimacy of the Union. This intention has been expressed in Article 12 of the Treaty on European Union, pursuant to which national Parliaments ‘contribute actively to the good functioning of the Union’: (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them; (b) by seeing to it that the principle of subsidiarity is respected; (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area and through being involved in the political monitoring of Europol and the evaluation of Eurojust’s activities; (d) by taking part in the revision procedures of the Treaties; (e) by being notified of applications for accession to the Union; (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament. It is the Polish Parliament which decides to what extent and for the implementation of which European policies, as well as with what intensity, and what consequences, it will make use of the possibilities provided for in the Treaty of Lisbon.

The applicant indicates that an ordinary revision procedure of the Treaties does not take into account the significance of the consent of the Member State with regard to the amendments concerning ‘the public security clause’, which, however, is not confirmed by the revision procedure challenged by the applicant. Indeed, in the case of that procedure –

as Article 48(4) of the Treaty on European Union stipulates – the amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. Moreover, pursuant to Article 48(5) of the said Treaty, if two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. Thus, the ordinary revision procedure provides for considerable safeguards against ignoring the stance of a Member State. The allegation of the applicant is not justified also due to the fact that, within the meaning of Article 4(2) of the Treaty on European Union, national security remains the sole responsibility of each Member State.

Therefore, the Treaties provide for safeguards against the danger of Poland's loss of control over the amendments to the primary EU law, which the applicant fears. The Treaties express the principle of making the effectiveness of an amendment contingent upon the stance of a Member State, which takes a different form depending on the type of the revision procedure. It is the task of each Member State to devise national procedures for evaluation of amendments. It should be stressed that Article 90(1) of the Constitution does not allow for conferring any competences of state organs if the requirements set out therein are not met, which means that the allegation of the applicants that the revision procedure of the Treaties is unconstitutional is groundless.

4.2. The assessment of constitutionality of the challenged provisions of the Treaty on European Union in conjunction with the provisions of the Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon).

4.2.1. The group of Senators indicates, as the object of constitutional review, Article 48 of the Treaty on European Union concerning the revision procedures of the Treaties which constitute the basis of the European Union. Pursuant to Article 48(1) of the Treaty on European Union, the Treaties may be amended in accordance with an ordinary revision procedure (provided for in Article 48(2)-(5) of the Treaty on European Union) as well as in accordance with simplified revision procedures (provided for in Article 48(6) and (7) of the Treaty on European Union). The allegations of the applicant as regards the particular provisions will be considered one by one.

[Omitted: content of Art. 48 TEU]

- 4.2.3. The ordinary revision procedure of the Treaties, challenged by the applicant, which requires concluding a revised treaty ratified by all the Member States, resembles the procedure for revising treaties which is specified in former Article 48 of the Treaty on European Union prior to the Treaty of Lisbon. The Treaty of Lisbon introduced three additional requirements which are aimed at strengthening the role of national Parliaments and the European Parliament, as well as are based on the experience with previous revision procedures of the Treaties. Firstly, the national Parliaments of the Member States must be notified about proposals for the amendments to the Treaties, submitted by the governments of the Member States, the European Parliament or the European Commission. Secondly, provided that the European Council decides in favour of examining the proposed amendments to the Treaties, the President of the European Council convenes a Convention preceding a conference of representatives of the governments of the Member States which, by way of consensus, adopts recommendations to the conference. The European Council, upon the consent of the European Parliament, may however make a decision not to convene a Convention if this is not justified by the extent of the proposed amendments. In such a case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States. Thirdly, a procedure for monitoring progress during the ratification of a revised treaty has been introduced – if, after the lapse of two years, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.
- 4.2.4. With regard to the indicated revision procedure of the Treaties, the applicant challenges the lack of participation of the Sejm and the Senate as a preliminary requirement for amendments to the primary EU law. The Constitutional Tribunal indicates that the allegation of the applicant is inapt. Pursuant to Article 48(2), second sentence, of the Treaty on European Union, the national Parliaments must be notified about the proposals for applying the ordinary revision procedure of the Treaties which constitute the basis of the European Union. This entails that even at the initial stage of the revision procedure, the national Parliaments, including the Sejm and the Senate, have the possibility of looking into the submitted proposals, as well as they may take a stance on those proposals, as part of cooperation with other organs of the state with regard to European mat-

ters. Moreover, under the ordinary revision procedure, the European Council convenes a Convention composed of *inter alia* representatives of the national Parliaments (Article 48(3) of the Treaty on European Union). In such a case, a national Parliament takes part in adopting recommendations for a conference of representatives of the governments of the Member States which prepares given amendments to the Treaties. The Sejm and the Senate have a guaranteed right to vote in the event of a decision not to convene a Convention. Pursuant to Article 16(1) of the Cooperation Act, before the European Council makes a decision not to convene a Convention, as referred to in Article 48(3) of the Treaty on European Union, the Prime Minister requests the Sejm and the Senate for an opinion which should constitute the basis for the stance of the Republic of Poland. Additionally, it should be indicated that, pursuant to Article 48(4) of the Treaty on European Union, the amendments to the Treaties enter into force after being ratified by all the Member States, in accordance with their respective constitutional requirements. The participation of the Sejm and the Senate in the procedure for the ratification of revised treaties is specified in Article 90 of the Constitution.

- 4.2.5. The group of Senators indicates, as the object of constitutional review, Article 48(6) and (7) of the Treaty on European Union, concerning the simplified revision procedures of the Treaties which constitute the basis of the European Union.

[Omitted: content of Art. 48 TEU]

- 4.2.6. In the opinion of the group of Senators, the lack of participation of competent constitutional state organs as a preliminary requirement for an amendment to the primary EU law is inconsistent with the principle of primacy of the Constitution. The applicant pointed out that, although Article 48(6) of the Treaty on European Union provides for the possibility that decisions of the institutions of the European Union do not enter into force until they are approved by the Member States in accordance with their respective constitutional requirements, but this refers solely to institutional changes in the monetary area. As higher-level norms for the constitutional review, the group of Senators indicates Article 8(1) and Article 90(1) of the Constitution.
- 4.2.7. The Constitutional Tribunal indicates that the Treaty of Lisbon, apart from an amended ordinary revision procedure of the Treaties

which has been regulated in Article 48(1)-(5) of the Treaty on European Union, has introduced simplified revision procedures provided for in Article 48(6) and (7) of the Treaty on European Union, which have been challenged by the applicants. In accordance with the procedure regulated in the challenged provisions of the Treaty on European Union, an amendment to the Treaties requires neither a Convention nor a conference of representatives of the governments of the Member States to be convened. The simplified revision procedures of the Treaties are to ensure greater flexibility to the political system of the Union, as they allow to amend the provisions of the Treaties with regard to particular areas (set out in detail in Article 48(6) and (7) of the Treaty on European Union) without the necessity to apply a complicated revision procedure. This is, above all, aimed at enhancing the effectiveness of the EU decision-making process. The first of the procedures set out in Article 48(6) of the Treaty on European Union provides for a simplified revision of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The proposals for the amendments in that regard may be submitted to the European Council by the governments of the Member States, the European Parliament and the Commission. On the basis of that, the European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. Pursuant to Article 48(6), third subparagraph, the indicated decision may not increase the competences conferred on the Union in the Treaties. The European Council acts by unanimity (i.e. upon consent of all the Member States), after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. The decision of the European Council does not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

In the light of the Polish law, for the legal acts referred to in Article 48(6) of the Treaty on European Union, Article 12(2a) of the Act of 14 April 2000 on International Agreements (Journal of Laws – Dz. U. No. 39, item 443, as amended; hereinafter: the Act on International Agreements), amended by the Cooperation Act, requires ratification. An international agreement is submitted to the President of the Republic of Poland for ratification after the consent referred to in Article 89(1) and Article 90 of the Constitution, or after notification of the Sejm of the Republic of Poland pursuant to

Article 89(2) of the Constitution (Article 15(5) in conjunction with Article 15(3) of the Act on International Agreements).

The other of the simplified revision procedures of the Treaties has been provided for in Article 48(7) of the Treaty on European Union. That provision allows for a possibility of introducing amendments to the decision-making procedures regulated in the Treaty on the Functioning of the European Union, as well as in Title V of the Treaty on European Union, i.e. the area of freedom, security and justice. The indicated procedure may be applied solely to the introduction of two kinds of amendments. Firstly, where the provisions of the Treaties provide for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. However, the said procedure does not apply to decisions with military implications or those in the area of defence. Secondly, where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Any initiative taken by the European Council is notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision of the Council is not adopted. For the adoption of the aforementioned decisions, the European Council acts by unanimity after obtaining the consent of the European Parliament, which is given by a majority of its component members.

Pursuant to Article 14(1) of the Cooperation Act, the decision in the case of the Republic of Poland with regard to a draft of an EU legal act, as referred to in Article 48(7) of the Treaty on European Union, is made by the President of the Republic of Poland, upon a motion of the Council of Ministers, upon consent granted by statute.

- 4.2.8. The Constitutional Tribunal indicates that the simplified revision procedures of the Treaties provided for in Article 48(6) and (7) of the Treaty on European Union have been accepted by the Republic of Poland, which has ratified the Treaty of Lisbon, pursuant to Article 90 of the Constitution. The decisions of the European Council, as referred to in Article 48(6) and (7) of the Treaty on European Union, are adopted unanimously by the head of states or governments of the Member States, as well as by the President of the European Council and the President of the European Commission.

The entrance into force of a decision adopted pursuant to Article 48(6) of the Treaty on European Union is to be approved by the Member States in accordance with their respective constitutional requirements. In the Polish legal order, the said legal acts of the European Council require ratification in accordance with the relevant provisions of the Constitution. Therefore, the allegation of the group of Senators concerning the lack of participation of constitutional organs of the state in the indicated procedures is groundless. Any amendment to the procedure of constituting law within the framework of the European Union, provided for in Article 48(6) and (7) of the Treaty on European Union, is accompanied by guarantees which allow the Member States to effectively protect their national interests. Moreover, the allegation of the applicant as to expressing consent exclusively to amendments to the Treaties in the case of institutional changes in the monetary area stems from inaccurate interpretation of the wording of Article 48(6), second subparagraph, of the Treaty on European Union. The indicated requirement pertains to all decisions adopted pursuant to Article 48(6) of the Treaty on European Union, whereas institutional changes in the monetary area are additionally consulted with the European Central Bank. Adopting a decision pursuant to Article 48(7) of the Treaty on European Union depends on the absence of opposition voiced by a national Parliament within the period of six months.

4.2.9. Article 48(6), second subparagraph, of the Treaty on European Union provides that ‘the European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting (...). That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements’. It follows from the challenged provision of the Treaty that the amendment which the said provision concerns does not enter into force unless it is ‘approved’ by the Republic of Poland, in accordance with the constitutional requirements of the Republic of Poland. It is within the remit of the constitution-maker to specify such requirements.

In the opinion of the Constitutional Tribunal, possible conferral of competences of state organs in relation to certain matters, as a result of this amendment, would be possible only in accordance with the rules set out in Article 90 of the Constitution, which concern the conferral of competences of state organs by virtue of international agreements. However, any conferral of competences in that regard

is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision ‘shall not increase the competences conferred on the Union in the Treaties’. Therefore, there will be no conferral of ‘competence of organs of State authority in relation to certain matters’. Thus, the point is not the conferral of competences.

The challenged provision of Article 48(6), second subparagraph, of the Treaty on European Union is consistent with the indicated higher-level norm for constitutional review.

- 4.2.10. The European Council decides by unanimity whether to apply the procedure specified in Article 48(7), second subparagraph, of the Treaty on European Union, which means that the Republic of Poland may block such a decision in the case where the solution would infringe on the principles of conferring the competences set out in Article 90 of the Constitution, to the extent indicated by the applicant as a higher-level norm for constitutional review. And thus, public authorities that are competent in that regard are not deprived of their ability to observe the provisions of the Constitution. The application of this procedure depends on the stance of the Polish Sejm and Senate, for – in the light of Article 48(7), third subparagraph – the initiative in that case is “conferred” on national Parliaments, which may notify their objections within the time-scale set; as a result, the decision to apply the said procedure is blocked. The national legislator has the power to specify the mechanism for determining the stance of the Parliament on matters ‘conferred’ pursuant to Article 48 of the Treaty on European Union, which contains measures safeguarding sovereign rights of the Republic of Poland.

In the view of the Constitutional Tribunal, Article 48(7), second subparagraph, is consistent with the higher-level norms for constitutional review indicated by the applicant.

Article 48(7), third subparagraph, of the Treaty on European Union stipulates that any initiative taken by the European Council on the basis of the first or the second subparagraph is notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph is not adopted. In the absence of opposition, the European Council may adopt the decision.

The conferral of competences is only possible in accordance with the rules set out in Articles 90(1)-(3) of the Constitution, and with the application of those rules for possible conferral of compe-

tences by virtue of an international agreement, and not by amending an international agreement, but by implementing its provisions, which the challenged Article 48(7) refers to. In the view of the Constitutional Tribunal, Article 48(7), third subparagraph, is consistent with the indicated higher-level norm for constitutional review.

- 4.2.11. The application by the group of Senators concerns Article 48(6) and (7) of the Treaty on European Union in conjunction with the indicated provisions of the Treaty on the Functioning of the European Union, and in particular Article 2(2) of that Treaty, which stipulates that ‘when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence’. Article 3(2) of the Treaty on the Functioning of the European Union grants the Union ‘exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope’. Article 7 of the Treaty on the Functioning of the European Union stipulates that ‘the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’.

It is pointed out in the substantiation of the application by the group of Senators that Article 48 of the Treaty on European Union in conjunction with the indicated provisions of the Treaty on the Functioning of the European Union ‘does not take into account the primacy of consent of a given Member State with regard to the national public security clause’. This allegation is not justified in the context of the explicit wording of Article 4(2) of the Treaty on European Union, which stipulates that ‘national security remains the sole responsibility of each Member State’. The applicant indicates that ‘only adoption’ of the clause indicated by him ‘eliminates the clash between the post-Treaty institutions and procedures of the European Union and the constitutional legal order which is binding in Poland’. But, in fact, the indicated clause has already been adopted in the Treaty on European Union.

In the opinion of the applicant, ‘the lack of legislative participation of competent constitutional state organs as a preliminary

requirement for an amendment to the primary EU law by means of treaties'. However, the participation is provided for both in Article 48 of the Treaty on European Union, as a requirement for the said amendment, as well as in the Protocol on the role of national Parliaments in the European Union.

- 4.2.12. In the opinion of the applicant, Article 352 of the Treaty on the Functioning of the European Union may serve, almost within the entire scope of application of the primary law, as a basis of competence that allows for activity at European level, which raises reservations as to 'the prohibition against conferring *carte blanche* authorisation or competence to determine competences' and allows for introducing significant amendments to the treaty base of the European Union, 'without the necessity of constitutive participation of legislative organs, apart from the participation of the governments of the Member States', which means 'exceeding the constitutional requirements of conferring the sovereign rights of the Polish state on the European Union'.

Article 352(1) of the Treaty on the Functioning of the European Union stipulates that: 'If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament'.

Article 352(2) of the Treaty on the Functioning of the European Union stipulates that: 'Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article'.

The group of Senators points out that Article 352(1) of the Treaty on the Functioning of the European Union allows for creating competence of the Union to specify the competences which have not been conferred on it by the Member States. The Senators pointed out the lack of participation of constitutional organs of the state in the said procedure, and in particular the organs of the legislative branch. In the opinion of the applicants, such participation is not guaranteed by Article 352(2) of the Treaty on the Functioning

of the European Union, since it provides only for a requirement of necessary notification of national Parliaments about the proposals adopted in accordance with Article 352 of the Treaty on the Functioning of the European Union.

Challenged by the applicant, Article 352(1) and (2) is, to a large extent, equivalent to Article 308 of the Treaty establishing the European Community (the EC Treaty), which used to be binding prior to the entrance into force of the Treaty of Lisbon. The indicated provision has already been reviewed by the Tribunal in the judgment in the case K 18/04 (point 18.6.). The Constitutional Tribunal, *inter alia*, stressed the fundamental significance of the requirement of unanimous action by the Council. This means that actions provided for in Article 308 of the EC Treaty may not be taken without obtaining the consent of any of the Member States, including the consent of the Republic of Poland. The Constitutional Tribunal indicates that in comparison with former Article 308 of the EC Treaty, Article 352 of the Treaty on the Functioning of the European Union, challenged by the applicants, may find a wider application, namely, 'within the framework of the policies defined in the Treaties'. There are also procedural differences. Instead of the Council's consultation with the European Parliament, the requirement of the Parliament's consent is introduced. Moreover, Article 352 of the Treaty on the Functioning of the European Union contains additional paragraphs 2 to 4, which limit and complement the scope of application of the flexibility clause. Pursuant to Article 352(2) the Treaty on the Functioning of the European Union within the framework of the procedure for the review of the application of the principle of subsidiarity, specified in Article 5(3) of the Treaty on European Union, the Commission draws the attention of national Parliaments to the proposals which are based on Article 352 of the Treaty on the Functioning of the European Union. In this regard, the national Parliaments exercise their powers in accordance with the Protocol No. 2 on the application of the principles of subsidiarity and proportionality, and in particular Article 7 thereof. Moreover, the measures adopted on the basis of Article 352 of the Treaty on the Functioning of the European Union may not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation (Article 352(3) of the Treaty on the Functioning of the European Union). Neither can the indicated provision serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article

shall respect the limits set out in Article 40, second subparagraph, of the Treaty on European Union, which concerns the scope of the implementation of the policies listed in Articles 3 to 6 of the Treaty on the Functioning of the European Union (Article 352(4) of the Treaty on the Functioning of the European Union). The Declaration No. 41, annexed to the Treaty of Lisbon, additionally specifies that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to the objectives of the Union refers to the objectives as set out in Article 3(2), (3) and (5) of the Treaty on European Union, and therefore legislative acts may not be adopted in the area of the common foreign and security policy.

- 4.2.13. The Constitutional Tribunal indicates that Article 352 of the Treaty on the Functioning of the European Union is subsidiary to the other provisions of the Treaties which set out the competences of the Union. Its application as a legal basis of a measure (a legal act) is justified only when no other provision of the Treaty grants the EU institutions the competence which is necessary for the adoption of the said measure (cf. the judgment in the ECJ Case 45/86 *Commission v Council* [1987] ECR 1493). The indicated provision is aimed at supplementing the lack of competences to take action which have been granted to the EU institutions explicitly or implicitly in particular provisions of the Treaties, in the situation where this proves indispensable for the Union to fulfil its tasks and attain one of the objectives set out in the Treaties. Article 352 of the Treaty on the Functioning of the European Union, being part of the institutional order based on the principle of conferred (granted) competences, may not constitute the basis of extending the scope of EU competences outside the general framework which arises from the entirety of the Treaties, in particular specifying the tasks and the actions of the Union. The provision may not serve as a basis for enacting provisions, the result of which would be an amendment to the Treaties bypassing the procedure provided for that purpose. Such a stance has been confirmed in the Declaration No. 42, annexed to the Treaty of Lisbon. A similar view had already been expressed by the Constitutional Tribunal (cf. the Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759).

In the view of the Constitutional Tribunal, the allegations of the applicant concerning conferral of competences to create additional competences on the basis of Article 352(1) and (2) of the Treaty on the Functioning of the European Union are unjustified. Pursuant to

Article 4(1) and Article 5(2) of the Treaty on European Union, the Union operates within the limits of the competences conferred upon (granted to) the Union by the Member States in the Treaties, whereas any competences which have not been conferred on the Union remain the responsibility of the Member States. Article 352 of the Treaty on the Functioning of European Union formulates the requirements for its application: an action of the Union is necessary (indispensable) to attain one of the objectives of the Union, falls within the scope of the policies set out in the Treaties (with the exclusion of the common foreign and security policy), and the Treaties have not provided for authorisation to act in the way required in that regard. The evaluation whether the indicated premisses have been satisfied is the task of the EU courts (cf. the aforementioned Opinion 2/94). Also, it is groundless to allege that the indicated procedure overlooks constitutional organs of the state. Pursuant to Article 352 of the Treaty on the Functioning of the European Union, the Council acts unanimously, i.e. upon consent of the representatives of all the Member States. Additional guarantees for the national Parliaments are provided for in the Protocol No. 2 on the application of the principles of subsidiarity and proportionality. Pursuant to Article 7(2), in the case where justified opinions on the non-conformity of a draft legislative act to the principle of subsidiarity constitute at least one third of the votes granted to the national Parliaments, the draft of the legal act is subject to another analysis.

Specific guarantees, as regards the participation of the Sejm and the Senate in the process of enacting legal acts pursuant to Article 352 of the Treaty on the functioning of the European Union, are provided for in Article 7(1) and Article 11 of the Cooperation Act. The Council of Ministers provides the Sejm and the Senate with draft EU legal acts, forthwith after their receipt, adopted in accordance with Article 352(1) of the Treaty on the Functioning of the European Union. The Council of Ministers submits draft stances of the Republic of Poland, with regard to the draft EU legal acts, to the Sejm and the Senate, taking into account the deadlines which arise from the EU law, no later however than within the period of 14 days from the date of receipt of those drafts. Before the Council examines a draft EU legislative act or a draft EU legal act, adopted pursuant to Article 352(1) of the Treaty on the Functioning on the European Union, the Council of Ministers consults an authority which is competent in that regard on the basis of the rules of procedure of the Sejm, and an authority which is competent in that regard on the

basis of the rules of procedure of the Senate, presenting the information on the stance of the Republic of Poland which the Council of Ministers intends to take during the examination of the draft at a session of the Council. The Council of Ministers supplements the information with the substantiation of the stance of the Republic of Poland as well as the evaluation of forecast consequences of an EU legal act for the Polish legal system and the social, economic and financial consequences for the Republic of Poland.

Although the requirement of unanimity of the Council and the dependence of its action on the Commission's proposal, as well as the necessity of acquiring consent from the European Parliament constitute the guarantees of protection of subjectivity of the Member States, it should be emphasised that in accordance with the principle of conferral, the Union acts only within the competences conferred on it by the Member States. Article 352(1) of the Treaty on the Functioning of the European Union may not be understood as the basis for granting competences to the Union which have not yet been conferred, and thus the provisions referred to in Article 352(1) of the Treaty on the Functioning of the European Union may not create any competences which have not yet been conferred.

- 4.2.14. Article 90(1) of the Constitution, indicated as a higher-level norm for review, concerns concluding a Treaty of Accession or revised treaties and does not regulate the issues of replacing the requirement of unanimity with the requirement of a qualified majority as well as replacing a special legislative procedure with an ordinary legislative procedure, which may have impact on the competences of the organs of the state. Also, the Constitution does not regulate the manner of authorising a representative in the European Council to act within the scope of decisions provided for in Article 48(7) of the Treaty on European Union. The lack of constitutional regulation with regard to this issue is not, however, tantamount to the non-conformity to the Constitution of the Treaty mechanism of conferral or modification of the competences, the enactment of which does not clash with the indicated higher-level norms for constitutional review. Only the comparison of the decision of the European Council with the scope of competences granted by the Treaty may constitute a premiss of evaluation of their conformity to the Constitution in its present form. Depending on that evaluation, it would be possible to introduce an appropriate amendment to the Constitution, the modification of the scope of conferral of the competences arising from that

decision, a possible change of the decision or taking the decision about seceding from the European Union.

Challenged by the applicant, Article 48 of the Treaty on European Union does not exclude the possibility of applying the triad of constitutional restrictions as regards conferral of competences (cf. point 2.6. of this part of statement of reasons), and thus it does not exclude granting consent as regards the conferral of competences in certain matters by statute, in accordance with the requirements specified in Article 90(2) of the Constitution, or by way of a nationwide referendum.

It is the Parliament that devises appropriate solutions concerning the fulfilment of constitutional requirements which are indispensable due to the principle of protection of the state's sovereignty in the process of European integration and possible specification of requirements which allow to avoid the consequences of the difference of opinions in that regard between the government and the Parliament; this is to be facilitated by the Act of 8 October 2010 on co-operation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union.

The binding constitutional provisions (in particular Article 90) allow for the interpretation of the Constitution which makes it possible to assume that the modification of Treaty provisions without amending the Treaties, entailing the conferral of competences on an international organisation or international institution, pursuant to an international agreement, although not by way of changing its provisions in the course of revising the Treaties, requires meeting the same criteria which Article 90 of the Constitution specifies for an international agreement.

For the above reasons the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion of Judge Mirosław Granat.

[Omitted]



**Judgment of the Polish Constitutional Tribunal
of 16 November 2011 concerning the Competence
of the Tribunal to Review the Compatibility
of EU Secondary Law with the Polish Constitution**

(File Ref. No. K 45/09, selected excerpts)¹

**On behalf of the Republic of Poland
The Constitutional Tribunal, composed
of the following members of the bench:**

Andrzej Rzepliński – Presiding Judge
Stanisław Biernat – Judge Rapporteur
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Miroslaw Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik

(Recording Clerk: Krzysztof Zalecki)

¹ The operative part of the judgment was published on 25 November 2011 in the Journal of Laws – Dz.U. No. 254, item 1530. Selection – M. Grzywacz and the YPES Editorial Board.

having considered, at the hearing on 16 November 2011, in the presence of the complainant and the Public Prosecutor-General, a constitutional complaint submitted by Ms Anna Supronowicz, in which she requested the Tribunal to examine the conformity of:

Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments² in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended) to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution of the Republic of Poland, has adjudicated as follows:

Article 41, second sentence, of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended) is consistent with Article 45(1) and with Article 32(1) in conjunction with Article 45(1) of the Constitution of the Republic of Poland.

Moreover, the Tribunal has decided:

pursuant to Article 39(1)(1) and Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz.U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), **to discontinue the proceedings as to the remainder.**

REASONS FOR THE RULING:

I

1. In a constitutional complaint of 9 July 2007 submitted to the Tribunal, and supplemented with a procedural letter of 13 August 2007, Ms Anna Supronowicz (hereinafter: the complainant) requested the Tribunal to de-

² Whenever the term ‘judgment’ is used here in the context of the Council Regulation (EC) No 44/200, it should be understood pursuant to Article 32 of the said Regulation, which stipulates the following: “For the purposes of this Regulation, ‘judgment’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

termine the non-conformity of Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended; hereinafter: the Council Regulation (EC) No 44/2001) to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution of the Republic of Poland.

1.1. The constitutional complaint was submitted on the basis of the following facts.

In its decision of 23 December 2004 (Ref. No. 1289/2004), the Court of Appeal in Brussels – adjudicating with reference to motions submitted by the Belgian Public Prosecutor’s Office and by Mr Jacques-Andre De Leeuw, a civil plaintiff – ordered the complainant to pay the amount of EUR 12 500. The said decision was issued as part of criminal proceedings pending against the complainant, in which she was convicted of an offence against life and health of Jacques-Andre De Leeuw. The amount of EUR 12 500 was ordered, in accordance with the civil procedure, to be paid as compensation for material and moral damage which the aggrieved party incurred as a result of the offence having been committed against him. The appellate proceedings were carried out after appeals against a judgment of the Criminal Court in Brussels had been lodged both by the complainant (in a criminal and civil case), as well as by the Belgian Public Prosecutor’s Office. On 11 May 2006, Mr Jacques-Andre De Leeuw requested that the enforceability of the decision of the Belgian court be declared in the territory of Poland, as regards the amount ordered to be paid to him. In its decision of 24 August 2006 (Ref. No. III Co 33/06), *Sąd Okręgowy Warszawa-Praga* (the Circuit Court) in Warsaw declared that the decision issued by the Court of Appeal in Brussels was enforceable. In the substantiation for its decision, the Polish court indicated that necessary premisses had been met in order to declare the enforceability of the judgment issued by the foreign court, as set out in the Council Regulation (EC) No 44/2001. On 20 October 2006, the complainant lodged an appeal with the Court of Appeal in Warsaw, requesting the said court to revoke the decision of the Circuit Court on the application for a declaration of enforceability concerning the judgment of the foreign court. The complainant argued that the Council Regulation (EC) No 44/2001 might not be applied in the case, as the judgment of the foreign court had been issued in criminal proceedings, and also that the declaration of enforceability of that judgment was manifestly con-

trary to public policy in the Republic of Poland. In its decision of 9 March 2007 (Ref. No. VI ACz 1877/06), the Court of Appeal in Warsaw, 6th Civil Division, dismissed the appeal of the complainant. The court determined that the application for a declaration of enforceability of the judgment issued by the Court of Appeal in Brussels was justified in the light of the Council Regulation (EC) No 44/2001. The said decision of the Court of Appeal in Warsaw is legally effective, and it may not be appealed against.

1.2. To substantiate her constitutional complaint, the complainant presented the following arguments:

The complainant stated that the challenged provisions of the Council Regulation (EC) No 44/2001 did not provide for any submissions to be made in first instance proceedings concerning the enforceability of a judgment of a foreign court by the participant against whom the judgment had been issued by the foreign court. In the present case, the right to a fair trial in first instance proceedings was guaranteed only to the applicant, since the complainant – as a participant – had no right to take part in the proceedings. In the opinion of the complainant, within the meaning of Article 45 of the Constitution, each court proceedings should be based on the principle of a fair and public hearing. What constitutes the essence of fair court proceedings is an adversarial procedure, i.e. the right of a party to present evidence, assertions and arguments. In her view, the law in accordance with which a party is not informed by a court about proceedings instituted against the party, is not consistent with the principle of a fair and public hearing, as well as with the party's right to two stages of proceedings. Even in the event where – as in the present case – the party had accidentally learnt about the proceedings pending against her, the party still had no opportunity to participate in the proceedings and to present her arguments, due to the wording of the challenged provisions of the Council Regulation (EC) No 44/2001. Presenting evidence by the complainant in the proceedings before the court of first instance, in order to argue that the application for a declaration of enforceability was unjustified, had no effect on the adjudication in that case, since the said court could not take the evidence into account. Consequently, according to the complainant, the proceedings before the court of first instance were reduced to fiction, as the challenged provisions of the Council Regulation (EC) No 44/2001 do not provide for the party against whom enforcement is sought (the debtor) to have the right to participate in proceedings and make any submissions.

In the view of the complainant, the essence of proceedings before a circuit court as the court of first instance is inconsistent with the principle of appeal against judgments and decisions made at first stage, which arises from Article 78 and 176(1) of the Constitution. The complainant does not question that, in the court proceedings carried out on the basis of the challenged provisions of the Council Regulation (EC) No 44/2001, she maintained the right to lodge an appeal against a ruling issued by the court of first instance.

However, the complainant argues that the principle of two stages of court proceedings does not consist solely in the possibility of appealing rulings issued by a court of lower instance, but means the right to actively participate in proceedings before a court of any instance. According to the complainant, in the case under discussion, one may not speak of the right to appeal against rulings issued in first instance, since – in those proceedings – the dispute was not examined as to its substance. In the proceedings before a circuit court only an applicant may participate and only his/her arguments are presented. By contrast, in appeal proceedings, the case was not examined anew, as it was only then that the participants presented evidence and their arguments. Consequently, in the view of the complainant, proceedings for the issue of a declaration of enforceability concerning a judgement of a foreign court, in accordance with the challenged provisions of the Council Regulation (EC) No 44/2001, are in fact one-stage proceedings, which is inconsistent with Article 78 and Article 176(1) of the Constitution.

In the opinion of the complainant, the challenged provisions of the Council Regulation (EC) No 44/2001 also infringe the principle of equality, provided for in Article 32 of the Constitution, which stipulates the requirement of equal treatment by public authorities, including the organs of the judiciary. In court proceedings, parties should have equal rights as regards presenting their arguments. In the case of proceedings based on the challenged provisions of the Council Regulation (EC) No 44/2001, only one of the parties (the applicant) had the right to present his arguments and statements to the court of first instance. Also, the complainant indicated that Article 8 of the Constitution set out the absolute primacy of the Constitution in the system of sources of law. In the case where an EU regulation imposes restrictions on the rights and freedoms set out in the Constitution there is no obligation to adhere to the provisions of that legal act. Article 91(3) of the Constitution concerns only the primacy of EU law in the event of its unconformity with statutes. The above regulation does not, however, concern the provisions of the Constitution.

II

[Omitted: point 2–7 description of the proceedings]

III

The Constitutional Tribunal has considered as follows:

1. The admissibility of the constitutional complaint.

1.1. What constitutes the subject of review in the present case is the provisions of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended; hereinafter: the Council Regulation (EC) No 44/2001), i.e. an act of the secondary legislation of the European Union (formerly: the European Community). Never before has the Constitutional Tribunal examined a case where it had to determine the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution. Hitherto, the Tribunal has only examined the conformity of the Treaties to the Constitution, which constitute the EU primary law (cf. the judgment of 11 May 2005, Ref. No. K 18/04, OTK ZU No. 5/A/ 2005 item 49, the judgment of 24 November 2010, Ref. No. K 32/09, OTK ZU No. 9/A/2010, item 108) as well as the statutes implementing the EU secondary legislation (cf. the judgment of 27 April 2005, Ref. No. P 1/05, OTK ZU No. 4/A/2005 item 42, the judgment of 5 October 2010, Ref. No. SK 26/08, OTK ZU No. 8/A/2010, item 73).

Bearing in mind the special character of the normative which has been challenged in the present case as regards its constitutionality, a prerequisite for examining the constitutional complaint as to its substance is examination whether there are no negative premisses which would cause the discontinuation of proceedings. The Constitutional Tribunal has the power to carry out such a review at any stage of proceedings.

Therefore, it should be considered whether legal acts enacted by the EU institutions may constitute the subject of review, in the course of review proceedings commenced by way of constitutional complaint, as set out in Article 79(1) of the Constitution.

1.2. Pursuant to Article 79(1) of the Constitution, a constitutional complaint may be submitted to the Tribunal for it to determine ‘the conformity to the Constitution of a statute or another normative act’, upon which basis

a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. What is of fundamental importance in the present case is to determine whether an EU regulation is 'another normative act' within the meaning of Article 79(1) of the Constitution, and hence whether it may constitute the subject of a constitutional complaint.

First of all, this entails determining a relation between Article 188(1)-(3) and Article 79(1) of the Constitution, and establishing whether the subject of constitutional complaints – to which Article 188(5) of the Constitution refers to – may be the legal acts mentioned in Article 188(1)-(3) of the Constitution, or whether this could also be other normative acts. Various views are presented on that issue in the literature on the subject. What is characteristic is that they were presented primarily in the context of the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution by the Constitutional Tribunal (cf. the presentation of various viewpoints of the representatives of the doctrine in that regard, T. Jaroszyński, *Rozporządzenie Unii Europejskiej jak składnik systemu prawa obowiązującego w Polsce*, Warszawa 2011, pp. 337–338, K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, pp. 323–328). Moreover, the said issue refers to the acts of local self-government law and collective labour agreements.

To put it succinctly, in the opinion of one group of authors, the scope of jurisdiction of the Tribunal has exhaustively been specified in Article 188(1)-(3) of the Constitution, which enumerates legal acts that are subject to review by the Tribunal, by mentioning the types of such acts or by indicating them by pointing out their characteristics: 'legal provisions issued by central State organs' (where legal provisions mean provisions containing general and abstract norms). Therefore, legal acts which are not mentioned in the indicated provision may not be the subject of review by the Constitutional Tribunal. With reference to the acts of EU secondary legislation, it is noted in the literature on the subject that those legal acts neither have the status of international agreements nor may be classified as provisions issued by central state organs. Consequently, Article 188(1)-(3) of the Constitution determines that the EU secondary legislation does not fall within the scope of the Tribunal's jurisdiction to conduct a judicial review.

By contrast, the authors belonging to the other group share the view that the provisions of Article 188(1)-(3) of the Constitution do not fully indicate the scope *ratione materiae* of the jurisdiction of the Constitutional Tribunal. In their opinion, Article 188(5) mentions a separate power of the

Tribunal, namely the power to adjudicate on constitutional complaints, as referred to in Article 79(1) of the Constitution. The last indicated provision stipulates that '(...) everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act (...)'

In accordance with the unquestionable stance of science of law, a normative act is every legal act which contains norms that are general (addressed to a specified group of addressees) and that set conduct which is, in principle, repetitive (abstract legal act). Such a substantive concept of a normative act has been assumed in the previous jurisprudence of the Constitutional Tribunal. As early as in the ruling of 7 June 1989 (Ref. No. U. 15/88, OTK of 1989, item 10), relying on the views presented in the literature on the subject, the Tribunal stated that: 'a normative act is a legal act that establishes legal norms which are general in character (and thus addressed to a certain group of addressees singled out due to a common characteristic shared by them) as well as abstract in character (i.e. they establish certain models of conduct)'. The analysis of the previous jurisprudence of the Tribunal indicates that the scope of normative acts, the challenging of which was regarded as admissible in the course of review proceedings commenced by way of constitutional complaint, is broader than what follows from Article 188(1)-(3) of the Constitution.

However, such a view was presented only in exceptional cases. For instance, the Constitutional Tribunal allowed a constitutional complaint which challenged certain provisions of local self-government law to be examined on its merits, but the proceedings did not end with a judgment (see the decision of 6 October 2004, Ref. No. SK 42/02, OTK ZU No. 9/A/2004, item 97). Likewise, in the decision of 6 February 2001, Ref. No. Ts 139/00 (OTK ZU No. 2/2001, item 40), the Tribunal recognised the possibility of filing a constitutional complaint against the acts of local self-government law, as long as they were normative in character. In the view of the Tribunal, 'the scope of provisions which are subject to review (the subject of a constitutional complaint) is set autonomously and exhaustively by Article 79(1) of the Constitution of the Republic of Poland'.

In the present case, the Constitutional Tribunal assumes that the scope *ratione materiae* of normative acts which may be subject to constitutional review, in the course of review proceedings commenced by way of constitutional complaint, has been set out in Article 79(1) of the Constitution, autonomously and independently from Article 188(1)-(3). Indeed, the examination of constitutional complaints constitutes a separate kind of proceedings. The arguments for such a conclusion are threefold.

Firstly, this is indicated by the systematics of the Constitution. Article 188, which regulates the scope of the jurisdiction of the Constitutional Tribunal, stipulates in its point 5 that the Constitutional Tribunal shall adjudicate on constitutional complaints, as specified in Article 79(1). The last-mentioned provision is also referred to in Article 191(1)(6) of the Constitution, with regard to the subjects that may make application to the Constitutional Tribunal to institute review proceedings. This indicates that, when distinguishing between several types of proceedings before the Constitutional Tribunal, the constitution-maker has rendered proceedings involving the examination of constitutional complaints separately from the other types of proceedings before the Tribunal.

Secondly, Article 188(1)-(3) of the Constitution regulates the powers of the Tribunal within the scope of reviewing the hierarchical conformity of normative acts. It should also be added that the powers in that regard have been divided between the Constitutional Tribunal and administrative courts, which are authorised to adjudicate ‘on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration’ (Article 184 of the Constitution). Thus, the powers to adjudicate on the hierarchical conformity of normative acts have been clearly separated from the powers to adjudicate on constitutional complaints.

Thirdly, the basic function of a constitutional complaint is the protection of constitutional rights and freedoms of the individual. Therefore, it would be unjustified to assume an interpretation of Article 188 of the Constitution which would narrow down the subject of review carried out in the course of review proceedings commenced by way of constitutional complaint, for such an interpretation would not facilitate the effective protection of rights and freedoms of the individual. By contrast, the view that every normative act may be the subject of the Tribunal’s review, as long as it constitutes basis upon which a court or organ of public administration has made a final decision on the individual’s rights or freedoms – is definitely justified in the light of constitutional values.

The Constitutional Tribunal indicates that the situation in the present case is different from the case U 6/08, which ended with the decision of 17 December 2009 (OTK No. 11/A/2009, item 178). In the statement of reasons for that decision, the Tribunal *obiter dicta* expressed the view that the constitutional review of norms of EU secondary legislation was inadmissible. However, the proceedings in that case were instituted by an application submitted by a group of Sejm Deputies, and they concerned an abstract review of norms. In such context, the scope of jurisdiction of the Tribunal is exhaustively specified in Article 188(1)-(3) of the Constitution.

1.3. The subject of a constitutional complaint may be a statute or another normative act. The jurisprudence of the Constitutional Tribunal has hitherto showed the adoption of the so-called substantive concept of a normative act (cf. point 1.2.). The term ‘normative act’ has so far been referred, in the previous jurisprudence of the Tribunal, to the acts which result from the law-making activity of the organs of the Polish state. However, in its judgment of 18 December 2007, Ref. No. SK 54/05 (OTK ZU No. 11/A/2007, item 158), the Tribunal adjudicated that a normative act within the meaning of Article 79(1) of the Constitution might also be an international agreement. In the said case, the complainant challenged the constitutionality of Protocol 4 to the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, signed at Brussels on 16 December 1991.

In the opinion of the Constitutional Tribunal, a normative act within the meaning of Article 79(1) of the Constitution may not only be a normative act issued by one of the organs of the Polish state, but also – after meeting further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns the acts of EU law, enacted by the institutions of that organisation. Such legal acts constitute part of the legal system which is binding in Poland and they shape the legal situation of the individual.

1.4. The legal acts of the EU institutions are varied. The catalogue of the legal acts and the characteristics thereof are specified in Article 288 of the Treaty on the Functioning of the European Union (hereinafter: the TFEU; ex Article 249 of the Treaty establishing the European Community). Due to the subject of the present case, the Constitutional Tribunal considers it indispensable to examine whether an EU regulation has the characteristics of a normative act within the meaning of Article 79(1) of the Constitution.

Pursuant to Article 288, second paragraph, of the TFEU: ‘A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States’. Thus, the norms of a regulation are general and abstract in character. The addressees of the norms of a regulation are not only the Member States and the organs of those States, but also individuals (private parties).

The indicated thesis is confirmed by the jurisprudence of the Court of Justice of the European Union. What follows therefrom is that a regulation is ‘a measure which applies to objectively determined situations and

produces legal effects with regard to categories of persons regarded generally and in the abstract' (the judgment of 5 May 1977, in the case 101/76, Koninklijke Scholten Honig, ECR 1977, p. 797). Also, the Court of Justice expressed the view that: 'A measure does not cease to be a regulation because it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time as long as it established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose' (the judgment of 30 September 1982 in the case 242/81, SA Roquette Frères, ECR 1982, p. 3213). In accordance with the established jurisprudence of the Court of Justice, 'general application' is a criterion distinguishing a regulation from individual and specific legal acts, in particular decisions indicating the addressee. The essential characteristics of such decisions involve limiting the group of addressees to which they are addressed. Some authors compare an EU regulation to a statute in a national legal order (see D. Lasok, *Zarys prawa Unii Europejskiej*, Toruń 1995, p. 176).

Therefore, the Constitutional Tribunal states that an EU regulation bears the characteristics of a normative act within the meaning of Article 79(1) of the Constitution.

- 1.5. Another prerequisite for a constitutional complaint to be admissible is the fact that its subject must be a normative act upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. When applying that requirement to EU regulations, it should be stated that they are legal acts which are directly applicable in the legal order of the Member States, and do not require implementation into national law (cf. the judgment of the Court of Justice of 10 October 1973 in the case 34/73, F.LLI Variola SpA, ECR 1973, p. 981). They may constitute the legal basis of administrative decisions and court rulings in the Member States, including Poland. The norms of EU regulations may be a source of the rights and obligations of individuals (cf. the judgment of the Court of Justice of 17 September 2002 in the case C-253/00, Antonio Muñoz y Cia SA, ECR 2002, p. 7289). When participating in proceedings before national courts, individuals and legal entities may rely on the norms of EU regulations and derive their rights therefrom. The doctrine and jurisprudence of the Court of Justice mention in this regard that the norms of EU law, including regulations, have a direct effect. The Court of Justice stated that the attribute of 'direct effect' is assigned to the provisions of regulations which are clear and precise, and do not leave

any margin of discretion to the authorities of the Member States (cf. the judgment of the Court of Justice of 24 October 1973 in the case 9/73, Schlüter, ECR 1973, p. 1135). Taking the above into consideration, the Constitutional Tribunal states that EU regulations may contain norms upon which basis a court or organ of public administration has made a final decision on the individual's freedoms or rights or on his/her obligations specified in the Constitution.

At the same time, it should be noted that it is not always easy to determine whether a court or organ of public administration has actually made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution on the basis of EU law. Frequently, courts or the organs of public administration adjudicate on the basis of the Polish law, which has been enacted in order to implement the EU law. This concerns directives, and also – in some cases – regulations. Also, there can be a situation where the legal basis of an individual act of applying the law is a legal norm constructed on the basis of EU and Polish provisions. Determining what legal act constitutes the legal basis of a decision of a court or organ of public administration is essential for determining the subject of review carried out in accordance with Article 79(1) of the Constitution. Dispelling doubts in this regard will depend on, *inter alia*, determining the content of the provisions of EU law and their effects. It should be stated in the conclusion that EU regulations, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by way of constitutional complaint. The fact that they are the acts of EU law, also constituting part of the Polish legal order, results in a special character of the review conducted in such a case by the Constitutional Tribunal.

2. The secondary legislation of the European Union as the subject of constitutional review.

2.1. Description of the earlier judgments of the Polish Constitutional Tribunal regarding the relation between the EU and Polish law

[Omitted]

2.2. EU regulations are normative acts whose position in the Polish constitutional system has been determined in Article 91(3) of the Constitution. What at present constitutes the basis of the European Union as an international organisation is the following: the Treaty on European Union (hereinafter: the TEU) and the Treaty on the Functioning of the European

Union. One of the constitutional principles of EU law is the principle of the primacy of EU law (formerly Community law) over the law of the Member States. The said principle has been formulated in the jurisprudence of the Court of Justice, but also it can be derived indirectly from various Treaty provisions, and in particular from those that specify the obligations of the Member States as regards the implementation of EU law (Article 4(3) of the TEU, Article 19(1) of the TEU, Article 291(1) of the TFEU and Articles 258–260 of the TFEU). What follows from Article 91(3) of the Constitution is the primacy of the norms of EU regulations in the event of their un conformity with statutes. By contrast, the Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law. The said position of the Constitution is enshrined in Article 8(1) of the Constitution, and has been confirmed by the previous jurisprudence of the Constitutional Tribunal.

In the judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal underlined that the Constitution remains – due to its special significance – ‘the the supreme law of the Republic of Poland’ in relation to all international agreements binding the Republic of Poland. This also refers to ratified international agreements concerning the delegation of competence ‘in relation to certain matters’. The Constitution takes precedence as regards having effect and being applied in the territory of the Republic of Poland. The indicated stance has also been confirmed in the Tribunal’s judgment concerning the Treaty of Lisbon (Ref. No. K 32/09). That thesis, formulated in the context of the relation between the Constitution and the Treaties, should also be referred to the legal acts of the EU institutions. Due to the indicated status of the Constitution as the supreme law of the Republic of Poland, it is admissible to examine whether the norms of EU regulations are consistent therewith.

- 2.3. The Constitutional Tribunal points out that it is necessary to draw a distinction between examining the conformity of the acts of EU secondary legislation to the Treaties, i.e. the EU primary law, on the one hand, and examining their conformity to the Constitution, on the other. The institution that ultimately determines the conformity of EU regulations to the Treaties is the Court of Justice of the European Union, and as regards the conformity to the Constitution – the Constitutional Tribunal. The Member States have competence to bring actions to the Courts of the European Union, for them to review the legality of the acts of EU secondary legislation (Article 263 of the TFEU). Moreover, the courts of the Member

States refer questions, in relation to pending proceedings, to the Court of Justice of the European Union for a preliminary ruling concerning the validity of acts of the institutions, bodies, offices or agencies of the Union (Article 267 of the TFEU). The Court of Justice has expressed the view that the national courts have no jurisdiction to declare that the acts of Community institutions are invalid. The Courts of the European Union have exclusive jurisdiction in that regard (cf. the judgment of the Court of 22 October 1987, in the case C-314/85, *Foto-Frost*, ECR 1987, p.4199).

2.4. Particular Member States may have influence on the content of EU regulations and other acts of EU secondary legislation in the course of their enactment. What should be emphasised here is the role of the representatives of the Member States (ministers) in the Council, which is an EU institution involved in enacting EU legislative acts, together with the European Parliament (cf. Article 16(1) of the TEU and Article 289(1) and (2) of the TFEU). An essential role is also played by national Parliaments, which apart from being national law-makers, jointly participate in the process of enacting the EU law (Article 12 of the TEU and the Protocol on the role of national Parliaments in the European Union, annexed to the Treaty of Lisbon). As the Constitutional Tribunal indicated in its decision of 19 December 2006, Ref. No. P 37/05, the Court of Justice safeguards the EU law. By contrast, the Constitutional Tribunal is to safeguard the Constitution. In such context, there may potentially be conflicts between the rulings issued by the Constitutional Tribunal and those delivered by the Court of Justice.

Taking the above into consideration, it should be stated that, also due to the content of Article 8(1) of the Constitution, the Constitutional Tribunal is obliged to perceive its position in such a way that – as regards fundamental matters concerning systemic issues – it is ‘the court which will have the last word’ with regard to the Polish Constitution. The Court of Justice and the Constitutional Tribunal may not be juxtaposed as courts competing with each other. The point is not only to eliminate the overlapping of the jurisdiction of the two courts or concurrent rulings on the same legal issues, but also any dysfunctionality in relations between the EU legal order and the Polish one. What is essential is to take into consideration the indicated differences between the roles of the Court of Justice and the Constitutional Tribunal (see OTK ZU No. 11/A/2006, item 177).

2.5. Allowing the possibility of examining the conformity of the acts of EU secondary legislation to the Constitution, what should be emphasised is

the need to maintain due caution and restraint in that regard. The EU law binds all Member States (currently 27). One of the systemic principles of EU law is the principle of sincere cooperation. Pursuant to Article 4(3) of the TEU, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. What would be difficult to reconcile with that principle is granting powers to particular Member States which would allow them to declare the norms of EU law to be no longer legally binding.

By contrast, within the meaning of Article 4(2) of the TEU, the Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional. National identity and constitutional identity, which is the essential component thereof, have already been discussed by constitutional courts, including the Constitutional Tribunal (cf. the aforementioned judgment in the case K 32/09). Also, the Court of Justice makes reference in its jurisprudence to the necessity to take into account the national identities of particular Member States (cf. the judgment of 22 December 2010, in the case C-208/09 Sayn-Wittgenstein, not yet reported as well as the judgment of 12 May 2011, in the case C-391/09 Runevič-Vardyn, not yet reported).

2.6. In that context, attention should be drawn to the various ways of avoiding the state of non-conformity of EU law to the Constitution.

As it has been indicated above, the Constitution has been explicitly guaranteed the status of the supreme law of the Republic of Poland. At the same time, that regulation is accompanied by the requirement of respect and favourable regard for the regulations of international law that are properly drafted and binding in the territory of Poland. In the judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal emphasised that the subsystems of legal regulations which came from different law-making centres should co-exist on the basis of mutually acceptable interpretation and cooperative application. Any contradictions should be eliminated by applying interpretation that respects the relative autonomy of EU law and national law. Moreover, the said interpretation should be based on the assumption of mutual loyalty between the EU institutions and the Member States. The said assumption gives rise to an obligation, on the part of the Court of Justice, to be

favourably inclined towards national legal systems, whereas on the part of the Member States – the obligation to approach the EU norms with the utmost respect.

Additionally, the review of conformity of an EU regulation to the Constitution, conducted by the Constitutional Tribunal, should be regarded as independent, and also subsidiary, in relation to the jurisdiction of the Court of Justice. When acceding to the European Union, the Republic of Poland delegated the competence of organs of public authority in relation to certain matters to the EU institutions (Article 90(1) of the Constitution). This also encompasses the delegation of competence to enact law. Consequently, the legal acts enacted by the EU institutions are binding in Poland. Pursuant to the principle of conferral (Article 5(1) of the TEU), which is fundamental to the law of the European Union, the competences of the Union, including law-making competences, shall be exercised only within the limits set by the Member States in the Treaties.

Moreover, the Republic of Poland accepted the division of powers with regard to the review of legal acts (cf. the judgment in the case K 18/04, cited above, and the judgment of 18 February 2009, Ref. No. Kp 3/08, OTK ZU No. 2/A/2009 item 9). The result of that division is the jurisdiction of the Court of Justice to provide the final interpretation of EU law and to ensure that the interpretation is observed consistently in all Member States, as well as to have an exclusive power to determine the conformity of the acts of EU secondary legislation to the Treaties and the general principles of EU law. In such context, one should analyse the subsidiary character of the jurisdiction of the Constitutional Tribunal to examine the conformity of EU law to the Constitution. Before adjudicating on the non-conformity of an act of EU secondary legislation to the Constitution, one should make sure as to the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 of the TFEU, as to the interpretation or validity of provisions that raise doubts. A similar view was presented by the Federal Constitutional Court of Germany in its judgment of 6 June 2010 in the case *Honeywell* (Ref. No. 2 BvR 2661/06).

As a result of the ruling of the Court of Justice, it may turn out that the content of the challenged EU norm is consistent with the Constitution. Another possibility is that the Court of Justice adjudicates on the non-conformity of the challenged provision to the EU primary law. In those instances, issuing a ruling by the Constitutional Tribunal would be useless. Although the Court of Justice and the Constitutional Tribunal differ as regards the scope of jurisdiction, still – due to the similarity of the val-

ues enshrined in the Constitution and the Treaties (cf. part III, point 2.10), there is a considerable likelihood that the assessment of the Court of Justice will be analogical to the assessment of the Constitutional Tribunal.

2.7. What needs to be considered is the effects of a judgment of the Constitutional Tribunal in the case of adjudication that the norms of EU secondary legislation are inconsistent with the Constitution. In the context of the acts of Polish law, the said nonconformity results in declaring the unconstitutional norms to be no longer legally binding (Article 190(1) and (3) of the Constitution). With regard to the acts of EU secondary legislation, such a result would be impossible, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. The consequence of the ruling of the Constitutional Tribunal would be to rule out the possibility that the acts of EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland. Therefore, the ruling of the Constitutional Tribunal would result in suspending the application of the unconstitutional norms of EU law in the territory of the Republic of Poland.

What should be noted is that such a consequence of the Tribunal's ruling would be difficult to reconcile with the obligations of a Member State and the aforementioned principle of sincere cooperation (Article 4(3) of the TEU). The said situation could lead to proceedings against Poland conducted by the European Commission and an action brought against Poland before the Court of Justice of the European Union for the infringement of obligations under the Treaties (Articles 258–260 of the TFEU). Undoubtedly, the ruling declaring the non-conformity of EU law to the Constitution should have the character of *ultima ratio*, and ought to appear only when all other ways of resolving a conflict between Polish norms and the norms of the EU legal order have failed. In its judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal indicated that, in such situations, there were three possible reactions in Poland to the occurrence of non-conformity between the Constitution and the EU law: a/ amending the Constitution, b/ taking up measures aimed at amending the EU provisions, or c/ taking a decision to withdraw from the European Union. Such a decision should be made by the Polish sovereign, i.e. the Polish Nation, or the organ of the state which, in accordance with the Constitution, may represent the Nation. Leaving aside the last solution, which should be reserved for the exceptional cases of the most serious and irreconcilable conflicts between the bases of the constitutional order of the Republic of Poland and the EU law, after the Constitutional Tribunal issues the ruling declaring the non-

conformity of particular norms of EU secondary legislation to the Constitution, measures should be undertaken forthwith in order to eliminate the conflict. The constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of the Member States towards the Union require that the effects of the Tribunal's ruling be deferred in time, pursuant to Article 190(3) of the Constitution. A similar view was already presented by the Constitutional Tribunal in its judgment of 27 April 2005, in the case P 1/05, which concerned the European arrest warrant (OTK ZU No. 4/A/2005, item 42). In the said judgment, the Constitutional Tribunal deferred the date on which a statute implementing certain provisions of EU law was to lose its binding force, mentioning the constitutional obligation of the Republic of Poland to respect international law binding upon it, and also due to the fact that Poland and other EU Member States are bound by shared systemic principles aimed at ensuring the proper administration of justice.

2.8. Considerations about judgments of constitutional tribunals of the member states of the European Union regarding the place of European law in its law systems

[Omitted]

2.9. In the context of the present case, it should be considered, in greater detail, what kind of non-conformity of EU secondary legislation to the Constitution may be the subject of review in the course of review proceedings commenced by way of constitutional complaint. Due to the content of Article 79(1) of the Constitution, it should be assumed that the point is the allegation that the norms of EU secondary legislation infringe the constitutional rights and freedoms of the individual, and in particular those mentioned in the provisions of Chapter II of the Constitution. The Constitutional Tribunal has previously expressed the view that the lower level of protection of the individual's rights that arises from the EU law, in comparison with the level of protection guaranteed by the Constitution, would be unconstitutional. The constitutional norms from the realm of the rights and freedoms of the individual set a threshold which may not be lowered or challenged as a result of the introduction of EU regulation. Interpretation 'consistent with the EU law' has its limits. It may not lead to results which contradict the explicit wording of the constitutional norms and which are incompatible with the minimum of the guarantees provided by the Constitution (cf. the aforementioned judgement in the case K 18/04).

The scope of the powers of an international organisation a member of which is the Republic of Poland should be delineated in such a way so that the protection of human rights could be guaranteed to a comparable extent as in the Polish Constitution. The comparability concerns the catalogue of the rights, on the one hand, and the scope of admissible interference with the rights, on the other. The requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analysed separately (cf. likewise K. Wojtyczek, *op.cit.*, pp. 285–286).

- 2.10. What should be noted is that the protection of fundamental rights has been assigned great significance in the law of the European Union. The Constitutional Tribunal has already drawn attention to that fact, emphasising that the consequence of common axiology of the legal systems, shared by all the Member States, is the fact that the EU law does not emerge in an abstract European area and is free from the influence of the Member States and their communities. It is not created in an arbitrary way by the EU institutions, but it results from joint actions of the Member States (cf. the aforementioned judgment in the case K 18/04, as well as the confirmation of the said stance in the judgement in the case K 32/09). Moreover, both the Polish law and the EU law include the principle of proportionality. These circumstances diminish the risk that there will be different standards of protection of fundamental rights. The protection of fundamental rights in the EU law was initially based on the jurisprudence of the Court of Justice, and later on it had its basis in the Treaty norms (currently it arises from Article 6 of the TEU). In accordance with Article 6(1) of the TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. Pursuant to Article 6(2) of the TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention). At present, the European Union is carrying out negotiations as regards acceding to the Convention. In accordance with Article 6(3) of the TEU, fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. The extensive catalogue of rights, freedoms and principles included in the Charter of Fundamental Rights stems, to a large extent, from the European Convention for the Protection of Human Rights and Fundamental Freedoms; the par-

ties to the Convention also include the Republic of Poland. Pursuant to Article 52(3) and (4) of the Charter of Fundamental Rights, in so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. By contrast, on the basis of Article 53 of the Charter, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the Convention, and by the Member States' constitutions.

Therefore, the Charter of Fundamental Rights, the Convention as well as the constitutional traditions of the Member States set a high level of protection of fundamental rights (human rights) in the European Union. The above circumstances prove a significant axiological concurrence between the Polish law and the EU law. However, this does not mean that the legal solutions in the two legal orders are identical. It would be hard to assume that the EU law will contain norms which will fully concur with the norms of the Polish law. This arises from differences related to the way of enactment of EU law, with the participation of all the Member States, as well as from the different character of the two comparable legal orders (on the one hand – the law of the state, on the other hand – the law of the international organisation).

3. The general characteristics of the Council Regulation (EC) No 44/2001

3.1. The provisions of the Council Regulation (EC) No 44/2001 that have been challenged by the complainant constitute an element of a broader legal regulation which concerns declaring the enforceability of judgments of foreign courts within the scope of judicial cooperation in civil matters among the EU Member States. The Council Regulation (EC) No 44/2001 regulates the procedure for recognition and enforcement which may be applied to judgments and other legal acts from the Member States, which have been issued in civil or commercial matters. The aim of the legal institution of declaring the enforceability of foreign judgments – which together with recognition constitutes a basic form of ensuring the effectiveness of judgments issued by the courts of the EU Member States – is to

make it possible to enforce those judgments outside the borders of the Member State of origin by making them enforceable in the territory of another Member State.

- 3.2. The procedure for declaring the enforceability of judgments which has been set out in the Council Regulation (EC) No 44/2001 is based on ‘mutual trust in the administration of justice’ in relations between the EU Member States (points 16–17 of the preamble of Council Regulation (EC) No 44/2001), which should determine and provide guidance for any actions of courts in cases related to the application of the Regulation. The national court of the Member State in which enforcement is sought should, in accordance with that principle, manifest its trust in a foreign court, and in fact in a foreign legal order within the European Union and its administration of justice.

The principle of mutual trust in the administration of justice considerably expedites proceedings for the issue of a declaration of enforceability and thus facilitates the enforcement of judgments coming from the EU Member States. The aim of proceedings for the issue of a declaration of enforceability, regulated in the Council Regulation (EC) No 44/2001, is to grant legal protection to a party concerned, by allowing for enforcement to be carried out on the basis of a judgment issued in another Member State. The scope of jurisdiction of the court which issues a declaration of enforceability amounts to the examination of the premisses of enforcement in the Member State in which enforcement is sought. However, the subject of examination carried out by the court is not a relationship in substantive law, in the context of which a judgment has been issued. Also, proceedings for the issue of a declaration of enforceability may not be perceived as part of enforcement proceedings in the Member State in which enforcement is sought, as they do not directly lead to the compulsory satisfaction of a claim, but merely assign an attribute of enforceability to the judgment stating the existence of the claim, which constitutes merely one of the premisses of commencing enforcement proceedings in that Member State. Preserving the dependencies which exist between: examination carried out by a foreign court, proceedings for the issue of a declaration of enforceability and national enforcement proceedings – the solutions adopted in the Council Regulation (EC) No 44/2001 make the procedure for making a foreign judgment enforceable analogical to the procedure concerning a Polish ruling (cf. part III, point 6.5).

- 3.3. Regulations as regards the recognition and declaration of enforceability of judgments (granting *exequatur*), contained in the Council Regulation

(EC) No 44/2001 are, to a large extent, modelled on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Brussels in 1968(OJ C 27, 26.1.1998, p. 1; hereinafter: the Brussels Convention) as well as the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on September 1988, since 1 February 2000, Poland has also been the party to the Convention (OJ 2000 No. 10, item 132; hereinafter: the Lugano Convention).

The basic aim of the provisions of the Council Regulation (EC) No 44/2001 concerning the recognition and declaration of enforceability of judgments is to ensure ‘the free movement of judgments’ within the EU Member States. The above aim is achieved at several levels. Firstly, the Regulation broadly renders the category of judgments and other legal acts which may be subject to recognition or declaration of enforceability. Secondly, it limits the terms (premisses) of recognition and declaration of enforceability, in comparison with the extensive regulations of particular Member States. Thirdly, it regulates the procedure for the so-called automatic recognition of judgments and other instruments from the EU Member States as well as the simplified and expeditious proceedings for the issue of a declaration of enforceability (cf. K. Weitz, in: *Stosowanie prawa Unii Europejskiej przez sądy*, A. Wróbel (ed.), Warszawa 2006, first edition, p. 570). The Court of Justice of the European Union has on a number of occasions indicated in its jurisprudence that the aim of proceedings provided for in the Council Regulation (EC) No 44/2001 is to simplify formalities related to mutual recognition and enforcement of judgments. As far as enforcement is concerned, the principal aim is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal (cf. the judgment of 16 February 2006 in the case C-3/05 Verdoliva, ECR 2006, p. 1579 and the jurisprudence cited therein).

4. Proceedings for the issue of a declaration of enforceability in the case of a judgment by a court of an EU Member State, in accordance with the Council Regulation (EC) No 44/2001.

[Omitted: The content of the Article 38.1 of the Council Regulation (EC) No 44/2001]

The parties to the proceedings are the applicant (usually the creditor or his/her legal successor) and the party against whom a given judgment

was issued in the Member State of origin, i.e. the debtor. First instance proceedings have been provided for as unilateral proceedings (*ex parte* proceedings), instituted by the applicant and taking place without the participation of the debtor. The prohibition against making submissions by the debtor at the stage of the examination of the application, provided for in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 is nothing new. In fact, it corresponds to the norm contained in Article 34, first sentence, of the Brussels Convention and Article 34, first sentence, of the Lugano Convention. The indicated solution is aimed at expediting proceedings at their initial stage so that the applicant interested in the rapid enforcement of a judgment or another instrument issued in an EU Member State could as soon as possible commence the enforcement of the judgment or the instrument in the Member State in which enforcement is sought. The principle of unilateral proceedings before the court of first instance is also aimed at preserving the so-called ‘surprise effect’ in the case of the debtor. This consists in the fact that the debtor does not know that proceedings for the issue of a declaration of enforceability have been instituted against him/her, and therefore s/he has no possibility of removing property that may be subject to enforcement from the Member State in which enforcement is sought, or disposing of them in any other way.

By contrast, having been awarded the declaration of enforceability in first instance proceedings, the applicant may – pursuant to Article 47(2) of the Council Regulation (EC) No 44/2001 – proceed to any protective measures against the property of the debtor. The applicant may not, however, institute enforcement aimed at satisfying his/her claim until the lapse of the time specified for an appeal or until any such appeal against the judgment has been determined (Article 47(3) of the Council Regulation (EC) No 44/2001). It follows from the above that proper enforcement is possible only after the debtor has been heard as part of examining the appeal or has had the opportunity to be heard.

In the light of the provisions of the Regulation, cases concerning the issue of a declaration of enforceability in first instance proceedings are examined by the court or competent authority. The competence of courts or competent authorities are specified in statements submitted by the EU Member States and are mentioned in the list constituting Annex II to the Council Regulation (EC) No 44/2001. Therefore, in the light of the Regulation, it is not only courts that may issue the declaration of enforceability of judgments in first instance proceedings, but these may also be other competent authorities, for instance quasi-judicial or administrative authorities, depending on the choice made by particular Member States. In

the context of Poland, competence in that regard has been granted to circuit courts (Pl. *sąd okręgowy*). At the first stage of proceedings, the said court examines merely the formal aspects of an application for *exequatur*, and documents set out in Article 53 of the Council Regulation (EC) No 44/2001 attached to the application as well as determines, on such basis, whether the judgment is enforceable in accordance with the law of the Member State of origin. Article 45 of the Regulation stipulates that under no circumstances may the foreign judgment be reviewed as to its substance.

Within the scope which is not regulated by the Council Regulation (EC) No 44/2001, as regards proceedings for the issue of a declaration of enforceability in the case of a judgment by a court of an EU Member State, the provisions of national law are applicable, as long as they are not contrary to the provisions of the Regulation. In the light of the Polish law, the applicable provisions are the regulations of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws – Dz. U. No. 43, item 296, as amended; hereinafter: the Code of Civil Procedure) which concern international civil proceedings, and in particular provisions which govern proceedings to determine the enforceability of judgments pursuant to Articles 1150 to 1152 of the said Code (por. J. Maliszewska-Nienartowicz, in: *Stosowanie prawa Unii Europejskiej przez sądy*, A. Wróbel (ed.), Vol. I, Warszawa 2010, p. 424). In that regard, it should be indicated that pursuant to Article 1151(1) of the Code of Civil Procedure, as amended by the amending Act of 5 December 2008 (Journal of Laws – Dz. U. No. 234, item 1571), the declaration of enforceability is done by issuing an enforcement clause for the judgment of a foreign court. The application for a declaration of enforceability is considered by the court in camera (Article 1151(2) of the Code of Civil Procedure).

Article 42(1) of the Council Regulation (EC) No 44/2001 requires that the decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought. Moreover, it is necessary that the declaration of enforceability, i.e. a ruling about granting *exequatur*, was formally served on the debtor (cf. the decision of the Supreme Court of the Republic of Poland, dated 6 January 2010, Ref. No. I PZP 6/09, OSNP No. 13–14/2011, item 183). An appeal is to be lodged by the debtor within one month of service thereof; the period provided for in that regard in the national law of the Member State in which enforcement is sought is excluded. However, if the debtor is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be

two months and shall run from the date of service, either on him/her in person or at his/her residence. In the case of the Polish law, parties lodge an appeal to a court of appeal (Pl. *sąd apelacyjny*) via a circuit court (Pl. *sąd okręgowy*) (pursuant to Annex III to the Council Regulation (EC) No 44/2001 as amended by the Commission Regulation (EC) No. 280/2009 of 6 April 2009, OJ L 93, 7.4.2009, p. 13). In the doctrine, it is indicated that an appeal lodged by the debtor may be based solely on the allegations that the requirements for the declaration of enforceability have been fulfilled. This concerns a situation where the judgment – the enforceability of which has been declared – is not a judgment within the meaning of Article 32 of the Council Regulation (EC) No 44/2001, the said judgment may not be enforced, or there are grounds to refuse a declaration of enforceability on the basis of Articles 34 or 35 of the Council Regulation (EC) No 44/2001 (cf. J. Ciszewski, T. Ereciński, *Kodeks postępowania cywilnego. Komentarz. Część czwarta. Przepisy z zakresu międzynarodowego postępowania cywilnego*, commentary to Article 1151, Warszawa 2009). Adopting a solution in accordance with which, during the proceedings for the issue of a declaration of enforceability in the case of a foreign judgment, the judgment may not be reviewed as to its substance does not allow to consider allegations concerning the content of the judgment. A decision of the court of appeal given on the appeal concerning the Declaration of enforceability of a judgment by a foreign court (or refusal to issue the declaration of enforceability) may be contested by a cassation appeal (Pl. *skarga kasacyjna*) lodged by either of the parties with the Supreme Court of the Republic of Poland (Article 44 in conjunction with Annex IV to the Council Regulation (EC) No 44/2001).

5. The indication of the subject of review and higher-level norms for the review.
 - 5.1. In the constitutional complaint submitted to the Tribunal, the complainant challenged Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001, from the point of view of their conformity to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution. Due to the withdrawal of the complaint by the representative of the complainant at the hearing, with regard to Article 36, Article 40 and Article 42 of the Council Regulation (EC) No 44/2001 as well as the higher-level norms for the review included in Article 8, Article 32(2), Article 45(2) and Article 176(2) of the Constitution, the Tribunal decided to discontinue the proceedings in that regard, on the basis of Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal

of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act).

As a result, after modifying her complaint, the complainant requested the Tribunal to determine the conformity of Article 41 of the Council Regulation (EC) No 44/2001 to Article 45(1) of the Constitution, to Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution as well as to Article 32(1) in conjunction with Article 45(1) of the Constitution.

[Omitted: The content of the Article 41 of the Council Regulation No 44/2001]

5.2. Within the meaning of Article 79 of the Constitution, the subject of the constitutional complaint may only be a normative act upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. The basis of adjudication encompasses the entirety of legal provisions (norms) applied by the organs of public authority in order to issue an act of applying the law. The basis understood in this way comprises not only the provisions of substantive law, but also procedural provisions as well as basic systemic provisions which provide for a given organ of public authority and vest relevant powers therein (cf. the judgment of the Constitutional Tribunal of 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108).

5.3. In the present case, the final decision is the decision of 9 March 2007 issued by the Court of Appeal in Warsaw, in which the court dismissed the complainant's appeal against the decision on the application for a declaration of enforceability concerning the decision by the Court of Appeal in Brussels, which had been deemed enforceable in the territory of Poland. It should be noted that the allegations in the constitutional complaint are not addressed against the ruling of the Belgian court where compensation was ordered to be paid by the complainant. The complainant clearly links the infringement of her constitutional rights and freedoms with the aforementioned legally effective decision of the Polish court.

The analysis of the content of the constitutional complaint indicates that the complainant alleges that her subjective rights were infringed due to the fact that she was excluded from proceedings before the court of first instance, in the case where the proceedings regarded the enforceability of a foreign judgment. The complainant did not raise the said allega-

tion in the appeal; however, the court of appeal made reference in the substantiation for its decision to the content of Article 41 of the Council Regulation (EC) No 44/2001, examining the issue of time-limit and manner of resorting to the redress procedure. Therefore, it may be assumed that the norm contained in the challenged provision fell within the scope of the basis of the ruling on the rights and obligations of the complainant, constituting an element of procedural regulation. As regards Article 41, first sentence, of the Council Regulation (EC) No 44/2001, the Constitutional Tribunal states that neither in her constitutional complaint nor at the hearing did the complainant formulate any allegations concerning contradictions with the indicated higher-level norms for the review. This justifies the discontinuation of the proceedings in that regard, on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible.

Consequently, the Constitutional Tribunal concludes that the subject of the review conducted by the Constitutional Tribunal may only be the legal norm expressed in Article 41, second sentence, of the Council Regulation (EC) No 44/2001, in accordance with which the party against whom enforcement is sought (the debtor) shall not at the first stage of the proceedings be entitled to make any submissions on the application.

5.4. The complainant has indicated the following higher-level norms for the review: Article 45(1) of the Constitution, Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution as well as Article 45(1) in conjunction with Article 32(1) of the Constitution. A constitutional complaint is a special means of legal protection which is aimed at eliminating – from the legal system – regulations that are inconsistent with constitutional provisions concerning rights or freedoms. Article 79(1) of the Constitution clearly stipulates that a premiss authorising the submission of a constitutional complaint is not any infringement of the Constitution, but only the infringement of constitutional norms which regulate the rights or freedoms of the individual and citizen. Thus, a constitutional complaint must include the indication of a specific person whose rights or freedoms have been infringed, the indication which of the rights or freedoms enshrined in the Constitution have been infringed as well as the indication of a manner of the infringement. For the effectiveness of the instrument for protection of rights and freedoms, i.e. a constitutional complaint, it does not suffice to determine the nonconformity of a given normative act, or part thereof, to any higher-level norm for review, but to constitutional norms constituting the basis for the rights or freedoms of the individual.

5.5. Inconformity of reviewed Article 45 first sentence of the Constitution in accordance to Article 79 and Article 176 first sentence of the Constitution

[Omitted]

5.6. Consequently, the Constitutional Tribunal states that the subject of review in the present case is Article 41, second sentence, of the Council Regulation (EC) No 44/2001 in the context of its conformity to Article 45(1) and Article 32(1) in conjunction with Article 45(1) of the Constitution.

6. The assessment of conformity of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 to Article 45(1) of the Constitution.

6.1. The subject of the assessment is a procedural solution adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001, pursuant to which the party against whom enforcement is sought (the debtor) shall not at the first stage of proceedings be entitled to make any submissions. The first instance proceedings are carried out without the participation of the debtor (*ex parte* proceedings). The allegations raised by the complainant amount to the infringement of the complainant's right to a fair and public hearing in first instance proceedings concerning the enforceability of a foreign judgment in the territory of the Republic of Poland, which has been issued against the complainant. Two basic allegations formulated by the complainant regard the infringement of the right to a fair hearing and the right to a public hearing, understood in the context of a party's participation in proceedings.

6.2. As the Constitutional Tribunal has indicated on a number of occasions, the right to a fair trial comprises the following: the right of access to a court, i.e. the right to institute proceedings before a court – an organ of the state with particular characteristics (impartial and independent); the right to a proper court procedure which complies with the requirements of a fair and public hearing; the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court as well as the right to have cases examined by the organs of the state with an adequate organisational structure and position (see the judgments of: 10 July 2000, Ref. No. SK 12/99, OTK ZU No. 5/2000, item 143 as well as of 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108). Moreover, the Tribunal has stated that another element of the right to a fair trial is the right to enforce a legally effective ruling in the course of en-

forcement proceedings (cf. the judgment of 4 November 2010 Ref. No. K 19/06, OTK ZU No. 9/A/2010, item 96). What is relevant in the present case is one of the elements of the right to a fair trial; namely, the right to a proper court procedure which complies with the requirements of a fair and public hearing. In this context, it ought to be emphasised that there is a need for procedural measures which will allow for appropriate determination of procedural positions of parties.

Explaining the point of that constitutional guarantee, the Constitutional Tribunal has, in its previous jurisprudence, expressed the view that a fair court procedure should ensure that parties enjoyed procedural rights which are relevant to the subject of pending proceedings. The requirement of a fair trial implies that the principles of the trial are adjusted to the specific character of particular cases under examination (see the judgment of the Constitutional Tribunal of 13 May 2002, Ref. No. SK 32/01, OTK ZU No. 3/A/2002, item 31, the judgment of 11 June 2002, Ref. No. SK 5/02, OTK ZU No. 4/A/2002, item 41, p. 554). As the Tribunal has pointed out on a number of occasions, constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of procedure – the same set of procedural instruments which would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them. Making a different assumption, one could question all procedural differences, within the scope of civil proceedings, which are meant to guarantee a quicker and more effective protection of the rights and interests of the subjects that invoke their rights before the court. It would be unjustified to assume, relying on constitutional provisions, that there is a necessity to create solutions which would reflect – with regard to every type of case, regardless of its character and other factors, usually closely related to the requirement of effectiveness of applied procedures – the same ideal and abstract model of proceedings, which actually does not exist (cf. the view expressed in the judgment of 23 October 2006, Ref. No. SK 42/04, OTK ZU No. 9/A/2006, item 125; of 28 July 2004, Ref. No. P 2/04, OTK ZU No. 7/A 2004, item 72; of 14 October 2008, Ref. No. SK 6/07, OTK ZU No. 8/A/2008, item 137). Consequently, it should be stated that not every difference or special character in the context of court proceedings must *a priori* be regarded as a restriction imposed on the right to a fair trial and the related procedural guarantees of parties. In fact, it does not follow from the Constitution that every court procedure has to involve the same procedural instruments. The freedom of the legislator (as well as of the EU law-maker) with regard to devising proper procedures does not entail that it is admissible to introduce arbitrary solutions which excessively and unjustly restrict the

procedural rights of parties, the exercise of which constitutes a prerequisite for a proper and fair determination of a given case. The constitutional guarantees related to the right to a fair trial would be infringed if a restriction imposed on the procedural rights of a party was disproportionate to the pursuit of such goals as enhancing the effectiveness and pace of proceedings, and at the same time it would make it impossible to balance the procedural positions of parties. Therefore, in this context, one should consider the point and significance of restricting the possibility of the debtor's participation in first instance proceedings concerning the enforceability of a judgment delivered by a foreign court, in the light of Article 41, second sentence, of the Council Regulation (EC) No 44/2001.

- 6.3. The proceedings regulated in the Council Regulation (EC) No 44/2001 aim at balancing the rights and contradictory interests of the applicant (the creditor) and the debtor. For that purpose, the EU law-maker has provided for a two-stage procedure. It reflects the general assumption of proceedings for the issue of a declaration of enforceability in the case of a judgment of another Member State, which are to reconcile the necessary 'surprise effect', in the case of the debtor, with respect for his/her right to a fair hearing (cf. the judgment of the Court of Justice of 11 May 2000 in the case C-38/98, *Régie Nationale des Usines Renault*, ECR 2001, p. 2973).

The said regulation of first instance proceedings as *ex parte* proceedings serves the protection of the applicant's interests. S/he also has the right to apply protective measures on the basis of a first-instance decision concerning his/her application. However, the rights of the debtor are subject to protection in the course of appellate proceedings. The debtor may raise allegations as regards the non-fulfilment of requirements for the issue of a declaration of enforceability, the scope of application of the Council Regulation (EC) No 44/2001 as well as other formal allegations which concern the course of proceedings before the court of first instance. S/he may also raise allegations with regard to refusal to enforce a judgment for the reasons enumerated in Article 34 or Article 35 of the Council Regulation (EC) No 44/2001 (which are also the reasons for refusal to recognise a judgment), *inter alia*: if a judgment is contrary to public policy in the Member State in which recognition is sought, if the right to be defended has been infringed, if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought or if the judgment conflicts with some provisions of the Regulation concerning jurisdiction. Moreover, the court may, on the application of the party against whom enforcement is sought

(the debtor), stay the proceedings (Article 46(1) of the Council Regulation (EC) No 44/2001) or the court may also make enforcement conditional on the provision of such security as it shall determine (Article 46(3) of the Council Regulation (EC) No 44/2001).

In the literature on the subject, it is pointed out that notifying the debtor by the court of first instance about proceedings pending against him/her with regard to the issue of a declaration of enforceability concerning a judgment of a foreign court could weaken or even eliminate the surprise effect for the debtor, the achievement of which is one of the goals of those proceedings. Notifying the debtor *ex officio* by the court would contradict the purpose of the said regulation and would undermine the procedural position of the applicant (the creditor), which is guaranteed by the provisions of the Council Regulation (EC) No 44/2001 (cf. K. Weitz, *op.cit.*, p. 606.).

6.4. What is of significance in that context is the fact that proceedings concerning the enforceability of a judgment of another Member State are secondary in character in relation to the court proceedings which ended with the judgment in the Member State of origin, which ordered compensation to be paid to the plaintiff by the defendant. In proceedings for the issue of a declaration of enforceability, there is a presumption that, in proceedings before the court of the Member State of origin, both parties were granted procedural rights which corresponded to the guarantees of a fair procedure. The said presumption is based on mutual trust in the administration of justice in the EU Member States.

The right to a fair trial is guaranteed in the constitutions and statutes of the EU Member States. Moreover, it arises from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also, it is a general principle which constitutes part of EU law (Article 6(3) of the Treaty on European Union; Article 47 in conjunction with Article 51(1) of the Charter of Fundamental Rights). Necessity for procedural guarantees in the national law order, which would arise from the EU principle of a fair trial, has been indicated many times in the jurisprudence of the Court of Justice (cf. the judgments of the Court of Justice of: 15 May 1986 in the case 222/84 Johnston, ECR 1986, p. 1651; 15 October 1987 in the case 222/86 Heylens, ECR 1987, 4097; of 7 May 1991 in the case C-340/89 Vlassopoulou, ECR 1991, p. 2357; 3 December 1992 in the case C-97/91 Borelli, ECR 1992, p. 6313; 25 July 2002 in the case C-50/00 P Unión de Pequeños Agricultores, ECR 2002 p. 6677; of 13 March 2007 in the case C-432/05 Unibet, ECR 2007, p. 2271. Cf. also N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii*

Europejskiej w postępowaniach krajowych, Warszawa 2010, p.153 and subsequent pages).

The presumption that the guarantees of a fair procedure were ensured in the Member State of origin may be rebutted, as a result of the debtor's allegation, raised before a court of second instance, that the enforcement of a judgment is contrary to public policy in the Member State in which enforcement is sought (Article 45 in conjunction with Article 34(1) of the Council Regulation (EC) No 44/2001). Among premisses related to that kind of allegation, the Court of Justice indicated the infringement – when the case was being heard before a court of the Member State of origin – the right to be defended, the principle of equality of parties, impartiality of a judge, misleading a party, or no mention grounds for a ruling (cf. the judgment of the Court of Justice of 28 March 2000 in the case C-7/98, Krombach, ECR 2000, p.1935). Regardless of the above, the party against whom enforcement is sought is entitled to the allegation of the infringement of the right to be defended, in the case of proceedings instituted in the Member State of origin, as provided for in Article 45 in conjunction with Article 34(2) in the Council Regulation (EC) No 44/2001.

6.5. The provisions of the Council Regulation (EC) No 44/2001 regulate only general issues related to simplified proceedings concerning the enforceability of a judgment of a foreign court, leaving other solutions to be specified in the law of particular Member States. In Poland, these are governed by Article 1151(1) of the Code of Civil Procedure, pursuant to which a judgment of a foreign court is declared enforceable by issuing an enforcement clause thereto. It should be noted that proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another EU Member State has been specified in the Polish Code of Civil Procedure in a similar way to proceedings concerning the enforceability of judgments of Polish courts. However, it should be emphasised that issuing an enforcement clause, in the case where a judgment of a foreign court is declared enforceable, plays a double role. Firstly, it implies consent to execute a foreign enforced collection order (the so-called *exequatur*). Secondly, it confirms that a given enforced collection order constitutes authorisation for enforcement, as is in the case of issuing an enforcement clause for a Polish enforced collection order.

In the Polish law, an executive title which constitutes the basis for enforcement is an enforced collection order with an enforcement clause (Article 776 of the Code of Civil Procedure). In the doctrine and jurisprudence of the Constitutional Tribunal, it is assumed that an enforcement clause is a declarative court decision which states that a given legal doc-

ument presented by the creditor meets the statutory criteria for an enforced collection order, and that it is admissible to institute relevant enforcement proceedings, in order to collect a given debt from the debtor by means of state coercion (cf. the judgment of 15 October 2002, Ref. No. SK 6/02, OTK ZU No. 5/A/2002, item 65 and the literature on the subject cited therein). Proceedings to issue an enforcement clause are carried out without the participation of the debtor. In principle, the court examines cases concerning enforcement in camera (Article 766 of the Code of Civil Procedure). The court's decision on the issue of an enforcement clause may be appealed against. The time for lodging an appeal by the debtor shall run from the date of service of a notice about the commencement of enforcement (Article 795 of the Code of Civil Procedure). *Ratio legis* in the case of first instance proceedings for the issue of a declaration of enforceability for a judgment of a foreign court and in the case of proceedings to issue an enforcement clause in the Polish law is the same.

The goal is to prevent the debtor from hiding or disposing of his/her property with the intention to make it impossible for the creditor to exercise his/her rights arising from a ruling issued to the creditor's advantage.

6.6. Moreover, the Constitutional Tribunal notes that the legal construct of *ex parte* proceedings, i.e. proceedings without the participation of the other party – being analogical to the construct adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 at the first stage of proceedings for the issue of a declaration of enforceability – occurs also in relation to some proceedings at a later stage, which have been regulated in the Polish Code of Civil Procedure. Particular attention should be drawn to special proceedings aimed at expeditious examination of certain types of civil cases, i.e. injunction proceedings (Article 4841 and subsequent provisions of the Code of Civil Procedure) and proceedings concerning orders to pay (Article 4971 and subsequent provisions of the said Code). In those proceedings, the court examines a given case in camera, upon a request of the plaintiff contained in his/her petition. The defendant is notified about proceedings pending against him/her no earlier than at the moment when s/he is being served with an injunction to pay. The character of proceedings without the participation of a defendant (debtor) is also shared, at the first stage, by proceedings concerning protective measures. (Article 730 and subsequent provisions of the Code of Civil Procedure) and the aforementioned proceedings to issue an enforcement clause (Article 781 and subsequent provisions of the Code of Civil Procedure). The said cases are examined in camera by the court, upon applications by plaintiffs (creditors). A given defendant is notified about the application

of protective measures or the issue of an enforcement clause no earlier than at the moment when s/he is being served with a court decision. The exclusion of defendants (debtors) at the first stage of the above-mentioned proceedings has not been challenged before the Constitutional Tribunal so far.

The legal construct of *ex parte* proceedings is justified by the special character, subject or function of given proceedings. In particular, it reflects the need for granting, even temporary, legal protection quickly or achieving the surprise effect. Without that kind of proceedings, it would be impossible in many cases to fulfil the function of civil proceedings, namely to grant legal protection. This means that taking into account the interests of the two parties to proceedings may justify postponing the exercise of the right to a hearing of one party (e.g. the debtor, the defendant) to proceedings at a later stage.

- 6.7. For the above reasons, the Tribunal states that ruling out the possibility of making any submissions by the debtor at the first stage of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, pursuant to Article 41, second sentence, of the Council Regulation (EC) No 44/2001, does achieve the above-mentioned significant goals, is not arbitrary in character and does not infringe the right to a fair trial. On the one hand, the said procedural solution implements the principle of the free movement of judgments within the EU (as part of cooperation in judicial matters among the Member States) and the principle of mutual trust in the administration of justice in the EU Member States, which also apply to rulings issued by Polish courts. On the other hand, it facilitates the effective enforcement of court rulings issued to applicants (creditors). Therefore, there are no grounds to conclude that the adopted model of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, with the existing restrictions imposed on a party against whom enforcement is sought in first instance proceedings, infringes the right to a fair trial, guaranteed by the Constitution.

Taking the above into consideration, the Tribunal states the Article 41, second sentence, of the Council Regulation (EC) No 44/2001 is consistent with Article 45(1) of the Constitution.

7. The assessment of conformity of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 to Article 32(1) in conjunction with Article 45(1) of the Constitution.

The complainant does not present extensive argumentation for the infringement of the principle of equality by the challenged Regulation in

the court proceedings. She only generally states that there is a necessity for ensuring the equal rights of parties to court proceedings, as regards the possibility of making submissions. Thus, it may be assumed that, in the opinion of the complainant, the infringement of Article 32(1) in conjunction with Article 45(1) of the Constitution by the challenged provision consists in differentiating between the situations of participants to first instance proceedings. The subject of proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another Member State has a special character. As it has already been clarified in point 6.4 above, the said proceedings are subsequent to proceedings as to the substance of the case conducted before a court of another Member State, during which parties had equal rights as regards the possibility of making submissions.

Moreover, the subject and aim of proceedings for the issue of a declaration of enforceability justifies differences in the shaping of rights granted to the creditor and the debtor. For the effective conduct of proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another Member State and for the protection of rights granted to the creditor, it is necessary to preserve the ‘surprise effect’ (for more details see part III, point 6.3).

In the opinion of the Constitutional Tribunal, due to a special character of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court which have been instituted by the creditor who has been awarded a judgment ordering compensation to be paid to him, it is admissible to differentiate between procedural rights of parties in first court proceedings. Therefore, it does not follow from Article 41, second sentence, the Council Regulation (EC) No 44/2001 that the applicant (the creditor) was excessively and unjustly privileged as opposed to the participant in the proceedings (the debtor).

Taking the above into consideration, the Constitutional Tribunal has concluded that Article 41, second sentence, the Council Regulation (EC) No 44/2001 does not infringe Article 32(1) in conjunction with Article 45(1) of the Constitution.

8. Preliminary review of the admissibility of a constitutional complaint in the case of challenging the conformity of acts of EU secondary legislation to the Constitution.
- 8.1. The review of the challenged provision of the Council Regulation (EC) No 44/2001 showed that the provision infringes neither the right to a fair trial (Article 45(1) of the Constitution) nor the principle of equality of

parties to court proceedings (Article 32(1) in conjunction with Article 45(1) of the Constitution).

In the present case, the Constitutional Tribunal has directly reviewed the conformity of the norms of EU secondary legislation to the Constitution for the first time. Therefore, the Tribunal first determined the issue of admissibility of a constitutional complaint, and then the issue of its substantive validity. Due to that new situation, the Tribunal decided to thoroughly examine the allegations, comparing the challenged EU provisions with the higher-level norms for the constitutional review, indicated by the complainant. This is similar to the approach taken by the Federal Constitutional Court of Germany in the aforementioned judgment in the case *Honeywell*. However, there is a difference; namely, in that case the subject of review was not an act of EU secondary legislation, but a judgment of the Court of Justice of the European Union, and the allegation of non-conformity to the Basic Law for the Federal Republic of Germany did not concern fundamental rights, but the issue of going beyond the scope of competences conferred upon the European Union (*ultra vires* action).

In the present case, the Constitutional Tribunal had no doubts as to the conformity of the challenged Council Regulation (EC) No 44/2001 to the EU primary law, and hence – within the meaning of the *Foto-Frost* doctrine – there was no need to refer a question to the Court of Justice of the European Union for a preliminary ruling.

8.2. The jurisprudence of the German Federal Constitutional Tribunal regarding the standard of human rights protection in European law

[Omitted]

8.3. Jurisprudence of the European Court of Human Rights

[Omitted]

8.4. There are premisses to take an analogical approach with regard to reviewing the constitutionality of EU law in Poland. In the judgment concerning the Treaty of Lisbon (Ref. No. K 32/09), the Constitutional Tribunal presented the view that the said Treaty enjoyed a special status in the legal order of the Republic of Poland, which affected the way of examining its conformity to the Constitution. Treaty of Lisbon was ratified by the President of the Republic of Poland, upon consent granted by statute enacted in accordance with the requirements specified in Article 90 of the Con-

stitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested his conviction that the ratified legal act was consistent with the Constitution. Based on the above grounds, the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution.

An analogical approach to the examination of conformity to the Constitution also regards the legal acts of the EU institutions. The legal acts prior to Poland's accession to the EU were adopted, pursuant to the Treaty of Accession, in the Polish legal system on the day of the accession (cf. Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, with regard to the conditions of EU membership, Journal of Laws – Dz. U. of 2004 No. 90, item 864). Subsequent legal acts were issued when Poland was already a Member State of the EU, usually with the participation of the representatives of the competent organs of the Polish state. What further justifies the assumption about a special status of EU secondary legislation, which is an analogical approach to that taken by other courts are the following aforementioned arguments: the great significance of fundamental rights in the EU legal order, the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration as well as the principle of loyalty of the Member States towards the Union.

- 8.5. The said approach has important procedural consequences. Pursuant to Article 79(1) of the Constitution, a constitutional complaint may be filed in accordance with principles specified by statute. Article 47(1)(2) of the Constitutional Tribunal Act imposes an obligation on a complainant to, *inter alia*, indicate in what manner regulations challenged in a given constitutional complaint have infringed the complainant's constitutional rights or freedoms. In the case of filing a constitutional complaint which challenges the conformity of a legal act of EU secondary legislation to the Constitution, the fulfillment of the above obligation acquires a qualified character. When indicating what is the nature of the infringement of his/her rights or freedoms, i.e. when presenting arguments for the substantive unconstitutionality of provisions constituting the subject of his/her complaint, a given complainant should, at the same time, be re-

quired to make probable that the challenged act of EU secondary legislation causes a considerable decline in the standard of protection of rights and freedoms, in comparison with the standard of protection guaranteed by the Constitution. Making this probable is an essential element of the requirement to indicate the manner in which rights or freedoms have been infringed.

The need for such more specific rendering is justified by the character of the acts of EU law, which enjoy a special status in the legal order of the Republic of Poland and which come from legislative centres other than the organs of the Polish state. What confirms that the obligation arising from Article 47(1)(2) of the Constitutional Tribunal Act needs to be imposed on the complainant in a qualified form is the circumstances presented in point 2 of this statement of reasons. The requirement to make probable that the level of protection of rights and freedoms has been lowered, in comparison with the level of protection guaranteed by the Constitution, follows from the allocation of the burden of proof in review proceedings commenced by way of constitutional complaint. This is not tantamount to possible indication (proof) that there has been an infringement of the Constitution, which is the task of the Tribunal.

When the indicated requirements are not fulfilled by the complainant, the Tribunal concludes that the constitutional and statutory requirements of a constitutional complaint have not been met and, consequently, issues a decision in which it refuses to proceed with further action (Article 36(3) in conjunction with Article 49 of the Constitutional Tribunal Act) or in which it discontinues proceedings, on the grounds that issuing a ruling is inadmissible (Article 39(1)(1) of the Constitutional Tribunal Act).

For the above reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

BOOK REVIEWS



Book Reviews

***Poland's Foreign Policy in the 21st Century*, ed. Stanisław Bieleń, Difin, Warsaw 2011, 462 p., ISBN 978-83-7641-556-7**

The group of analysts and experts gathered around the Faculty of Journalism and Political Sciences, University of Warsaw (although not only from this faculty), including many persons with practical experience in diplomacy, took to presenting a publication on the evaluation of Polish foreign policy in the early 21st century, the first work of this kind in Poland. After individual publications of such authors as Prof. Roman Kuźniar, Prof. Ryszard Zięba and ambassador Przemysław Grudziński,¹ it was time for a scientific undertaking on a much grander scale.²

The collective work, edited by Prof. Stanisław Bieleń, is particularly coherent, compact and lucid. Apart from a few exceptions (Franciszek Gołembski – a purely academic text, Marek Ostrowski – a journalistic report, Konstanty Wojtaszczyk – only a draft of scientific discourse), all texts included in the publication (23 in total) are characterised by diligence of technique, deep analysis, inquisitiveness, and are well set in professional literature, as proven by the exhaustive footnotes in almost all the included texts.

As noted in the 'Introduction', the publication is the result of statute research and a scientific conference conducted in November 2009. It is lucid and divided into four topic areas. The first area, perhaps the most creative in research terms, is devoted to deliberations concerning the identity of Poland in the international arena. This is an important issue, for the notion that Poland is too big for Central Europe,

¹ R. Kuźniar, *Droga do wolności. Polityka zagraniczna III Rzeczypospolitej* (later published in English as *Poland's Foreign Policy After 1989*) Warszawa 2008 (review of the Polish edition by this Author in 'European Studies' No. 4/48/2008, p. 241–245); P. Grudziński, *Państwo inteligentne. Polska w poszukiwaniu międzynarodowej roli (Smart State. Poland Searching for its International Role)*, Toruń 2008 (review in 'European Studies' No. 1/49/2009, p. 223–226); R. Zięba, *Główne kierunki polityki zagranicznej Polski po zimnej wojniei (Main Directions of the Polish Foreign Policy in the Post-Cold War Era)*, Warszawa 2010.

² The review translated by M. Wolsan.

but too small to be an equal partner to the biggest Western European states has been conceived long ago. The editor of the volume expressed this as follows: *'The trouble with Poland, however, is fact that it lies somewhere in the middle between large and small states. It is suspended "between the major and minor leagues of Europe" and this is a long term situation'*. Elsewhere, he put this even more directly: *'Poland does not have a civilizational vision of development and has yet to work out – despite the passage of 20 years as an independent state – a clearly defined, well-thought-out international identity (...). Poland has no strategy for action in various time phases (short-, medium- and long-term), it does not have preferences regarding actors (one time it is France, another time Great Britain, its fear of German domination is diminishing, it is looking for allies among small, weak states). Polish political elites are unable to utilise a rich and complex historical experience for anything other than confrontational purposes'*. The quoted fragment clearly shows the mark of the period of 'Storm and Stress' in Polish foreign policy (2005–2007), but we have to admit that the policy has retained many of the abovementioned traits even until now, at least the one conducted by some important and influential parliamentary groups. This issue is by no means closed or resolved.

The issue of our identity in the international arena has not lost importance after Poland joined the Western structures, i.e. the major Western organisations – the Council of Europe, the OECD, the NATO and the EU. After 2005, the related problems became even more pronounced (let's hope only temporarily), which echoes through almost all texts in the discussed volume. Prof. Kazimierz Łastawski, quoting Prof. Adam Bromke, writes: *'In Polish national identity, the influence of romantic ideas is stronger than positivist or pragmatic ones'*. The former ones were especially pronounced after 2005, which Prof. R. Zięba, quoting the minister of Foreign Affairs Radosław Sikorski, described even as *'Jagiellonian superpower aspirations'*. We have to admit and underline that Prof. Stanisław Parzymies is quite right to write in the discussed publication (that is at the end of the first decade of the 21st century): *'Poles have everything they fought for: democracy, a market economy, the optimal geopolitical conditions for development, stable boundaries and a favourable internal and external situation'*. Yet still, largely due to the internal situation (both in Poland and, to a lesser extent, in the EU), the question: *'what will Poles do with these favourable conditions given them by history after 1989 (and 2004)?'* remains relevant. The authors of the discussed publication leave this question open – and quite rightly so.

The second thematic area comprises deliberations on the major challenges to the Polish foreign policy in the early years of the new century (and millennium). In this context, the text by Prof. Włodzimierz Anioł, full of empirical matter, is particularly important. Quoting Anthony Giddens, he mentions the energy and climate shocks as the key challenges to Poland, Europe and the world, because the new century, as W. Anioł particularly stresses, brings entirely new problems, requiring an entirely new approach and different tools for implementation of the new policy. Owing to new technologies and many other factors (although, obviously, the former are of key importance), the world is rapidly changing, which requires constant

adaptation to the ever new situation. The texts in this part of the publication – as well as the works by Prof. Anioł, Prof. Bolesław Balcerowicz and Katarzyna Kołodziejczyk, Ph.D. – emphasise this fact very well. The arena around us is especially dynamic, so we have to be dynamic as well.

The third examined issue is the decision-making process and political practice. Here, the authors pay particular attention to: disputes over competences regarding foreign policy (Artur Nowak-Far), the main directions of which – what should be constantly underlined, as it was particularly good for the state – were subject to a political consensus previously to Poland's accession to the EU; the difference in approaches of various groups and political parties to foreign policy (Krzysztof Zuba); the professionalisation of the foreign service (Bogusław W. Zaleski) and the role of *think tanks* (Jacek Czaputowicz) and advisory bodies in its development, and finally – the growing influence of media on foreign policy (Marek Ostrowski). There is a quite unambiguous conclusion of these analyses: the situation in each of the discussed fields is not very good in Poland; in fact, there is a great deal of work to be done. Furthermore, some processes and phenomena that took place particularly in Anna Fotyga's term of office as the head of the Ministry, and in relation to the Ministry of Foreign Affairs, differed greatly from earlier practices in Polish politics after 1989. Fortunately, they have not been continued by her successors. However, we have to admit as well that so far, no positive breakthrough has been observed in the discussed fields, which only further increases the significance of the issues dealt with in this chapter.

The last discussed thematic block, a relatively broad one, are the major directions and areas of activity in Polish foreign policy, with particular focus on partnership in the EU (first of all with Germany – Prof. Stanisław Sulowski) and the problems in Polish eastern policy (editor of the volume, S. Bieleń). Apart from this, eminent experts discussed the following issues: *A New phase of the Polish messianism in the East?* (Andrzej Szeptycki), *The Promotion of Poland's culture and image in the world* (Grażyna Michałowska), *Poland in the fight against international terrorism* (Marek Madej) and Poland's policy concerning particular areas: Asia and the Pacific (Jan Rowiński and Paweł Milewski), Near and Middle East (Stanisław Pawlak), African states (Wiesław Lizak) and Latin American states (Marcin F. Gawrycki). This chapter gives rise to two major conclusions:

1. Poland, focused on entering Western structures, and after 2005 on the relations with its closest neighbours, has so far failed to develop any adequate strategy of conduct in relation to non-European states, and even in relations with the USA it was more guided by emotions than by actual interests of both parties;

2. Post-2005 relations with Poland's neighbours, especially with those in the East, starting with Russia, were dominated by a certain messianism, which led the editor of the volume, S. Bieleń, to the bitter conclusion: '*...a bizarre sense of messianism (a new version of Prometheanism) in Eastern Europe, polonocentrism and national megalomania colliding with the realistic policies of the US, EU and NATO towards Russia have led to enormous disappointment and to the concoction of doomsday scenarios. The traditional dichotomy between the "Piast and Jagiellon-*

ian ideas” still persists, which means a return to old geopolitical patterns, as if in the meantime nothing has happened’.

As it always is with this type of publications, it can be argued whether the emphasis was properly placed, whether the particular issues were examined in the right order, whether the analysis covers all fields. With such an approach, it is easy to say: ‘no’ and dismiss the work for whatever reasons. However, it is worth looking at this unique – what should be once more underlined – publishing undertaking from a slightly different point of view. It is the most extensive and the most reliable study, in scientific terms, of Polish foreign policy in the period after joining the NATO and the EU, that is after fulfilling its fundamental postulates after regaining independence. Poland’s foreign policy after 2005 has struggled with severe internal disputes (between parties). This, of course, is reflected in the presented publication. Therefore, we can predict that some readers will consider its contents less and others more, even though these are almost solely solid academic papers.

The publication discussed, which should be pointed out as well, is well documented, but is still not free of certain shortcomings. The Introduction lacks a diligent presentation of the comprehensive subject matter of the volume and an arrangement of the key aims, directions and challenges to the Polish foreign policy in the early years of the second decade of the 21st century. It requires some effort to find this information in the publication. It is also regretful that profiles of the numerous authors of the various papers, most of whom have many notable achievements in the field of study in question, were not presented in the publication – not even by means of brief biographical notes. The Bibliography, the final part of the publication, is also not very functional and the readers are forced to look for the relevant information either in the extensive bibliographical footnotes or simply in the Internet.

There can be only one conclusion, though: the discussed publication is the most comprehensive study of Polish foreign policy after 1989, the biggest joint undertaking of this kind in Poland. The publication seems to be even more valuable as the authors try to present the most recent challenges to Polish diplomacy, resulting from the dynamism of the situation in the international arena, the relative change of our geopolitical location (due to the involvement in Western structures), or the consequences of the new scientific and technological revolution, called the information revolution, which is changing the nature of diplomacy (there is more and more technology involved) and requires even quicker reactions and mobility of those who engage in it. The discussed publication describes these new challenges quite well and, consequently, constitutes an important point of reference for those who are professionally (both academically and by occupation) involved in foreign policy issues.

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Tomasz Kapuśniak, *Polityka czarnomorska Grecji, Prace Instytutu Europy Środkowo-Wschodniej (Greece's Black Sea Policy, Papers of the Central-Eastern Europe Institute), Vol. 10, The Central-Eastern Europe Institute, Lublin 2010, 45 p., ISBN 978-83-60695-42-5*

For several generations of Poles instilled with the classical ideal, Greece will remain the Hellenistic Greece, cherished by Lord Byron, Greece full of sunlight, with footprints of Plato and his students still fresh in the olive groves surrounding Athens. As since 2009 Greece has been in the centre of the media coverage on Europe with the sovereign debt crisis in Greece eventually becoming, at least in the popular press, synonymous with the crisis of the Eurozone, significant shift in the Poles' perception of Greece has taken place. The overly dramatic reports on (frequently sponsored) riots in the centre of Athens and strikes in Piraeus, coupled with the lure of Greece's blue sky, its islands and hot weather, contributed to the emergence of a confusing image of Greece unfit to serve as an explanatory framework necessary for the understanding of the roots and the nature of the sovereign debt crisis in Greece. In this sense, the Polish romantic vision of Greece needs an urgent contemporary update.

Polityka czarnomorska Grecji (Greece's Black Sea Policy), by Tomasz Kapuśniak, Ph.D., research fellow at the Central-Eastern Europe Institute in Lublin, offers a comprehensive answer to the above plea. By highlighting its broader historical and geopolitical context, the Author discusses the specificity of Greece's foreign policy strategy toward the Black Sea region. By directing the focus of the discussion on the post-cold war developments in the region, the Author reveals the magnitude of challenges that the region is subjected to as regards politics, economy, and security issues; all of them having a direct influence on the strategic potential of the Black Sea region. With an obvious skill, the Author navigates through the nuances of the Greek strategy toward the Black Sea region. By so doing, Kapuśniak identifies the elements of a complex puzzle that while limiting the space of the politically possible for Greece in the region creates at the same time a number of new opportunities for Greece's policy choices and strategies. In this context, it is argued that following Bulgaria's and Romania's accession into the European Union (EU), Greece's strengthened cooperation with these countries might actually contribute to Greece becoming a kind of political and economic stabilizer in the Black Sea area. The paradox here is that Greece does not border the Black Sea; and yet the region represents one of the most important areas of Greece's strategic interest, and Greece remains one of the most important players in the Region.

Athens' interest in the Black Sea region is driven by a number of historical, economic and political factors. It is pointed out that the Black Sea region was colonized by the Greeks in the Antiquity. By way of explanation, it should be noted, that although massive displacements of population were conducted in the region, the memory of the Pontic Greeks (i.e. the Greeks of the Black Sea) is still alive in the region, whereby their unique folklore and dialect are nourished by their descen-

dants living in Greece. As Tomasz Kapuśniak writes, large parts of the population in Ukraine, Russia and Georgia admit to having Greek roots. Again, it should be stressed that the (frequently artificially) revived sense of affiliation with Greece allows many of them to travel to Greece not only to work but also to study there. In those cases, a documented Greek origin helps them to obtain Greek (read EU) citizenship. As far as economic and political reasons for Athens' interest in the Black Sea region are concerned, these are related to the region's location at the junction of Central Asia, the Caucasus, Central and Eastern Europe, the Balkans and the Middle East. This in turn raises incentives for deepened regional cooperation as well as for third actors' involvement in the area. Clearly, the Black Sea region is consequential for Europe's energy security (think of the petroleum and natural gas transportation routes). Equally important is the realization that the Black Sea region constitutes a 'corridor' on the way from Asia to Europe. In this sense, the region has become fundamental for the EU member-states when dealing with 'soft security' threats.

The volume 'Greece's Black Sea Policy' consists of three parts. In the first chapter the historical rationale behind Greece's continued involvement in the region is discussed. The Author guides the reader through landmark developments in Greece's modern history such as the War of Independence of 1821, the interwar period, Greece's membership in NATO (1952), Greece's accession to the European Communities (1981), and the challenges posed to Greece following the collapse of the communist regimes in Central and Eastern Europe. Succinct analysis of these developments allows the Author to introduce the reader into the past and present meanders of Greece's foreign policy approach toward the Black Sea region. Kapuśniak, explores the main vectors of Greece's foreign policy defined by the Cyprus issue and its bearing on the Athens-Ankara relationship, and the stability in the Balkans. From this perspective, Greece's policy objectives toward the Black Sea region are examined. The Author argues that as far the northern part of the Black Sea region is concerned, the approach that the government in Athens promotes converges with the broader policy orientation of the EU and its member-states toward the region. This entails the promotion of bilateral and multilateral modes of cooperation, frequently coupled with support for specific countries' EU membership aspirations. This line of argumentation is compromised in the monograph with the observation that, given their undeniable position of influence in the Black Sea region, Turkey and Russia play *de facto* the role of 'filters' that indirectly shape the scope of Greece's engagement with the region.

The following chapter of the volume examines Greece's Black Sea policy as seen through the lens of Greece's membership in the EU. In particular, the discussion focuses on Greece's relations with Turkey, Russia, Armenia, Azerbaijan, Georgia, Ukraine, Moldova and, finally, with Romania and Bulgaria. The discussion that abounds with historical details, reviews of diplomatic visits, treaties and agreements negotiated, offers the reader the opportunity to acquire an unbiased view and understanding of the foreign policy (strategy) of Greece and of the logic that underpins it. It could not escape the attention of the reviewer that the Author provides

the reader with a bear testimony to the events, devoid of cheap rhetorical figures aimed at manipulation and/or over-interpretation of events. In this context the discussion devoted to EU-ization of Greece's foreign policy choices and strategies deserves particular attention. The Author does not engage with theoretical ramifications of this issue. Nonetheless, the thorough analysis of the evolution of Greece's relations with the above mentioned countries reveals the gradual convergence of Greece's policy goals and priorities with those agreed on at the EU-level. By focusing on the EU, the Author of the monograph does not undermine other factors influencing Greece's policy choices in the region. Here the role of Russia is emphasized and the economic and political cooperation between these two countries is outlined. From the insider's perspective, the reviewer would like to add that Greece and Russia share a 'quasi-sisterly sentiment' founded on the common ground of religion and the Orthodox Church. In this context, Kapuśniak's thesis on the role of Russia as the 'filter' of Greece's Black Sea policy acquires a distinctive meaning.

The final part of the volume constitutes in fact a political commentary, close to the 'policy advice' genre. While the often divergent interests of Turkey and Russia in the region are mentioned, the challenges to effective realisation of Greece's foreign policy in the Black Sea region are discussed. The argument reveals as well how deep-reaching the geopolitical implications of Romania's and Bulgaria's accession to the EU have been. The Author stresses that the 2007 enlargement endowed the EU with a new role i.e. that of an actor in the Black Sea region implicated in problems and conflicts of Southern Caucasus, Central Asia and the Middle East. As a result, the EU Black Sea policy requires re-definition, whereby Greece's policy toward the region acquires a new dimension. Kapuśniak aptly notes that '*security and stability in the Black Sea region to a large extent depend on establishing closer cooperation as well as on the ability of the countries of the region to integrate with (...) NATO, EU, and OSCE.*' Simultaneously, the Author stresses that '*the closer the relations between the countries of the Black Sea region and the EU, the greater the chance for successful implementation of democratic reforms, stabilization and conflict resolution in the region.*' Due to Greece's geographical location as well as due to the specific quality of bilateral relations with a number of countries in the region, Greece – an 'old' EU member-state – and its Black Sea policy have gained in importance for the regional balance of power. It remains an open question whether the current establishment in Athens, entangled in the so far fruitless attempts at taming the crisis, will manage to use this opportunity...

Doubtless, the monograph 'Greece's Black Sea Policy' enriches our perception of Greece, without any harm to the romantic ideal of Hellenistic Greece so dear to Poles. The Author offers a solid analysis of historical and geopolitical determinants of Greece's Black Sea policy that will be of interest to professionals and academics dealing with these issues as well as to laymen. Step by step, the reader is introduced into the logic behind the processes and developments that have been shaping the evolution of the Black Sea region. In this context, the role of Greece in the region is portrayed. Although the Author avoids dealing with the contentious issues in

Greece's modern history, whenever the argument so requires, Kapuśniak reveals his diplomatic skill. Accordingly, the question of competing/contested interpretations of certain events is seconded to the reader; the Author retains his neutral status. With an emphasis on the detail, the Author navigates through the meanders of history and politics and highlights that a number of still unexplored dynamics shape the Black Sea region. Given the fact that several countries are involved in the area, a number of competing interests, claims and visions of the Black Sea region and its role will need to be reconciled in the future. Greece could play a quintessential role in this regard. The volume that has been reviewed here seems to invite for a discussion on this issue.

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**Aleks Szczerbiak, *Poland within the European Union.*
New awkward partner or new heart of Europe?
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The year 2012 will mark the eight anniversary of the Polish accession to the European Union. What kind of an EU member has Poland become? What do we remember most from this period? Do we recall some great moments and a carnival atmosphere of May 2004, or we rather tend to be depressed by the post-2009 economic crisis? Do we take the 2011 Polish EU presidency as a good model of conciliatory, effective politics, or we rather have fond memories of an assertive, maybe even combative approach of the Law and Justice government, and President Lech Kaczyński? Do we feel that Poland is an important EU Member State or a second-class member? Finally, do we still regard Poland and other post-2004 accession countries as new EU Member States? The book by Aleks Szczerbiak, a British professor of Polish descent, offers a careful, rigorous and comprehensive review of the first five years of Polish EU membership starting from the pre-accession period and finishing on the year 2009. The subtitle of this book seems to echo well-known metaphors that have been applied to describe the British attitude towards the EU (although Szczerbiak paraphrased 'new heart of Europe' from a popular monograph of the Polish history by Norman Davies). Always hesitating whether to join what was referred in the UK in 1970s as the common market, Britain was depicted in the 1980s as an awkward partner, primarily thanks to the uncompromising and combative attitude of UK Prime Minister Margaret Thatcher. When John Major became Prime Minister in 1992, he said that he wanted to bring Britain back to the heart of Europe, thus giving a hope that this awkward partnership will break up. However, while different in tone, Major did not change much of the way how Britain was perceived by its continental partners. Finally, when most people expected that a long-awaited breakthrough would come through with the pro-European New Labour and

Tony Blair as the Prime Minister, these initial expectations were tempered by reality, and by many decisions that Blair took distancing the UK from the mainstream of European integration.

On the verge of EU accession, many people expected that Poland might become another problematic EU Member State. Referring to a tough negotiating style of then Polish Prime Minister Leszek Miller, including his key role in blocking the agreement of the draft Constitutional Treaty in December 2003, Heather Grabbe described Poland as a new awkward partner. The election of an anti-federalist and distrusted Law and Justice party to the government (2005–2007), and then a coalition formation with eurosceptic parties (Self-Defence and particularly the League of Polish Families), reinforced this notion of Poland as a partner unable to make constructive proposals. However, the awkwardness emerges not only out of strategic decision around the negotiating table or due to the composition of a governing coalition. As Szczerbiak argues, any country which like Poland is relatively big in size but economically weak has a natural tendency toward creating problems for other EU members. These difficulties are caused by large political aspirations derived from the country's size, on the one hand, and its inability to back these aspirations with sound economic arguments, on the other. But in principle, the notion of awkwardness or marginality v. centrality and inclusiveness relates to how a Member State portrays itself and how it is portrayed by others. Within the period of 2004–2009, Poland experimented with creating its own image, depending on the government in office, with left-wing Democratic Left Alliance and centre-right Civic Platform trying to bring it to the new heart of Europe, and with Law and Justice being accused of making of Poland a new awkward partner. However, despite an apparent discontinuity related to these two visions, Szczerbiak argues that the overall aims of the Polish foreign policy, and in particular the vision of Poland within the EU, has not differed between the main political forces. They all strongly believe in a number of common principles rooted in the Polish tradition and history such as 'nothing against us, without us' (thus any kind of two-speed Europe is excluded by all political parties) or the principle of solidarity. Derived from the legacy of the Polish movement for independence of the 1980s, and now defined as the European solidarity, this concept is understood both at political and social levels, as the need to speak with one voice toward the non-EU countries, but also that the rich Member States help the poorer ones. What makes Polish parties different is the strategy to reach these objectives. Since Civic Platform took power in 2007, we have been witnessing an example of a strategy that aims to bring Poland to the heart of Europe. After the 2011 Polish EU presidency (an area not covered by Szczerbiak's book), of which one of the highlights was a very federalist speech of the Polish foreign minister Radosław Sikorski, one could even argue that not only has Poland tried to bring itself to the new heart of Europe, but that Poland is now pumping fresh blood to the veins of an organ in great need of a surgery.

Without any doubt, Aleks Szczerbiak is very competent to tackle the problem of the Polish-EU relationship. By offering this book, he thus continues his interest into comparative Euroscepticism (this time focusing on the Polish case) and Polish

politics *sensu largo* (with his PhD being devoted to the party organization in Poland). This baggage of experience allows him to build a balanced narrative, focusing both on the Polish vision of what kind of EU member it wants to be as well as on the perceptions of Poland in the eyes of the other Members States. The book is divided into five chapters: Returning to Europe; A new European player?; Looking eastwards; Eurosceptics, Europhiles or Europhobes?; (Not) a realigning issue?. The author states two principal goals for this work. On an empirical note, in various perspectives which are neatly captured by the titles of book's chapters, Szczerbiak offers a detailed case study, carefully explaining the context and intricacies of Polish politics, society and economy in relation to the EU membership. In this exercise, he is guided by the questions of Poland's impact upon the EU, and the impact of EU membership on public attitudes, with a particular emphasis on party and electoral politics. He covers a wide range of issues, from the grand question of Polish effectiveness in the intergovernmental arena, through the impact of Polish MEPs, finishing on the role of European integration as an issue in party and electoral politics in Poland. From a theoretical point of view, based on the case of Poland, he intends to theorize about the reasons for state's success and its effectiveness in the EU. However, unlike what we could typically expect from an academic book, from the outset these theoretical aspirations are moved to the concluding chapter. Such an approach makes the book much more accessible to the non-academic audiences, but the question arises what kind of value the theorizing based on a single-case study might have (I will return to this issue later).

Chapter 1 begins with an accessible survey of the broad political and economic context in which Poland's membership of the EU occurred. In drawing a political picture, it moves back to late 1990s to show that at certain point there was a possibility that due to a tough negotiating stance of then Polish governments, Poland would not join the EU with the first group of countries. In terms of economic benefits, thanks to number of factors that were persistent after 2004, including an increase in the level of direct investment in Poland and an opening of labour market in a few EU countries, the level of unemployment in Poland fell from 19.6 per cent in 2004 to only 9.8 in 2008, osculating around 10 per cent nowadays. This development led to such paradoxes as labour shortages, when in some areas of economy (such as transport or construction) there were not enough workers that could be employed by the Polish companies. One of the reasons why Polish farmers changed their previous negative attitude towards the EU was that between 2004 and 2008 they received 10.4 billion Euros in direct payments alone, and by 2008 EU agricultural subsidies made up 42 per cent of farming income. At the same time, given its administrative and infrastructural incapacity, Poland could only benefit from a part of EU funds appropriated to it. For example, by January 2009, the absorption level for the cohesion fund was 51 per cent. This first chapter offers many other details that are surely necessary to understand the context of the Polish politics and its relations with the EU.

Chapter 2 convincingly portrays the dilemmas of Poland's own vision of the EU: between the conviction for a deeper liberalization and deregulation (in line

with the British approach), and the need to maintain an ineffective Common Agricultural Policy (in line with the French); between a broad sympathy for the 'Europe of nations' approach and more federalist solutions; between strong Atlanticism and a belief to strengthen the EU Common Foreign and Security Policy, and many others. This chapter shows the history of building alliances with other Member States, which due to Poland's status as a new, large and economically weak state did not fit easily into the pre-existing coalition patterns in the EU. However, it seems that this part of the book would benefit from using some additional sources to the press reports (such as interview with diplomats). This chapter also provides an account of how Poland was learning to influence EU affairs. For example, when Polish MEPs wanted to block the construction of the Baltic gas pipeline, which connects Russia and Germany directly and thus bypassing Poland, instead of pointing to the purely national interests they focused on the European interest, in particular, on the environmental risk that this construction posed.

Chapter 3 investigates the attempts of Poland to set the agenda of EU's Eastern policy. From the very beginning, Poland has tried to present itself as an expert on Eastern countries, and as the main agenda setter, for example by proposing (together with Sweden) the concept of Eastern Partnership. Szczerbiak illustrates the great efforts and finally a success of the Polish politicians in bringing a happy ending to the Orange revolution in the Ukraine, but at the same time shows that what Poland really wanted, that is to create a perspective for Ukrainian EU membership, clashed with a period of enlargement fatigue and an unsteady atmosphere after the French and Dutch referendums of 2005, and hence had little success. On the other hand, Poland did not manage to 'Europeanize' EU's relations with Russia, both because it was not trusted by other Member States as an expert on this issue (and most likely the entire Polish nation being perceived what Szczerbiak refers to as 'knee-jerk Russophobes'), but also due to the poor preparation and presentations of many initiatives. In sum, Szczerbiak argues Poland has had only a limited success in shaping the EU Eastern policy agenda, primarily because it could not convince the largest Member States to its proposals.

Chapter 4 is devoted to the analysis of the Polish public attitudes towards the EU. The most interesting question that Szczerbiak deals with is one of the reasons why the Polish people supported Eurosceptic parties to such an extent, while the opinion polls have constantly proved that Polish people are enthusiastic Europeans. In other words, he is interested to cover the question whether relatively high party-based Euroscepticism was reflected in public attitudes. Szczerbiak argues that the reason why Poles have remained so enthusiastic about the EU is that they have never actually expected anything of a miracle from the EU membership, quite the contrary, they have known that the job needs to be primarily done in Poland, and so in this sense they were very realistic, Szczerbiak argues. There was no reason to get disillusioned when the benefits of EU membership did not materialize quickly. One of the most interesting aspects of the public attitudes toward the EU is that while almost a half of the respondents positively assess the benefits of EU membership for the country as a whole (48 per cent had this opinion in 2006), only 15

per cent believe that it had improved their own lives, and 54 per cent said that they had neither gained nor lost. However, while this seems to be a very logical explanation of the general attitude of the Polish people, it does not explain why some political parties have remained so eurosceptic. The key question that should have been discussed in much more detail is whether political parties react to the changes in the opinion polls on EU integration (this was clearly observable in the case of the Polish Peasant's Party, but what about other parties?); or, if these public attitudes remain steady, what political parties want to achieve by politicizing EU affairs. This kind of analysis would offer much to the general literature on party ideologies and their responsiveness to general public attitudes.

Furthermore, the analysis in the book is limited by the data from the opinion polls which the author intensively uses. It seems that Aleks Szczerbiak could have focused more on the quality of opinion polls on EU integration in Poland, thus contributing to the larger literature on this topic. While in some cases he points out that in many instances the respondents may be totally unaware of the questions they are being asked (for example when they strongly support the EU constitutional treaty of which they know very little), then in other cases he leaves this problem without comment. For example, an interesting phenomenon that Poles trust more European institutions than their own political institutions. However, did these opinion polls control whether the respondents even know what these European institutions have ever done for them? Another example: Szczerbiak shows some data illustrating the variance in the opinions polls on the level of corruption in Poland and on the respect for the rule of law just before and after the accession. The typical question that these opinion polls asked is phrased like 'how do you assess the level of corruption in Poland after one, two or more years after joining the EU?' But surely the level of corruption is not only related to the impact of the EU, but more to the situation in domestic arena. So it seems that a solution for the future research should be to commission a separate opinion poll, and control for a number of deficiencies of the traditional polling.

The best part of the book is chapter 5, devoted to the question of the role of European integration as an issue in Polish party and electoral politics. This chapter builds most strongly on the previous publications of the author and offers many original insights. Szczerbiak convincingly argues that instead of acting as a realigning issue, European integration was successfully assimilated into the logic of Polish domestic party politics, and there should be not so much of a surprise here. Contrary to commonplace assumptions that the impact of the EU should lead to realignments at the domestic party level, Szczerbiak asserts that perhaps a better idea is to start from the typically domestic explanations, and only if they are insufficient, turn to the impact of the EU. However, perhaps due to the limits of the data he used, the author did not link the general attitudes among the Polish public across the supporters of various political parties, which would greatly enhance his analysis of the impact of the EU on Polish party politics. This is the reason why he uses conditional tense in many cases, when he speculates, for example, that 'Poles may have voted for parties that advocated a 'tough' approach to defending Polish national interests

within the Union, while remaining themselves enthusiastic supporters of European integration and Poland's membership of the EU' (p. 132). But in this case why has a much more consensual Civic Platform been in office since 2007? Needless to say, one would need to be in possession of some hard data in order to answer the question regarding the extent to which the vote for the parties labelled as eurosceptic was due to their perceived euroscepticism or whether it was brought about by other factors.

Finally, returning to the theoretical aspirations of the book, Szczerbiak acknowledges the limitations of a single case study for drawing theoretical conclusions. He suggests that bettered suited to this aim are cross-country analyses. For this reason, the initial research questions that the author asked in the introduction, such as concerning the reasons why some countries are more effective at pursuing their interests within the Union, were left mostly untouched. Nevertheless, there are still a number of interesting lessons from the Polish case that can be partially generalizable, such as that there is no strong link between domestic political consensus on objective of a country's EU policy and this country's ability to influence EU agenda. Furthermore, the Polish case shows that there are obvious limits to what an economically weak Member State can achieve, particularly if more powerful (richer) partners are unreceptive to its agenda.

Overall, Aleks Szczerbiak's book is a very good account of the Polish first experiences with the European Union. His way of writing is so clear and meticulous that the book could become a primer into Polish politics for anybody who feels that he or she needs to know more about the largest of the post-2004 enlargement countries. But certainly it also brings a great value to those who already know the topic, and in particular, to academic audiences for both scientific and ...sentimental reasons. As a Pole I enjoyed reminding myself of the pre-accession time which seems as if it was decades, rather than ages ago, and realizing how enormous progress Poland has made within this short period of the first few years of EU membership.

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ACTIVITIES
OF THE
CENTRE FOR EUROPE
UNIVERSITY OF WARSAW



Twentieth (Porcelain) Anniversary of the Centre for Europe¹

The year 2011 marked the 20th anniversary of the foundation of the Centre for Europe, University of Warsaw. Besides celebrations with champagne and enjoying fond recollections of the Centre's beginnings, above all we had the opportunity to participate in a series of stimulating lectures, conferences, and other academic events organised to accompany the celebration of the 20th anniversary of our activities.²

The Centre for Europe was founded in 1991 by the professors of three faculties of the University of Warsaw: History, Law, and Administration and Economic Sciences. The Centre is one of the oldest interdisciplinary university faculties in Poland. Apart from conducting research on the political, social, legal and economic aspects of European integration, the Centre works actively to popularise its results.

1. January, 2011: A meeting with Herman Van Rompuy, President of the European Council

The celebration of the Centre's 20th anniversary began in January 2011 with a true highlight – an extraordinary event which constituted a perfect

¹ Translated by M. Wolsan.

² When writing the article I used information from the internet website of the CE UW and the following texts: M. Nassalska, *Sprawozdanie z działalności Centrum Europejskiego w roku 2011 (Activity Report of the Centre for Europe 2011)*, K. Kosiński, P. Warski, *Centrum Europejskie UW: Unia Europejska–Afryka. Wyzwania dla polskiej prezydencji (The Centre for Europe, UW: EU-Africa. Challenges for the Polish Presidency)*, “Debata” No 6/2011; K. Kalinowska, *Prezydencja Polski w Radzie UE a relacje wschodnie Unii (Poland's Presidency in the EU Council and the Eastern relations of the EU)*, available at: <http://www.psz.pl/tekst-36697/Kinga-Kalinowska-Prezydencja-Polski-w-Radzie-UE-a-relacje-wschodnie-Unii?mosmsg=Dzi%25Eaku-jemy%2Bza%2BTw%25F3j%2Bg%25B3os> (last visited 09.12.2011)

beginning of our anniversary celebration and set the unique tone of the entire jubilee year – namely a meeting with Herman Van Rompuy, President of the European Council, who gave a lecture on ‘The challenges facing the European Union in 2011’.³

Our distinguished guest was greeted on behalf of the University authorities by the Vice-Rector for Research and International Relations, Prof. Włodzimierz Lengauer. Following an official welcome, Prof. Dariusz Milczarek, Director of the Centre for Europe, took the floor to express his pride and joy that the 20th anniversary year of the Centre was kicked off with a lecture from such an outstanding guest. Among the numerous other honoured guests present at the lecture was Tadeusz Mazowiecki, Prime Minister of the first non-communist government of Poland, as well as representatives of the Ministry of Foreign Affairs, the diplomatic corps, and of various European institutions. The lecture ended with a lively discussion in which the entire audience, including many students, got involved. After the lecture President Van Rompuy met with the authorities of the University of Warsaw.

2. February 2011

The next events in the planned anniversary celebration took place in February. The first was a lecture entitled ‘The Polish Presidency of the EU – the EU’s Eastern policy’ delivered by Jan Borkowski (Ph.D), a research fellow at the Centre and the Secretary of State in the Ministry of Foreign Affairs.

The starting point of this lecture was an outline of the historical and factual context of the system of the EU Council Presidency, taking into account the changes introduced by the Treaty of Lisbon. Dr Borkowski then presented the specificity of the office of the Presidency, including the legal basis, the social, political and economic conditions, as well as the challenges facing the national administration and the government as it prepares to take on this important function. The main part of the lecture was devoted to the priorities of the Polish presidency, in particular focusing on the EU’s Eastern policy and the strengthening of the Eastern Partnership.

The second lecture held in February as part of the anniversary celebration was entitled ‘Turkish Foreign Policy’, delivered by Prof. Çağrı Erhan from Ankara University (Department of International Relations; EU Research Centre). This lecture was especially interesting inasmuch as it was delivered from the perspective a non-EU member state looking at the external policy of the EU.

³ See: ‘Policy Documents’ section of the present volume.

3. March 2011

In March, the Centre for Europe continued the celebration with further lectures and seminars. One noteworthy lecture was delivered by Ms Joanna Skoczek, Director of the Department of Coordination of Poland's Presidency of the EU Council (DKP) in the Ministry of Foreign Affairs. She spoke on the topic of 'Poland's Preparations for taking on the Presidency of the Council of the European Union'. Director Skoczek presented the preparation process from the practical point of view of a person directly involved in the organisation and co-ordination of actions of the government administration, and interspersed her lecture with comments on and insights into all aspects of the process in light of the content and practical application of EU law.

The next issue examined with regard to the role and importance of the Polish Presidency was presented at the seminar 'EU–Africa. Challenges for the Polish Presidency', held on 29 March 2011.

This seminar was divided into two parts: (1) the political dimension of EU–Africa relations, and (2) the economic and social challenges in EU–Africa relations. Both parts put great emphasis on the multilateral and bilateral role of Poland in the EU's relations with Africa. During the first thematic block, speeches were given by Ambassador Jan Wieleński (Department of Africa and the Middle East, Ministry of Foreign Affairs), Prof. Arkadiusz Żukowski (Director of the Institute of Political Science, University of Warmia and Mazury), and Wiesław Lizak, Ph.D (Institute of International Relations, University of Warsaw). The second part of the seminar, devoted to economic issues, included speeches by Prof. Edward Halizak (Director of the Institute of International Relations, University of Warsaw), Prof. Jan Jakub Milewski (University of Social Sciences and Humanities in Warsaw; University of Warsaw) and Malgorzata Szupejko, Ph.D. (President of the Polish Association of African Studies; Institute of Mediterranean and Oriental Cultures of the Polish Academy of Sciences). In addition to the invited experts, the meeting was attended by many students, public officials, and a broad array of other people interested in deepening their knowledge about the relations between the European Union and Africa.

In addition, in March 2011 the Center was visited by Prof. Luciano Segreto of the Faculty of Political Science, University of Florence, who gave a lecture on the 'Models of Governance in European National Economic and Entrepreneurial Systems'.

4. April 2011

As part of the continuing celebration of the 20th anniversary of the Centre for Europe another seminar was organised on 18 April 2011 under an unusual

title, referring to the works of renowned crime fiction author Agatha Christie and to a recently published study analysing detective novels from an anthropologist's perspective: *Morderstwo odbędzie się....czyli antropolog z historykiem w Mieście Grzechu (The murder will take place... an anthropologist and a historian in Sin City)*. The guest of honour at the seminar was the Vice-Rector for Research and International Relations, Prof. Włodzimierz Lengauer.

This day-long symposium was devoted to crime literature and films as a comprehensive source of knowledge about the past and the present. Presentations were given by Prof. Tadeusz Cegielski (Department of History, UW), Mariusz Czubaj, Ph.D. (University of Social Sciences and Humanities in Warsaw), Prof. Grażyna Szelaągowska (Department of History, UW), and Mirella Kurkowska, Ph.D (CE UW), the scientific coordinator of the seminar. The lectures analysed the beginnings of crime literature and films against the background of the processes of formation of mass culture, the characteristic features of thriller films in Communist Poland, as well as an interpretation of crime novels as anthropological evidence, i.e. a 'great narrative on society'. Differences in both points of view and research approaches could be observed during the ensuing lively discussion, leading even to radically divergent assessments of and explanations for the same events and phenomena.

5. May 2011

May 2011 abounded in further jubilee events organised to celebrate the 20th anniversary of the Centre for Europe.

Already on 11 May, the Library of the University of Warsaw hosted an open lecture by Prof. Grzegorz W. Kołodko, entitled 'Globalisation, Crisis – What Next?'. Prof. Kołodko presented globalization as an irreversible positive historical process which, although continuous, may be subject to changes in dynamics or even 'meltdowns' of sorts. The effective use of globalization requires – according to the Professor – an adequate long-term *pro publico mondiale bono* strategy which will ensure that newly arising opportunities are taken advantage of and, at the same time, lower the latent risks involved in globalisation processes. Unfortunately, the national state policies of various countries, including Poland, is often dominated by short-term electoral strategies, which causes them to refrain from taking those socially unpopular actions which are necessary from the long-term economic point of view.

The audience attending Prof. Kołodko's lecture was composed of students, academics, and experts interested in the subject of globalisation. They awaited with particular interest the esteemed Professor's opinion concerning the current crisis, as well as his comments about the possible prospects for a globalised world.

Another event in the celebration was the seminar 'Frontex – Mission, Ob-

jectives, Career Opportunities' (12 May 2011). The seminar was attended by Mr Sakari Vuorensola, Director of the Legal Department of Frontex – the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union; Ms Magdalena Silska, an adviser in Frontex; and Wojciech Gagatek, Ph.D, of the Centre of Europe, UW. The aim of the seminar was to look at the role and activities of Frontex from multiple perspectives and to present the career opportunities available in this institution.

The seminar began with an analysis by Dr Gagatek of the achievements of the EU within the Schengen area in the context of the current migration issues in the EU. He pointed out that, at present, the conditions at the external borders of the EU significantly affect the situation at the Union's internal borders, leading some countries to undermine the principles of the Schengen co-operation. He also emphasised the emerging conflicts in this area between the main EU political institutions and discussed their potential consequences. In the next speech, Mr Vuorensola focused on the interpretation of the legal provisions regulating the activities of Frontex. He presented, in the following order, the objectives incorporated in the Treaty, a review of the detailed provisions of the regulation establishing the Agency, and the specific tasks undertaken by Frontex. The meeting ended with a discussion with the students of the Centre for Europe, including many foreign students, who were interested in the budget of Frontex, the functioning of the Schengen area, and the status of current discussions on the restoration of internal border controls within the Union.

Finally, it is worth noting that in the same month an international conference was held entitled 'The Role of Turkey in International Relations – Implications for the Polish Presidency in the EU'. This conference was essentially a continuation of the analysis and discussion of the Polish Presidency within the context of the studies conducted in the Centre for Europe, University of Warsaw.

6. November 2011

Following a long summer break, and during the ongoing activities of the Polish Presidency, two international academic conferences were held in November 2011. The first, entitled 'Voter Empowerment: VAA in the May 2011 Elections in the UK', summarised the first year of the project *VAA for Poles and Lithuanians Eligible to vote in UK local elections*. This project, financed by the European Commission and the Polish Ministry of Education, is dedicated to the study of the political activity of Poles and Lithuanians in the UK.⁴

⁴ See further: A. Dziewulska and K. Wojdelko, *Mycandidate.eu – a VAA in 5th May 2011 Elections in the UK*, in the 'Activities' section of the present volume.

The second conference, entitled 'Studies on European integration – challenges for Polish–Ukrainian academic cooperation', was organised under the auspices of the project *A Signpost to the West. Ukrainian Youth at the Gates of Europe*.⁵ The aim of the conference was a thorough presentation of the complex processes of integration, in particular of the Polish experience in adaptation and the parallel challenges for Ukraine. An important element of the event was outlining the structure of the evolution of European studies in Poland and Ukraine.

7. December 2011

The 20th anniversary celebration year was concluded by an international scientific conference organised jointly by the Centre for Europe and the Institute of International Relations, Centre for Contemporary India Research and Studies, entitled 'India in International Relations: Regional and Global Dimensions', and a seminar on the 'Challenges for the new European Union budget' under the auspices of the European Court of Auditors in Luxembourg and the Polish Presidency of the EU Council.

The jubilee year has come to an end, and the debates, discussions, and opinions of the speakers have now become an integral part of the expanding, rich history of The Centre for Europe. It was a year highlighted by new experiences, with students benefiting from the fascinating and thought-provoking lectures delivered by the invited guests, and a year in which the employees of the Centre established and continued their academic co-operation as part of projects, seminars and conferences. The topics discussed during this cycle of anniversary events were related directly to current European issues, most prominently: the Polish Presidency of the Council in the second half of 2011; the democratic deficit in the EU; the Schengen area; as well as Europe's current approaches to global challenges, such as the EU's external policy, relations with Turkey, Africa, and India, and the economic crisis; or general social phenomena like migration and the role of anthropology and culture in contemporary European societies. Taken as a whole, the subjects of the jubilee academic events described above accurately reflect the unique interdisciplinary nature of the research and studies which have been conducted by the Centre for Europe for the past twenty years.

We would like to thank all the invited guests for their significant contributions to the development of the Centre. We hope to see you at our next anniversary!

Patrycja Dąbrowska-Kłosińska
Centre for Europe

⁵ See further: M. Drouet and K. Zajaczkowski, 'A Signpost to the West. Ukrainian Youth at the Gates of Europe' – Report on the Realisation of the International Research Project, in the 'Activities' section of the present volume.

How It All Begun – the 20th Anniversary of the Centre for Europe¹

2011 is a special year for the Centre for Europe, University of Warsaw. Twenty years ago, professors from the Faculties of: History, Law and Administration, and Economic Sciences at the University of Warsaw initiated the establishment of an academic unit focusing on European issues. Marzena Skubij interviews **Professor Hanna Machińska**, who was involved in the activities of the CE UW from the very beginning.

Marzena Skubij: **Prof. Machińska, you were one of the initiators of the establishment of the Centre for Europe, University of Warsaw. Could you tell us about the beginnings of the Centre?**

Prof. Hanna Machińska: Indeed, I was involved in the establishment of the Centre for Europe. In 1990, our activities concerning, on the one hand, the organisation of work of the Information Office of the Council of Europe, and on the other hand, the establishment of a unit which would focus on the European Communities, coincided. It is also in 1990 that the idea came up to establish the Centre for Europe. I remember that we were even discussing the future name and its English equivalent with representatives of the European Commission. The discussions were long and we were advised to have the Centre named ‘for’ Europe. In the end this name was adopted in English (the Polish name, Centrum Europejskie, literally reads ‘European Centre’). We decided that the Centre for Europe will focus on issues connected with the European Communities and Council of Europe. Another very important moment in the process of establishing the CE was the discussion with the Council of Europe

¹ Translated by M. Wolsan.

on transferring the existing small office of the Council of Europe into the university structures. The patron of this venture was Prof. Andrzej Wiczorkiewicz, professor of the Faculty of Economy and Member of the Parliament. It is he who presented the Centre for Europe (which at that time was called the EEC Research and Study Centre) to the Council of Europe, as a newly created institution which could also be an umbrella for the Information Office of the Council of Europe. Indeed, before Poland joined the Council of Europe (in November 1991), in October, the Information and Documentation Centre of the Council of Europe was established. Since 1991, this Centre was also the main library of the Council of Europe in Poland and, at the same time, a pilot project. The Council of Europe considered creating a network of this type of offices throughout Europe. And indeed, since 1993, similar institutions were established in Eastern and Central Europe at parliaments, universities and national libraries, thus creating a network of almost 20 offices. We operated in the structure of the Centre for Europe until 2002. The second information and documentation centre in the structure of the CE was the European Documentation Centre (CDE). The CDE status was granted to the Centre for Europe, University of Warsaw, under a letter of intent of September 1991 signed by Prof. Andrzej Wiczorkiewicz (at that time the Director of the Centre for European Studies) and by a representative of the European Commission – Jacqueline Lastenous. I was the deputy director of the Centre for Europe and my task was not only to expand the activity of the Council of Europe, but also to deal with issues related to the European Communities. I was part of a team appointed in early 1992 – ‘Team Europe’. These teams were established all over Europe. The Polish team included, among others, the present head of the representation of the European Commission in Poland, Ewa Synowiec. The members of ‘Team Europe’ were trained at various meetings in Brussels. Their task was mainly to expand the activities for the Communities and the development of various structures in the future Member States. All in all, in the Centre for Europe we were trying to combine the activities of the Council of Europe and the European Communities.

What was the Information Office of the Council of Europe originally dealing with? Was it only information activities, or educational as well?

The issues which were taken on actually involved everything that the Council of Europe deals with, e.g. the situation of women or broadly understood social issues. We were conducting a competition – ‘Europa w szkole’ (‘Europe at school’) – in which the Centre for Europe was strongly involved. It was a pan-European competition, organised in cooperation with the Ministry of National Education. Another example of such activities were numerous

conferences, e.g. the conference ‘Consequences of Open Borders – Problems of Migration’, organised in cooperation with the Ministries of Foreign Affairs of Poland and the Federal Republic of Germany, with participation, to a certain extent, of the Council of Europe. Within the Centre, we were also conducting seminars for teachers and trainings for librarians on the information in the Council of Europe and the European Communities. Many discussions were devoted to historical issues, the roots of the Communities – in this context it is worth mentioning the memorable visit of Raymond Barre, who presented his visions of a united Europe and who met with the youth. This combination of activities within the Council of Europe and Centre for Europe allowed us to create a certain basis for the activities regarding European integration in Poland. We knew that our main task was education, not only of school children and teachers, but also judges, public prosecutors and barristers, whom we trained in the European Convention on Human Rights. For 20 years, intensive trainings for judges, with trips to Strasbourg, have been held by the Centre – this was extremely important. Apart from that, we were training employees of state administration. For many years, I was the director of the Polish–Dutch post-graduate studies under the mechanism of the Dutch government’s fund ‘Matra’. As the Centre for Europe, we received a grant and we were preparing the state administration for the future role of European officials. These were one-year post-graduate studies combined with a trip to Maastricht and to Brussels. The persons now employed on the highest-ranking positions or in the embassy with the EU are our graduates. We were also meeting them in the headquarters of the NATO, in a great deal of places. In 1992, the studies for barristers started. Then there were the studies for judges and prosecutors. We were operating within this structure until 2002. In 2002, the Information Office of the Council of Europe became the Information Bureau of the Council of Europe, an international unit, connected directly with the Council of Europe. In this office, we were still in contact with the Centre for Europe, e.g. we were still training judges and prosecutors.

Who else was involved in the establishment of the Centre for Europe and the Information Office of the Council of Europe?

Prof. Andrzej Wiczorkiewicz, the first Director of the Centre for Europe, Prof. Zofia Sokolewicz, the Director of the Centre and creator of the concept of functioning of this institution, Prof. Jan Jakub Michałek, Prof. Marta Grabowska, Prof. Anna Ogonowska, Ms Magdalena Zmysłowska and Prof. Anna M. Ostrowska, the present Deputy Director of the Centre. Prof. Eugeniusz Piontek was the Chairman of the Academic Council – this was the core of the Centre for Europe. The Academic Council included also representatives

of other faculties and universities, e.g. Professor Elżbieta Kawecka-Wyrzykowska of the Warsaw School of Economics. Later, the heads of the Centre were Prof. Tadeusz Skoczny, Prof. Alojzy Z. Nowak and Prof. Dariusz Milczarek, who has been the Deputy Director of the Centre for a long time. Prof. Krzysztof Wielecki, the Deputy Director of the Centre, also played an important role. We believed that the Centre for Europe was to promote the idea of European integration not only within the University, but also outside. For instance, the representatives of the Centre were invited to work on the preparation of Poland's negotiations on accession to the European Union. We were working intensively in this team, which was created by Minister Hübner, and later was chaired by Minister Jarosław Pietras. The team operated for a very long time and issued numerous expertises. The representatives of the Centre were also invited by the President Aleksander Kwaśniewski to a reflection group. In this group, I dealt with the issue of relations between the Council of Europe and the European Union. Prof. Marta Grabowska was in a different group, for elections to the European Parliament. Our activities extended beyond the academic mandate. It was a turning point in time, with our role being to strongly participate in the processes of Poland's accession to the European Union and I would say that, in this respect, the Centre for Europe actually proved itself. Apart from that, what is to be credited absolutely to the Centre for Europe, is the development and establishment of the field of study called 'European studies'. The source of inspiration for our work was the recommendation of the Committee of Ministers of the Council of Europe. We have transposed this recommendation into the Polish system. We have gathered professors from various universities, e.g. Prof. Zdzisław Mach of the Jagiellonian University. We have developed a single position of Polish universities, to which European studies owe their present high popularity in Poland.

The Centre for Europe was not an independent unit at first?

The Centre was a small extrafaculty unit. For many years, attempts were made to incorporate the Centre into various larger university units. Fortunately, this has not happened. Finally, the Centre for Europe has become an independent unit in its own right.

What were the beginnings of the educational activity?

We begun our educational activity with post-graduate European studies, for which there was great demand at that time. In 15 years of conducting the post-graduate studies, we have trained approx. 1000 persons interested in the European Union, including many employees of state administration. The pre-

viously mentioned Polish–Dutch fund ‘Matra’ allowed to prepare the state administration for the great challenges connected with Poland’s membership in the EU. After the post-graduate studies, in 1995 BA, studies in international relations with the specialisation in European integration (SMIE) started. They are conducted even today in co-operation with the Institute of International Relations, University of Warsaw. A BA and MA programme in European studies was started in the academic year 2004/2005 (under the decision of the Senate of the University of Warsaw of 17 December 2003). Currently, we train approx. 1000 students per year in two fields of study and we have the great satisfaction to see our students occupy top positions.

Thank you for the conversation.

Interview by Marzena Skubij



Mycandidate.eu – a VAA in 5th May 2011 Elections in the UK – Report on the Project¹

When a call for applications for an EU grant came, the online tool had already been in use for two or three years, allowing the team to gather experience. On one occasion, in 2009, the online tool was put into practice for the elections to the European Parliament which was an opportunity to cover no less than three countries (Latvia, Lithuania and Poland) with a single Voter Advice Application and one and the same questionnaire. All the past experience confirmed that the software had already been well tested and inspired the academic staff of the project to do more research on issues related to VAAs and voting patterns, since academic study had accompanied the implementation of the VAA for long. All the project needed in order to develop was the coordination between IT specialists and academics, and money. The first was easy to find in the Lithuanian Mypolitiq who had been dealing with Voter Advice Applications since 2008 with acknowledged success, winning prizes at fairs and Seedcamps several times.² The academic part of the project was covered by Centre for Europe, University of Warsaw and its British partner: Loughborough University. Academics of both of these universities share interest in patterns of voting by Poles and Lithuanians, as well as changes the EU 2004 enlargement brought (migration of labour force from the newcomers to the ‘old EU’ being one of them). An application was made for a grant of

¹ This article is based on ‘Why Mycandidate.eu?’ forthcoming in: *Voter Empowerment*, ed. A. Dziejulska and S. Guerra, Warsaw 2012.

² A Seedcamp is a competition of start-up projects which are judged and advised to by jurors.

the European Commission for developing a VAA in order to support Polish and Lithuanian communities living in the UK in elections they were entitled to take part in. These were local elections and those to national assemblies in Scotland, North Ireland and Wales.

The project team identified three target groups for the application:

- candidates in the 2011 UK elections (and later on in 2012 elections),
- UK-based Polish eligible voters and
- UK-based Lithuanian eligible voters.

A 'secondary' target groups were also a European academic world and decision-makers, to which the project findings would be presented. Findings, that were planned to be results of collecting data from additional statistical software attached to the VAA. The whole task was a large-scale enterprise as there were several thousand candidates to be contacted and since there was no central registration for them, it was hard to get precise data both on the number of candidates and – as the further report shows – it was equally difficult to find their e-mails and addresses for the purpose of presenting the project. There were also several thousands of Lithuanian citizens living in the UK with the right to vote (in the lack of precise data, an amount of 50K was assumed). Finally, there were also Poles, who are equally uncountable as the Lithuanians and for the same reasons: on the road to finding a job in the UK (the predominant motivation for Poles and Lithuanians to move to Britain) there is no obligatory point at which all of them would have to register – it is possible to find a job with no – for instance – work permit. Hence referring to the size of the Polish population in Great Britain we have to rely on estimations and these show between 400K and 1 mln Polish citizens eligible to vote in all the elections that were scheduled for 2011.

Working on these primary objectives, the project team divided the tasks and while the IT partners moved on to create the web site and adjusting the application, the academic staff prepared guidelines for the additional software that was to be tested. The novelty in this round of aiding voters was the attempt to test the VAA users in anticipation of learning more about Poles and Lithuanians in the UK. Since data on EU-citizens but non-UK-nationals living and working in Great Britain is in scarce supply, a successful research on them would make a valuable contribution. The same stands for VAA users – there is never too much knowledge on who uses VAAs, how and with what outcome, as the election turnout is going down all across the EU and online applications helping voters are thriving, trying to respond to the needs of voters.

The additional statistical software was supposed to profile a user (regarding their gender, age group, income, size of place they live in, religion, whether they feel at home in the UK and time they arrived in Great Britain)

and allow later on to link types of answers to questions related to candidates' and users' opinions with data from the statistical software. It was hoped that thanks to this, it would be possible to indicate groups of people who think similarly and further to examine the co-relation between points of view of users/voters and candidates. If this data was enough to draw conclusions, it would be – when juxtaposed with additional studies – a step towards assessing how voters make their choices regarding candidates. The effort of encouraging people to participate in the polls would gain more feedback possible to turn into practical means.

With the project kicking off in January 2011 and the elections scheduled for May the same year there was little time for planning and executing all that needed to be done: preparation of the IT (web site, application, statistical software), optimising the application for the elections after having done research on where and what type of elections are taking place, the questionnaire, implementing the questionnaire online, marketing campaign, information dissemination to candidates (which needed to be done from scratch – from the very first step of building a database of candidates and people who could give a hand with approaching candidates), getting support of political parties, targeting and approaching Polish and Lithuanian mass media and Internet fora, using professional networks of Poles and Lithuanians living and working in the UK. Out of all the above, the preparation of the questionnaire was the key element and hence one of the first things the team concentrated on.

Making the questionnaire

The questionnaire was a sensitive issue as it needed to be:

- long enough to cover all areas that matter for judging the effectiveness of local authorities and to provide a wide range of topics so that it makes the questionnaire representative and to allow users to differentiate between candidates, and
- short enough for the users to be able to go through it all and for the candidates to find time to fill in the entire form.

The second important thing after deciding about the length of the questionnaire were the areas it would cover which required from the project team to find out the priority issues of interest to potential voters and issues that local authorities and national assemblies would deal with. An additional difficulty was that the questionnaire had to be universal enough to be of use for both local elections and those to national assemblies in Scotland, Northern Ireland and Wales. The geographic spread was an extra complication as it was hard to

predict which topics would be irrelevant in some parts of the UK and which would fit everywhere.

In order to optimise the questionnaire in the best possible way, two studies were undertaken simultaneously: in the first one all the project experts brainstormed a list of potential topics of interest to local populations, with special focus on immigrants to the UK. In the second one, a small-scale Internet query was addressed to Poles living in the UK in order to sound out problems they face. These two – the project experts' list and the results of the online Poles' examination – put together gave a reservoir of subjects to raise in the questions for the VAA. In the end, a list of 22 questions was prepared by the project experts and later on implemented on the Internet in order to test them by a group of Poles living in the UK. In this latest study, respondents were asked to estimate the extent questions were relevant and the clarity they were formulated with. This proved very helpful as after even a short time of testing, it allowed to eliminate some questions and rephrase other ones so that finally a questionnaire of 18 questions (in areas of: security, social security, child care, labour market, transportation, leisure) was ready and passed on to the IT team. Given the very limited experience of the project team in dealing with local issues in the UK (the project was being implemented there for the first time), it would have been beneficial to have had more time for generating larger online feedback but since the experts had been running out of time, the small-scale Internet inquiry had to be enough. And it had been – it turned out later on that the candidates interviewed after the elections by the project team, evaluated the questionnaire positively as all-inclusive.

The additional part of the questionnaire – for the purpose of differentiating from the major part, called an 'interview form' – was also a challenge. There were several things that the project team wanted to find out through the 'interview form': verify the nationality of the users, their gender, place of living, income (this could contribute to the study of the economic situation of migrant population in the EU), religion (again, as part of a larger study on immigrant communities), the time the users arrived in the UK (this one was addressed mainly to those, who held citizenship other than British but it turned out that there were some users who were non-native British too; this information was intended to be used in a study of migration in relation to the 2004 EU enlargement), the users' feeling in the receiving country as compared to how they felt about the place they arrived from ('Do you feel at home in the UK?'), how the users felt about their social advancement in relation to their migration. All in all, the 'interview form' included 13 questions and the fact of its getting to be so large raised an anxiety that VAA users would omit this part of the test. Luckily, the concerns turned out premature and a large proportion of the users submitted the information.

Structure of the 2011 elections

Once the ‘interview form’ – a compromise between all that the project experts wanted to find out – had been delivered to the IT team, it was time to concentrate on the structure of the elections in the UK in 2011. It was important to know this well for a number of reasons: in order to start disseminating information about the VAA among Polish and Lithuanian communities in the UK, in order to start building a database of candidates and other people who could be intermediary in reaching the candidates, in order to start marketing the project, that is finding ways of making the public aware of the existence of the tool, and in order to prepare the software online in such a way as to best respond to the needs of a user. The study of the system of voting in local elections, the database of candidates, next to one of the local party leaders and the then-members of local authorities, targeting media and Internet fora that could be of help in distributing information about the project needed to be worked on simultaneously, superseded by dissemination of the information that closely followed the stage of the preparation was predominantly the task of the Centre for Europe and was done by a liaison team of six people (the project manager and five assistants). Initially, in January 2011, the liaison team had two assistants working part time but in March it increased to five assistants (also part-timers).

Table 1. Government in the UK below the state level

THE UNITED KINGDOM				
Countries	England	Scotland	Wales	Northern Ireland
National Parliaments level	The British Parliament is England's Parliament of this level	The Scottish Parliament	National Assembly for Wales	National Assembly for Northern Ireland
Local council level	<ul style="list-style-type: none"> • 6 Metropolitan Boroughs • 41 Unitarian Authorities • 34 Two-tier districts (counties divided into districts) • Great London (32 London boroughs) 	<ul style="list-style-type: none"> • 32 Unitary authorities 	<ul style="list-style-type: none"> • 22 Single-tier principal areas 	<ul style="list-style-type: none"> • 26 Districts

Source: The liaison team.

The voting system in the UK local elections is complex. Every country (i.e. England, Scotland, Wales and Northern Ireland) is in charge of designing its own electoral system and therefore the systems differ from one country to another. There are many kinds of different units of local government holding different competences. Moreover, local elections do not take place in the entire UK the same year and not all of the representatives in local and country governments are polled in every election – it is possible to design a local system in such a way that only a part of the seats are elected.

Table 1 on the previous page presents the general scheme of the local government in the UK.

In reference to Table 1, the liaison team identified all the elections, that were going to take place in 2011. These are presented in Table 2 below.

Table 2. Elections in UK in 2011

Country	Type of service	Number of places where the elections are held	Voting system/ comments (by thirds – 1/3 of the people in particular service is going to be elected; all-up – all of the service is going to be elected)
England Boroughs	Metropolitan	36	First-past-the-post, all by thirds
	Unitary authorities	49	First-past-the-post, 19 by thirds and 30 all-up
	Two-tier districts	194	First-past-the-post, 67 by thirds and 127 all-up
	Mayoral election	5	Directly elected mayors in Bedford, Middlesbrough, Mansfield, Leicester, Torbay
Northern Ireland	District councils	26	Single Transferable Vote / all-up
	Northern Ireland Assembly	18	Single Transferable Vote / all-up
Scotland	Scottish Parliament	73 + 8 = 81	Additional Member System (a combination of first-past-the-post, and 'closed list proportional representation') / Each voter has 2 votes: a Regional Vote (8 electoral regions) and a Constituency Vote (73 electoral regions)
Wales	National Assembly for Wales	40 + 5 = 45	Additional Member System (a combination of first-past-the-post, and 'closed list proportional representation') / Each voter has 2 votes: a Regional Vote (5 electoral regions) and a Constituency Vote (40 electoral regions)

Source: The liaison team.

The two tables above include elections to national assemblies. Although these in fact are not ‘local elections’ (and providing an online tool for those was the primary target of the project), covering them is in compliance with the goals of the project. Moreover, enclosing these elections does not require much additional work while it can boost the effect of the implementation of the VAA by attracting more voters. All the EU immigrants to the UK have the right to take part in elections to National Assembly of Wales, Scottish Parliament and Northern Ireland Assembly, and the elections were held on the same day as local elections. The candidates to National Assemblies are easy to find as compared to those to local authorities and therefore the dissemination of information was a low time cost.

Building a database of candidates was the next step for the liaison team.

Database of candidates

The liaison team’s search showed that the local elections and those to national assemblies in 2011 would take place in more than 400 electoral regions on different levels of governing the state. This already large number of places that needed to be covered by the team in search of contacts was further complicated by there being no central (i.e. for the whole UK) record of candidates registered for the elections. The same stands for the results of local elections and those to national assemblies: there is no central result list for the entire UK available, which makes any research on this rather difficult. Because of the lack of the central registration system, it was hard to acquire comprehensive data about the candidates and calculate their total quantity. The exceptions were a few regional lists of candidates provided by some non-governmental organizations, political parties and city councils. However, these lists were often published without candidates’ email addresses which required from the liaison team further inquiry. Timing was an additional trouble: the lists of candidates were issued only at best one month before the elections, which left the liaison team very little time to start the dissemination of the information about Mycandidate.eu.

Aware of the unfortunate conditions of preparing the distribution of information about the project – and especially the tight timeframe – the liaison team looked in advance into most of the electoral regions with an intention to find people who could give a hand with passing on the information before the lists of candidates were made public. As a result, a special database was created, that included potential candidates and people who might have access to the candidates, such as then-active representatives of local authorities, election officers, leaders of political parties, as well as key civil servants working for

local governments. The aim was to approach all these groups in order to promote the Voter Advice Application.

Three main types of contacts were looked for:

1. Key representatives of local governments (such as election officers).
2. Current members of authorities and assemblies representatives (especially those whose term of office was going to end in 2011 as this could indicate their trying to get re-elected).
3. Party leaders on different levels.

This database was built thanks to an Internet search and purchasing a database 'The Public Service Exchange' from Oscar Research Ltd. The total amount of records was 5620, including 1105 incorporated from 'The Public Service Exchange' database. A useful source of information were the official websites of the electoral commissions, political parties and local governments. Another valuable source proved to be the websites of organizations providing information about elections to the public, such as 'Directgov' (Direct.gov.uk), BOND (bond.gov.uk), 'About my vote' (aboutmyvote.co.uk), as well as some newspapers, and here predominantly Daily Post was used.

It took three months in total to create this database (between February and May – the dissemination of information via e-mail was being done until the very last moment before the poll), which can be divided into two stages: before and after April 4. On April 4 all the lists of candidates had already been published which allowed to change the way of researching. Before the registration deadline, the Internet search was mainly about checking the websites of every single district and borough, as well as national assemblies. After April 4, some of the regional units published cumulative lists of candidates, though many of them contained no e-mail addresses of the candidates, in which case the names were checked against web sites of political parties and Facebook. While it was relatively easy to find information about the candidates to National Assembly for Northern Ireland, Scottish Parliament and National Assembly for Wales, reaching candidates in local elections in England and district councils in Northern Ireland was rather a challenge even for a deeply committed researcher.

Although the database constructed in 2011 contains mainly contacts for candidates in May 2011 elections, many of the addresses can in fact be used in 2012. While searching the names, the liaison team would often find data it was after on the Internet for the places, where elections are going to take place in 2012. All those were added to the database with an appropriate annotation and the majority of people whose e-mails were included in the database have already received information about the availability of Mycandidate.eu for the May 2012 UK elections. It was anticipated that early information dissemination allows aggregating more interest from decision-

makers and users alike. For instance, London boroughs in England or unitary authorities in Wales were added to the database although elections there were going to take place only in 2012, in order not to duplicate the job with finding information the following year and to raise awareness about the project.

The information about the database (arranged by country) is presented in Table 3 below. In general, the database provides several facts such as: number of contacts identified as candidates, names (or offices) and address (office, home, email, telephone, fax), part of the UK, type of authority, regional distinction, position occupied, political party belonging.

Table 3. VAA database – summary

Part of the UK	England	Northern Ireland	Scotland	Wales	Total
Number of contacts	4076	481	740	318	5620
The rows below present some of the data generated from the database:					
Candidates	3	217	326	190	738
Local political party Leaders	404	6	21	-	431
The Public Service Exchange database	938	32	72	62	1104
Electoral offices	20	1	82	10	116

Source: The liaison team.

The table above demonstrates that candidates in Scotland were by far easiest to approach. It was not difficult to find contact details or e-mail addresses for candidates in Northern Ireland and Wales but England proved to be a surprisingly hard nut to crack. Here, mainly local political leaders could be found and civil servants dealing with elections, who were not obliged to help finding candidates (but could, depending on their good will). There were e-mail addresses of only 3 candidates found. Table 4 below shows yet in a different perspective the data collected in three months of the Internet search – this time displaying numbers in relation to the type of authorities in a particular country.

Table 4. Contacts in the VAA database divided by the type of authority

England		Northern Ireland	
County Council	63	Borough Council	23
Two-tier District	1653	City Council	37
Metropolitan Boroughs	446	District Councils	217
Unitary Authorities	637	Constituency	182
London Borough	92	Not identified	22
Not identified	730	All records	481
All records	4076		
Scotland		Wales	
Scottish Parliament (Constituencies or regions)	217	National Assembly for Wales (Constituencies or regions)	131
Unitary Authority	72	Unitary Authority	62
Not identified	451	Not identified	125
All records	740	All records	318

Source: The liaison team.

Ever since the beginning of the project, it was clear that the registration of candidates on the project web site was crucial. It was also expected that the Internet search of the e-mails of the candidates would be a hard job and one that did not guarantee any success – even if the team found the right addresses, there was no guarantee that a candidate would pay attention to information about something new. And Mycandidate.eu was new and its presenting to ‘target groups’ was like launching a new product on the market. Although this comparison might sound rough, it usually proves correct to assume that a new thing is more trusted if introduced by somebody we already trust. This is why another way the project was promoted from the start was by approaching the headquarters of political parties. This way of promoting a VAA was tested before both by the project team when earlier (in 2009) implementing another VAA for the European elections in Poland, Lithuania and Latvia, and by other VAA teams, operating all across Europe. As Diego Garzia shows in his contribution to this volume, getting support of the top politicians means that basically no other form of promotion needs to be done. A VAA earns credibility the very moment some of the top or well known politicians back it up. The Swiss Smartvote is always nourished this way – political parties deliver the list of candidates and encourage those to take part in the VAA. The cooperation from the political parties seems to bring benefits to all involved: the project

team, political parties, candidates and voters. The Swiss case (like most of the cases in Europe) shows clearly that it makes sense to try to involve parties into making a voter-support tool.

Here, unfortunately the response was very weak, although miracles did occur: one of the ways the politicians in the main party headquarters were approached was – following the advice of a vice-president of the Federation of Poles in Great Britain – by getting in touch with Friends of Poland. The members of this organisation belong to different political parties and what they have in common is concern about Poles in the UK and Polish interests – people who have some means of supporting projects like Mycandidate.eu. Sadly, the reaction from the members of two out of three major parties was not very helpful. The members of Friends of Poland who were members of Conservative and Labour Parties were disinterested in the project of empowering Polish eligible voters by promoting a VAA, while the member of Liberal Democrats found it a good idea. This example can demonstrate how much can be done if the right person is found. Within two weeks time, the project received an official quote from two of the top LibDem politicians, one of which was its deputy leader, saying about Mycandidate.eu:

‘This is a really good scheme to increase participation by Poles and Lithuanians in the English local elections, and in the elections in Northern Ireland, Scotland and Wales on May 5th. And British voters can use it as well, of course!

It’s not just a good idea for the UK, but one that has cross-Europe credentials and is proven to have worked in other European countries in recent years.

I commend this idea to all councillors, candidates, campaign organisers and activists and hope you will give it full and enthusiastic support’.

This quote, together with more information about the VAA was sent out in the newsletter to members of the party (although it is impossible to check the percentage of candidates among the recipients). It was estimated that in this way about six thousand LibDem members received information about the project.

Approaching candidates

Even before completing the database of candidates (in fact this database had been supplemented until the very last moment), the mailing started by e-mail and via traditional post. Every recipient received a package containing

a leaflet describing the project and its objectives, an instruction on how to register, a copy of the questionnaire and a list of electoral districts to tick off the relevant. The traditional post was used only once and letters were sent on March 23 to 300 estimated as most relevant people from the database. E-mailing was divided into three overlapping rounds (for the detailed information refer to Table 5 below).

Table 5. Rounds of mailing

Type of dispatch	Time of sending	Number of mails
Post mail	March 23 rd	300
Email	April 2 nd – 30 th	5655
	April 9 th – 27 th	1178
	April 27 th - 28 th	509
Total		7342

Source: The liaison team.

The first round of e-mails (the one between April 2nd and 30th) was sent to all people in the database, no matter whether they were candidates or people who could help getting to candidates. For the second round of e-mails (the one done between April 9th and 27th), only candidates were selected. The last round (between April 27th and 28th) was the second time the e-mails were sent to candidates only, once again encouraging them to use Mycandidate.eu. The 7342 e-mails and letters sent by the liaison team combined with estimated 6 thousand addressees of the LibDem newsletter gives over 13 thousand records. This can be translated into a number of people who received information about Mycandidate.eu. Some of them were not candidates but all of them knew candidates and some were in position to pass the information to more than one. Therefore it is hard to give precise data on how many candidates in total were informed about the project but it is safe to conclude that several thousand.

Recipients' response

The immense effort of the liaison team who e-mailed over 13 thousand recipients did not amount to what was anticipated. Unlike earlier in Poland, Lithuania or Latvia (where the project team had experience from the 2009 Eu-

ropean elections), the UK candidates were not too keen to join the project. There were just 8 candidates registered from a variety of places which was no guarantee for a user to get a representative sample in his or her voting district. It seems, however that the users still were interested in the opinions of the candidates. Three of the registered candidates came from Scotland, four were from Wales and there was only one candidate from England. This puts the effort of building the database in a rather harsh perspective: the liaison team had over 4 thousand contacts from England (mainly to election officers and other people in public service) and only one candidate registered which shows just how difficult it was to reach candidates on the local, council level. Reaching candidates in elections to Northern Ireland's district councils was an even bigger challenge as none of them registered on the project's web site, despite the e-mailing campaign.

Table 6 below presents the candidates who used Mycandidate.eu (no names are indicated, though), their electoral region and their ultimate score. An interesting information from the analysis of this data is that seven out of eight were members of political parties. This indicates that the liaison team was right in believing that getting the commitment of the parties in dissemination of information would be a winning move. Despite a relatively large number of independent candidates (and the liaison team registered at least fifty types of independent candidates in 2011), the majority of them were party members. To use the parties' channels of distribution of information was to win project participants.

Table 6. Candidates registered with Mycandidate.eu

No.	Country	Political Party	Electoral district	Won/lost
1	Wales	LibDem	Cardiff South	Lost
2	Wales	Labour	Wales, Caerphilly	Won
3	Wales	Plaid Cymru	Wales, Clwyd West	Lost
4	Wales	Conservative	Wales, Caerphilly	Lost
5	England	Labour	Leicester South	Won
6	Scotland	Independent	Rutherglen, Glasgow	Lost
7	Scotland	Scottish LibDem	Dundee East	Lost
8	Scotland	Scottish LibDem	Edinburgh East	Lost

Source: The liaison team.

In search of a reason for such a low rate of candidates' registration on the project web site, the question was asked of whether the information delivered to candidates was unsatisfactory. In the interviews with candidates completed after the May 2011 elections, however, it becomes quite evident, that the information in the package was described by them as clear and sufficient. The questionnaire used by the project team was said to be exhaustive, too. There must have been other reasons for this and perhaps a sample of e-mail feedback the team received from the correspondents can be of help. This response varied from a full support and words of encouragement to sharp criticism. There were voices of appreciation of the VAA as innovative and helpful but there were some not quite so positive. The extreme of them was the one that criticized strongly not as much the VAA as the fact that the major source of financing was the European Commission which made the VAA perceived as an undesired attempt to interfere with the British internal matters that should be left for the Brits to decide upon.

The liaison team checked out also the productivity of contacting election officers and local administrative staff, and it turned out that only one election officer notified the team about his forwarding the information to candidates, some of them had provided the team with full lists of candidates in their electoral region, but many of them refrained from undertaking any action or the material they had provided was of little use. Some of them chose to pass the information to Member Services Sections, Democratic Services and elections teams. It has to be said that it is no obligation of election officers to provide candidates with any information about the availability of voters' aids so it depended entirely on their good will. This is yet another argument in favour of winning the support of political parties in promoting VAAs – their channels of communication seem to work most efficient and they already have well developed systems of distributing information. It has to be mentioned, however, that the regional and local cells of the parties would commit themselves to doing something practically only if the direction was pointed out by the central office.

The overall conclusions from mailing include also this one: it is relatively easy to find addresses of candidates in elections to national assemblies but it is laborious to search for contact details for candidates in elections to authority of any lower level than that. It is also hard to make state and local authorities to cooperate or at times even to receive any response (although an officer in one of them was kind enough to point out the company that would be able to provide the team with The Public Service Exchange database). All this experience makes the basis for the 2012 information dissemination planning.

Reaching out to the users

Another important task was to get users informed about and interested in the tool. Since it was the primary objective of the project to encourage Polish and Lithuanian citizens living in the UK to take part in the poll, the main stream of actions promoting the project was directed at them. It is only fair to add that the web site was available in three languages: Polish, Lithuanian and English which made it perfectly possible for anybody speaking any of these three to use the tool. Therefore British citizens were able to use Mycandidate.eu too, and many of them took this opportunity. Since the questionnaire was relatively universal (i.e. not profiled specifically for Polish or Lithuanian minorities but relating to needs of the residents of Great Britain), the only obstacle they would meet was in getting information about the existence of the VAA. It is not for the lack of will or attempts of the project team that the British public was not informed on a large scale about the project – it never caught attention of the British newspapers, despite the efforts to divert it. From the research on the British press' coverage of the local election and those to national assemblies in May 2011 that the project team undertook before, during and after the poll, it stands clear that there is little interest in these issues from the press. There was close to no mention at all about the elections and very little regarding their results.

It was more encouraging with Polish media in the UK, that happily joined the campaign. The main effort in contacting the Polish press and radios in the UK was done between March 21 and 27, mostly in meetings in person in London. It was also then that the material for Polish Radio London (an extended interview with the project manager) was prepared and emitted for the first time with parts of it prepared to be used in the second half of April. This week was also devoted to coordinating marketing campaign between the project partners who were all involved in project promotion in a number of ways. The partners concluded that the marketing should go in three dimensions:

- approaching Polish and Lithuanian media in the UK,
- meeting activists and representatives of Polish and Lithuanian networks (professional and social),
- e-marketing, including Internet fora, social networking sites and advertisement.

The London meetings allowed to establish a good working relationship with the major Polish media, selected for the project in advance on the basis of their readers and geographical coverage. The aim was to agree with all of them to have two articles in weekend issues (these have the highest edition): two weeks before the elections and the weekend just before May 5. This goal

was reached and all of the journalists kept their promises. Between April 15 and May 5, press releases were published in the following newspapers: 'Dziennik Polski', 'Goniec Polski', 'Cooltura', 'Nowy Czas'. Radio broadcasts were aired in the middle-of-the-day prime time in Polish Radio London (live interview at the end of March and once again a week before the elections) and Radio Orla (two weeks before the elections and on Saturday preceding the poll). There were also mentions about Mycandidate.eu on some web sites, including these: eLondyn at <http://www.elondyn.co.uk>, Polish Professionals at <http://www.polishprofessionals.org.uk>, Federation of Poles in Great Britain <http://www.zpwb.org.uk>.

Users were also targeted via professional and social networks, which was achieved by meeting representatives of: Ognisko Polskie, Polish Professionals, Polish City Club, Federation of Poles in Great Britain, Friends of Poland and UCL School of Slavonic and East European Studies – this last one also in order to share experience and consult the project. They all agreed to pass information through their mailing lists and some of them placed information about the project and its link on their web sites. Next to linking web sites with those, whose viewers might be interested in Mycandidate.eu, advertisements were placed on the web site of 'Dziennik Polski' (<http://www.dziennikpolski.co.uk>), a Facebook profile created and a blog linked to the project web site.

Statistics

Google Analytics counted that www.mycandidate.eu was entered 900 times by a total of 625 unique visitors, 60 per cent of whom found the site by typing its address. Another 20 per cent used search engines and the remaining 20 per cent were redirected from referring sites. This statistics would suggest that the users knew about the project when looking for it, that is they had heard or read about it prior to typing the site address on the computer. This relation is further confirmed by the fact that the traffic on the site intensified in mid-April, precisely on the day when two major newspapers published articles about the project. The number of visits on the site ranged from 20 to 50 a day from mid-April and almost stopped on April 29 which was the day of the Royal Wedding. The peak came on May 5, the day of elections. The majority of viewers (76 per cent) were staying in Britain, 13 per cent site entrances were from Poland and 7 per cent from Lithuania.

The lesson learned from these data is that the information campaign was done adequately: the timing was right and the media chosen were effective. The limited number of viewers is most probably co-related with the low number of candidates registered. Unfortunately, these two are conditional on each

other and it can be expected that when a VAA is representative, people tend to recommend the site to each other and the press pays more attention to it. Having so few candidates (despite the effort made), the VAA was not useful for most of the users. Nevertheless, there are two optimistic accents in the story about the first year of Mycandidate.eu: the first one is that while the majority of Polish media is London-based (although many of them reach readers and listeners across country), the time for local elections in London (where a large Polish and Lithuanian population live) is May 2012. This means that the input of the befriended media can be cumulated in 2012 in London, where the media are strong. 2012 is also the second year of the project and the second optimistic accent: it is usually difficult to be starting up a new enterprise but after wiping the paths in 2011, it should be easier to get attention in 2012.

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‘A Signpost to the West. Ukrainian Youth at the Gates of Europe’ – Report on the Realisation of the International Research Project¹

The Centre for Europe at the University of Warsaw, and the Institute of European Integration and the Faculty of International Relations at the Ivan Franko National University of Lviv, in cooperation with the Institute of International Relations and the Faculty of Management at the University of Warsaw, as well as the Faculty of International Relations and Foreign Policy at the Donetsk National University, have carried out an international research project entitled **‘A signpost to the West. Ukrainian youth at the gates of Europe’**. The project was implemented from 1 April 2011 to 31 December 2011. It was financed by the Minister of Foreign Affairs of the Republic of Poland, as part of the cyclic programme ‘Promotion of knowledge on Poland’ (a grant of PLN 70,000). The project was managed by Kamil Zajączkowski (Ph.D.) of the Centre for Europe, and its organisational and financial coordinator was Magdalena Drouet, a doctoral student of the Warsaw School of Economics. On the Ukrainian part, the project was coordinated by Prof. Bohdan Hud, the Director of the Institute of European Integration at the Faculty of International Relations, Ivan Franko National University of Lviv.

The project consisted of the following tasks:

- publication of the collective work entitled *Poland in the European Union: Adjustment and Modernization. Lessons for Ukraine*;
- organisation of the international academic conference ‘Badania nad integracją europejską – wyzwania dla polsko-ukraińskiej współpracy naukowej’ (‘Studies on European Integration – Challenges for the Polish-Ukrainian Academic Co-operation’);

¹ Translated by M. Wolsan.

- conclusion of the Annexe to the Agreement between the University of Warsaw and the Ivan Franko National University of Lviv on academic and research co-operation;
- lectures on European integration held by the employees of the Centre for Europe, University of Warsaw, for the students of the Faculty of International Relations of the Ivan Franko National University of Lviv.

The academic editors of the joint publication *Poland in the European Union: Adjustment and Modernization. Lessons for Ukraine* were Artur Adamczyk (Ph.D.) and Kamil Zajączkowski (Ph.D.). The main aim of the book (*Poland in the European Union: Adjustment and Modernization. Lessons for Ukraine*, eds.: Artur Adamczyk and Kamil Zajączkowski, forthcoming Warsaw 2012) is to present the most important achievements and challenges in the process of European integration and to show the impact which the membership in the European Union has on Poland and its citizens, as an example and inspiration for the Ukrainians to take further efforts towards integration. The book comprehensively discusses the role and position of Poland in the European Union. It analyses the effectiveness of the Polish policy towards Europe, as well as selected adjustment-related problems which our country has been facing in the process of European integration. An important part of the work is also the presentation of Ukraine's place in the process of getting closer to the European Union and highlighting the importance of the dissemination of knowledge on the European Union in the Ukrainian education system. The book is composed of articles written by such authors as: Artur Adamczyk, Olga Barburska, Taras Budzinskyy, Andriy Didukh, Magdalena Drouet, Przemysław Dubel, Bogdan Góralczyk, Bohdan Hud, Roman Kalytchak, Marta Malska, Dariusz Milczarek, Małgorzata Pacek, Svitlana Pysarenko, Ihor Todorov, Krzysztof Wielecki, Anna Wróbel, Jakub Zajączkowski and Kamil Zajączkowski.

The key event in the project was the international academic conference: 'Studies on European Integration – Challenges for the Polish-Ukrainian Academic Co-operation', which took place on 29 November 2011 in Warsaw, in the Senate Hall of the University of Warsaw. It was intended as a detailed presentation of the complex processes of integration, in particular of the Polish experiences in adapting to the EU and the ensuing challenges for Ukraine. It was also important to outline the structure of the evolution of European studies in Poland and Ukraine.

Before moving on to the working part of the conference, the organisers conducted a ceremony of signing the Annexe to the Co-operation Agreement between the University of Warsaw and the Ivan Franko National University of Lviv. The subject of the Annexe was the development of bilateral co-operation in the fields of research and teaching between the Centre for Europe and

the Institute of International Relations at the University of Warsaw, and the Faculty of International Relations at the Ivan Franko National University of Lviv. The co-operation will consist in: joint research and scientific conferences; exchange of research and educational programmes; exchange of publications and other academic materials which are the result of joint research, conferences and seminars; exchange of academic staff, students and doctoral students. On behalf of the University of Warsaw, the agreement was signed by Prof. Dariusz Milczarek, the Director of the Centre for Europe, and Prof. Edward Halizak, the Director of the Institute of International Relations. On the Ukrainian side, the document was signed by Bohdan Lapchuk (Ph.D.), the Associate Dean of the Faculty of International Relations of the Ivan Franko National University of Lviv.

The conference was officially opened by: Prof. Włodzimierz Lengauer, the Vice-Rector of the University of Warsaw for Research and International Relations, Prof. Markiyan Malsky, the Ambassador of Ukraine in the Republic of Poland, Jan Borkowski (Ph.D.), the Secretary of State in the Polish Ministry of Foreign Affairs.

At the welcoming ceremony, Prof. Włodzimierz Lengauer highlighted the role and importance of Ukraine in the history and culture of united Europe and the fact that Ukraine needs Europe, just as Europe needs Ukraine. Prof. Lengauer stressed that Ukraine has always been and will always be a fully European country. The professor pointed to the enormous academic and research achievements in the field of European integration at the University of Warsaw. However, he also stressed that the promotion of knowledge about the EU among the candidate countries gives rise to many challenges, such as the development of joint initiatives and research programmes and intensification of mutual cooperation.

Prof. Markiyan Malsky highlighted the role of the Polish-Ukrainian relations in the European Union and of their future in the context of greater integration of the eastern territories of Europe. Mr Borkowski, in turn, referred to the priorities of the Polish Presidency in the Council of the European Union and the challenges that the intensification of activities within the Eastern Partnership presents to Poland. In the context of the enlargement of the European Union's eastern territories, Mr Borkowski stressed the importance of co-operation of institutions safeguarding the adjustment process, such as academic bodies, research institutes and consulting groups.

The conference's introductory speech was held by Kamil Zajaczkowski, who elaborated on the principles and objectives of the Polish-Ukrainian joint research initiative – 'A signpost to the West. Ukrainian youth at the gates of Europe' He also presented the joint academic publication *Poland in the European Union: Adjustment and Modernisation. Lessons for Ukraine*. He stressed

the fact that the publication will be an important tool for education and promotion of knowledge about Poland among the students and researchers of Ukrainian universities.

The conference was divided into two thematic sessions: 'Polish-Ukrainian collaboration in the process of Ukraine's integration into the EU' and 'European Studies in Ukraine. Opportunities for co-operation with Polish scientific institutions'. The sessions were presided in turn by: Prof. Dariusz Milczarek and Prof. Bohdan Hud.

The first session included presentations by: Prof. Markiyan Malskyy, Prof. Edward Halizak, Rostyslav Romaniuk (Ph.D.) of the Faculty of International Relations at the Ivan Franko National University of Lviv, and Prof. Alojzy Nowak, the Dean of the Department of Management at the University of Warsaw.

Opening the first session, Prof. Dariusz Milczarek recalled the history of the co-operation with the Ukrainian partners and presented the outlook for the future. In this context, he highlighted the importance of strategic and political factors in the plans for further EU enlargement to the east. Prof. Milczarek pointed to the existence of conditions which, in his opinion, lead to a thesis that the model of the Polish-Ukrainian co-operation to be carried out will be an interesting and innovative one.

In his speech opening the working part of the conference, Prof. Markiyan Malskyy shared his reflections on the Polish-Ukrainian co-operation. He drew attention to the Polish position as a strategic partner and source of inspiration for Ukraine in the process of its integration with the European Union. The Ambassador mentioned three important aspects of the mutual relations of Poland and Ukraine: the political dialogue, the energy security in the region and the intensification of economic co-operation and trade. He described the Polish-Ukrainian partnership as strategic, based on mutual respect and trust, and having a chance to become a solid foundation for the co-operation of future generations and the binder in the sensitive process of ethnic reconciliation.

In the next speech, Prof. Edward Halizak asked very interesting questions about the historical context of Polish-Ukrainian relations. In his opinion, we need to redefine the Polish eastern policy. The Polish-Ukrainian co-operation gives grounds for hope that the past will eventually be overcome and the key to the positive elements of our common history will be found. Considering the predictions for the future, Prof. Halizak expressed the opinion that co-operation in higher education will require full commitment – not only in the academic, but also in the institutional dimensions.

The next speaker, Rostyslav Romaniuk, asked a vital question: What does the European Union constitute for Ukraine and how it should be perceived. He emphasized the key role of strengthening democracy in Ukraine and the

dependence of this process on the degree of integration with the European Union. He stressed in particular the two current issues which are, in his opinion, the most important ones today: the multi-dimensional promotion of knowledge of the European Union and the preparation of key institutional actors for full integration with the EU. Prof. Alojzy Nowak, in turn, underlined that a new chapter of Polish-Ukrainian co-operation is opening, and Poland, which, in his opinion, had been focused heavily on the West, now has felt that it is an active player in Eastern Europe and that it could make this a powerful tool for further co-operation with Ukraine. Prof. Nowak asked questions about the ways which should be chosen to work towards closer integration with the European Union, while protecting Ukraine's national identity. He stressed the crucial importance of multi-faceted economic co-operation with EU Member States for Ukraine's future, particularly in terms of intensification and further liberalisation of trade.

These presentations became the basis of lively discussions, raising, among others, the problem of strengthening the area of peace in the region by expanding democracy in Ukraine and the role of the Polish-Ukrainian partnership in the political, economic and cultural dimensions. The participants also stressed the legitimacy and desirability of partnership programmes in higher education, which can become a productive factor, a type of investment in human capital that will decide the future of Ukraine.

The second session included presentations by: Prof. Igor Todorov from the Department of International Relations and Foreign Policy of the Donetsk National University, Bohdan Lapchuk (Ph.D.) and Roman Kalytchak (Ph.D.) of the Department of International Relations and Diplomatic Service of the Faculty of International Relations at the Ivan Franko National University of Lviv.

The session started with a brief introduction by Prof. Bohdan Hud, who stressed the role played by the University of Warsaw in the development of mutual relations with Ukrainian universities. Prof. Igor Todorov analysed the state and prospects of European studies in Ukraine. He pointed out that the scale and pace of development of European studies at Ukrainian universities is a natural consequence of being a part of Europe.

The author of another speech delivered at the conference, Bohdan Lapchuk, emphasized the fact that Poland has become a key partner and promoter of knowledge about the European Union in Ukraine. In this context, he pointed out the need to intensify mutual agreements between universities from both countries. Roman Kalytchak highlighted the unifying factors positively influencing the co-operation, such as common culture, history and regional ties. However, he also emphasized the differences, such as institutional bonds or the lack of sufficient autonomy of universities in Ukraine, which may adversely affect the development of further co-operation.

Like the previous ones, this discussion following these speeches was interesting and fruitful. The participants considered the prospects of further co-operation and the need to replicate the project throughout the territory of Ukraine. The conference ended with the presentation by Katarzyna Kozdra of the International Relations Office at the University of Warsaw, who showed the scale of mutual co-operation, exchanges and scholarships for Ukrainian researchers and students in Polish universities and research institutes.

Another element of the project was the participation of 10 students from Lviv in the lectures on European integration prepared by the Centre for Europe, which took place from 28 November to 2 December 2011. These included issues such as the new international order and Poland's place in it (Prof. Bogdan Góralczyk); the institutional system of the EU and the EU regional policy (Artur Adamczyk); the European social order (Prof. Krzysztof Wielecki). The students also attended the conference described above.

The project, carried out by Polish and Ukrainian academics, was just the beginning of the research on the Polish experiences in the process of European integration and of the analysis of how this experience can be used by the Ukrainian partners. Naturally, the main issue here is to encourage the Ukrainian society to take more effort on the road towards the EU. Hence the enormous weight of the challenges that lie before the Polish government, aspiring to the role of the leader in the Eastern Partnership, as well as before the Ukrainian society and politicians. The academic circles, who have the most influence with students and people with higher education, could play a special role in promoting the EU.

The Centre for Europe at the University of Warsaw is grateful to the Ministry of Foreign Affairs for its assistance and for making it possible to initiate the studies on Poland's impact on the process of Ukraine's integration with the EU. Special thanks go also to the Ambassador of Ukraine in the Republic of Poland, Prof. Markiyan Malskyy, and to Prof. Bohdan Hud, who have shown great personal commitment to this project.

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