INSTITUTE OF COMPARATIVE LAW

EUROPA INSTITUTE - ZURICH

3rd NETWORK CONFERENCE
ADAPTATION AND IMPLEMENTATION OF THE EU –ACQUIS: AN EXCHANGE OF EXPERIENCES

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TABLE OF CONTESTS

THE EDITOR'S WORD

Neighter Switzerland, nor Sebia are members of the EU. And may be that is the only common characteristic of those countries. Almost everything else is different. People of Switzerland decided not to enter to the EU and Serbian citizens desperately want(ed) at least to come on the White Schengen List. Switzerland is a rich, quiet and regulated country and Serbia on the other hand is a poor, in some way noisy and chaotic country. In its history Switzerland did not have too many wars and Belgrade, the capital of Serbia was known as a „house of wars". Only in the XX century it was four times bombarded and nowadays the visitor can see many injures on its „face", especially those from the last bombarding, ten years ago.

So, the question is why the Europa Institute from Zurich and the Institute of Comparative Law from Belgrade organized the conference about Europe and the European integrations Beacuse, both our countries are surrounded by Europe, because Serbia always used to be a part of Europe, in every sense, no matter about many prejudices and manipulations when the word is about Serbia.

The third network conference - 3rd NETWORK CONFERENCE ADAPTATION AND IMPLEMENTATION OF THE EU –ACQUIS: AN EXCHANGE OF EXPERIENCES - was held in Belgrade from October 7th to 9th. On that conference experts from Switzerland, Estonia, Poland, Slovakia, Hungary, Slovenia, Croatia, Macedonia, Bulgaria and Serbia presented their experiences in the implementation of the European law. It was an opportunity to discuss about everything that is connected with Europe.

The necessity to get knowledge about the EU, to see and hear what others do, was the main reason why two different institutions from two different countries coorganized this conference.

Unfortunately, we in Belgrade did not receive contributions from Macedonia, Bulgaria and Switzerland, but we are ready to publish them in our journal, when we get those articles. The word is about „Foreign Legal Life“ („Strani pravni život“ – you could read it on www.comparativelaw.info)

Anyway I would like to express my gratitude to all the participants for their written and oral contributions. I hope that they felt very comfortable in Belgrade and that we were good hosts, as I am sure that for us in Serbia everything connected to this conference was more than useful and helpful on our way to Europe. At the end I would also like to express my gratitude to H.E the ambassodor of Switzerland. With the support of him personally and his country, we did a good job.

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TRANSLATION OF THE ACQUIS IN SERBIA

1. Multilingualism in the European Union

The European Union is founded on 'unity in diversity': diversity of cultures, customs and beliefs - and of languages. Multilingualism is one of the basic principles and key features of the European Union. It refers to both a person's ability to use several languages and the co-existence of different language communities in one geographical area. Bearing in mind that there are 23 official languages of the Union, and 60 or so other indigenous languages and a number of non-indigenous languages spoken by migrant communities, the importance of multilingualism in European Union cannot be understated.[1]

Multilingualism is a guarantee of cultural and linguistic diversity, equal treatment between peoples and individuals in Europe, and the right of citizens and entities to interact with European Union institutions in any of its official languages. Formal confirmation of this can be found in Arti-

[1] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee And The Committee Of The Regions - A New Framework Strategy For Multilingualism, Brussels, 22.11.2005, COM(2005) 596 final

cle 22 of the Charter of Fundamental Rights of the European Union[2], which states that the Union shall respect cultural, religious and linguistic diversity. Article 21 of the same Charter prohibits discrimination based on a number of grounds, including language. Therefore, European Union has created special policies for linguistic diversity, aiming to create an environment that is encouraging to the full expression of all languages and in which the teaching and learning of a variety of languages flourishes. Moreover, in March 2002, the Heads of State or Government of the European Union meeting in Barcelona[3] called for at least two foreign languages to be taught from a very early age. The activities aimed at achieving this ambitious goal are in the competence of the European Commission, but a major responsibility for making further progress also rests with Member States.

The Commission's multilingualism policy has three aims:

- to encourage language learning and promoting linguistic diversity in society;
- to promote a healthy multilingual economy, and
- to give citizens access to European Union legislation, procedures and information in their own languages.

The Commission's long-term objective is to increase individual multilingualism until every citizen has practical skills in at least two languages in addition to his or her mother tongue.

One of the major steps towards raising awareness on the importance of multilingualism has been taken already in 2001, when the European Year of Languages was jointly organised by the European Commission and the Council of Europe. It gave languages a higher profile than ever before. Since then, the European Day of Languages has been held on 26 September every year to help people appreciate the importance of language learning, raise awareness of all the languages spoken in Europe

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[2] Charter of Fundamental Rights of the European Union 2000/C Official Journal of the European Union 364/01

[3] Barcelona European Council, 15 and 16 March 2002, Presidency Conclusions, part I, 43.1.

and encourage lifelong language learning. Following on this, in 2003 the Commission committed itself through an Action Plan[4] to 45 new actions to encourage national, regional and local authorities to join it in working for "a major step change in promoting language learning and linguistic diversity". Recent developments show that European Union is additionally stressing the importance of this subject. In 2004, for the first time, the portfolio of a European Commissioner explicitly included responsibility for multilingualism – Commissioner Ján Figel from Slovakia was responsible for education, training, culture and multilingualism. As of January 1, 2007, with the accession of Bulgaria and Romania, multilingualism became a separate portfolio, and was transferred to Commissioner Leonard Orban from Romania.

In November 2005, the Commission published a Communication entitled "A New Framework Strategy for Multilingualism", it's first-ever Communication on this subject. Following this, the High Level Group on Multilingualism (HLGM) as an external group was set up in September 2006 to bring about an exchange of ideas, experience and good practice, to develop ideas relevant to policies and practices on multilingualism across the European Union and to make recommendations to the Commission on action in this area. The Group was given the general remit of providing support and advice on developing initiatives, together with fresh impetus for and ideas on a comprehensive approach to multilingualism in the European Union. The HLGM's final report, presented to the Commission on 26 September 2007, presents various aspects of multilingualism.[5] The Commission also launched an online consultation between 15 September – 15 November 2007, inviting organisations and individuals to write their views and expectations concerning language policy. The outcomes of the survey were published in

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[4] COM(2003)449

[5] COMMISSION STAFF WORKING DOCUMENT *Accompanying document to the* COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Multilingualism: an asset for Europe and a shared commitment SEC(2008) 2443

February 2008 and discussed in public in the framework of a Public Hearing on Multilingualism in April 2008. In September 2008, the Commission published a Communication advocating an approach which includes multilingualism across a whole series of EU policy areas.

2. European Union and its 23 Official Languages

A strong expression of the principle and importance of multilingualism in the EU lies in the fact that it has 23 official languages[6]. Each Member State, when it joins the Union, determines which language or languages it wants to have declared as official languages of the EU. This means that the official languages are those so determined by the national governments, not EU officials. This principle is embodied in Regulation 1/1958[7], which is amended every time a new country joins the Union.

Official multilingualism is an important feature of the Union. Since the Union passes legal acts that are directly binding on its citizens and companies, the need for every document to be available to the courts and citizens in a language they can understand is self-explanatory. However, the official multilingualism story does not end there. The European Union institutions also have to be as accessible and as open as possible to the general public. This is guaranteed by the provisions of Regulation 1/1958, which guarantee the right of residents of the Member States to communicate with the EU institutions in their own language.

The concept of multilingualism is also important before the European Court of Justice and the Court of First Instance, as well as before the recently constituted Civil Service Tribunal, institutions which resolve disputed between the parties and provides judicial protection of right guaranteed in the Community law. The European Court of Justice recognised by its Rules of Procedure the right to use all official languages. The applicant

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[6] Within the framework of its 27 Member States, the official and working languages of the EU are the following: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish.

[7] Regulation No 1 determining the languages to be used by the European Atomic Energy Community, *Official Journal 017, 06/10/1958 P. 0401 – 0402.*

can choose the language. Usually it is the language in which the action of the applicant has been submitted. In preliminary ruling procedures, the language of the case is the language that the national court must use according to its own national law. All passed judgements and court opinions are also translated in all official languages, in order to make the case law accessible and transparent for everyone.

When it comes to legislation, the initial proposals by the Commission are usually drafted and discussed internally in one or two languages. Once the texts are sent to Parliament, the Council and the Committees for further legislative debate, they have to be translated to all official languages, so that everyone involved could familiarise himself/herself with their content. Naturally, all finalised EU legislative documents have to be published in the Official Journal in all official languages before they can enter into force. Documents that are of major political importance are also translated into all official languages. It is therefore evident that the European Union needs to have a developed and well-structured translation service or services, in order to be able to supply versions of official texts in all official languages.[8] However, since this is such an overwhelming task, and for purely practical reasons, some concessions have had to be made in order to reduce and seed up the translation.

On the other hand, correspondence with the authorities, associations, business and the public in Member states is translated only to the language or languages spoken by those to whom the correspondence is addressed. This so-called "variable geometry" approach to translation meets two objectives at the same time:

- it safeguards the right of every individual to be informed on the most important EU issues in his/her mother tongue and also the right to communicate with the EU in his/her own language;
- it avoids unnecessary translation and thus, unnecessary spending of taxpayers' money.

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[8] There are translation services for all EU institutions and bodes. They cooperate inter-institutionally through and Inter-institutional Committee on Translation and Interpretation. Council Regulation No 2965/94, amended by Council Regulation No 1645/03 established the Translation Centre for the Bodies of the European Union. The European Commission also has a Directorate General for Translation.

In as much as democratic and transparent this system is, it is not without its flaws. Since all versions of all documents are equally authentic in all languages, when reading and interpreting EU legal documents, particularly Regulations, it is recommendable to read its versions in more than one official language. Sometimes even different language versions of the same document differ in content – however, this seldom occurs.

This is why it is of paramount importance that those employed in EU translation services have perfect command of their mother language, have a very sound knowledge of English, French or German, as a compulsory source language for translation, and, in addition, have a thorough knowledge of a second source language. Each of the three languages must be official language of the EU. Moreover, the Court of Justice has a separate position of a lawyer-linguist. This means that the candidates for this post must hold a law degree awarded in the State or one of the States in which the language for which the recruitment is being organised is spoken, and to meet the mentioned conditions for a translator. Engagement of a lawyer with a thorough knowledge of three official languages is an additional guarantee of consistency and, more importantly, legal accuracy of the translations provided.

2.1. Eurojargon

One additional peculiarity of the EU legal system is its so-called eurojargon. Namely, since the law of the European Union includes a number of legal terms and notions that are very specific, and which sometimes even have a different meaning than they would have in national law, the wording of EU legal documents can be puzzling not only for the general public, but also for those more familiar with EU law. This is often true for the members of the press, particularly those coming from candidate countries and countries negotiating the SAA. This is why the European Union website has a page dedicated to plain language explanation of the eurojargon.[9] Eurojargon and the specific, autonomous meaning of certain terms in EU law present a specific challenge for translators. This is why it so important

[9] http://europa.eu.int/abc/eurojargon/index_en.htm

for those working on the translation of EU documents to have in-depth knowledge of the subject-matter of the document they are working on.

As it was explained previously, the languages of all member states are official and working languages in the European Union and there is a principle of equality between the languages. The EU *acquis* is drafted and published in all official languages. The equality of languages is also present before the European Court of Justice which guarantees the use of 23 languages.[10]

In regard to the candidate countries the multilingualism has several repercussions. Firstly, it obliges a candidate country even before becoming a member to begin the process of translation in order to facilitate the accession process, but also to make EU *acquis* transparent for each national. The incentive to translate the EU *acquis* also lies in the fact that after the accession all translated documents will become official documents in a new official language of the country in question.

Secondly, it obliges a candidate to recruit a considerable number of translators who will be able to work in the EU institutions as official translators once the candidate country becomes a member state. Finally, translating multilingual instruments places a burden on translators, requiring them to consult not only one but several official languages. The translators have to produce a coherent corpus of law, without misleading and unclear translations. Translations in English languages are mostly used in the process of translating the *acquis*.[11]

Translation of legal documents is a joint accession requirement, a requirement which is in quantitative and qualitative terms equal for all candidate countries. Legal translation is the key aspect of the process of approximation of national legislation, which entails the harmonisation of the national legislation with the well know *acquis communautaire*[12]. The application of the EU *acquis* is one of the most difficult Copenhagen crite-

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[10] Article 29 of the Rules of Procedure of the Court;

[11] Some countries do fear that with the further enlargement of the EU, the English language will become the dominant and perhaps one of few official languages.

[12] The *acquis communautaire* contains the entire EU legal corpus divided into primary and secondary legislation.

ria which each candidate country must fulfil in order to become the member state of the European Union. However, this process can be endangered without the adequate legal translation. Each candidate country faces the translation of over 180,000 pages of the *acquis communautaire.*

The significance of the legal translation becomes even more important when confronted with the main principles of Community law - direct effect and direct applicability of Community law. Since certain EU legislation is directly applicable and at the same time has direct effect, the citizens of each member state must be able to read and understand the provisions in order to comply with them, but also to be able to control the extent of the transposition of the Community law by a member state.

The translation process is not a mechanical process of substation but is process which entails the knowledge of EU legislation, familiarity with the structure of EU texts and their application. The process of translation is the responsibility of each applicant country, although the final approval is given by the EU institutions prior to the publication by the Office for Official Publications of the European Communities.

The translation of the Community law is a very difficult and tedious task. This was one of the problems that were common for all former candidate countries from Central and Eastern Europe. Many of them, such as Slovenia, which was generally a very successful story, in a short period of time, almost until the very end before joining the EU, had a backlog of untranslated community legislation.

It is also very important to mention a significant component of the legal translation, which is connected to the drafting of national legislation. The wording, expressions, phrases and even the single terms that translators choose in their daily's work today will be of immense importance for judges and lawmakers.[13] The best example are directives which are binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.[14] This means that a national legislator if, the issue is not already

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[13] Legal Translation – Preparation for Accession to the European Union, edited by Susan Sarcevic, Faculty of Law, University of Rijeka, 2001;

[14] Article 249 TEC

regulated by the national legislation, is obliged to pass a new law or byelaw in order to transpose a directive. Thus, the translation of the directive serves as a mandatory base for the transposition of norms into the national legal system. Thus, the principle of legal certainty may depend on translators and the language in use.

2.1. TAIEX

The European Commission realised very quickly that the countries of Central and Eastern Europe were facing a very serious problem concerning the translation of community law which was the main prerequisite for the successful approximation of the national legislation with the Community law. Therefore, within the Directorate-General for Enlargement the Commission created a unit TAIEX - the Technical Assistance and Information Exchange Instrument of the Institution Building.

It is operational since 1996 and it provides technical assistance in the field of approximation, application and enforcement of legislation. Its services are complementary to the several alternative assistance programmes the European Commission offers to new Member States, candidates for accession to the European Union, and the countries of the Western Balkans.

The TAIEX mandate to provide assistance to the three groups of beneficiary countries:

- new member states of the EU – Bulgaria and Romania;
- candidate countries – Croatia, Former Yugoslav Republic of Macedonia and Turkey;
- potential candidate countries – Albania, Bosnia and Herzegovina, Kosovo (as defined by the Resolution 1244) and Serbia;
- countries within the European Neighbouring Policy;
- Others - Turkish Cypriot Community in the northern part of Cyprus

TAIEX' main tasks are focus on numerous issues from which the most important is the provision of technical assistance and advice on the transposition of the *acquis communautaire* into the national legislation of beneficiary countries and on the subsequent administration, implementation

and enforcement of such legislation. It also provides information by gathering and making available information on the Community *acquis* and providing database tools for facilitating and monitoring the approximation progress.

The actual beneficiaries of the TAIEX assistance include both public and private sectors, which includes different target groups such as civil servants working in public administrations; civil servants working in administrations at sub-national level and in associations of local authorities; Members of Parliaments and civil servants working in Parliaments and Legislative Councils; professional and commercial associations representing social partners, as well as representatives of trade unions and employers' associations; the Judiciary and Law Enforcement authorities and interpreters, revisers and translators of legislative texts.

TAIEX Programme was opened for Serbia in 2003 after the European Council meeting in Thessaloniki, but the actual utilisation of its benefits began in 2004 when the Serbian representatives commenced to participation at various seminars abroad organised within the framework of TAIEX. From 2005, by following the more appropriate Demand Driven Approach based on the initiative of the beneficiary country, numerous events were organised in Serbia throughout 2005, 2006 and 2007 covering all internal market areas[15].

3. Legal Translation in Serbia – formal grounds

In April 2008, Serbia and the EU signed the Stabilisation and Association Agreement and Interim Agreement on Trade and Trade-related issues. Both agreements were ratified by the Serbian National Parliament in September 2009. As of February 1, 2009, Serbia is unilaterally implementing the Interim Trade Agreement, awaiting the Council decision on its implementation[16] and

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[15] It is worth of mentioning the following activities: workshop on asylum, public procurement, consumer protection, safety at work, waste management, police and customs cooperation statistics in agriculture, etc.

[16] On its 2864th and 2865th Council meetings, the Council (General Affairs and External Relations) agreed to submit the SAA to their parliaments for ratification and the Community decided to implement the Interim Agreement as soon as the Council decides that Serbia fully cooperates with the ICTY.

the consequent ratification of the SAA by Member State's national parliaments. As for European partnership, the European Council has adopted a new European Partnership for Serbia in February 2008[17]

The two most important obligations Serbia undertook by signing the SAA are the establishment of a free trade zone and harmonisation of Serbian legislation with the *acquis*. Given the scope of the *acquis*, the SAA[18] states that approximation of laws will, at an early stage, focus on fundamental elements of the internal market *acquis*, justice, freedom and security, as well as on other trade-related areas, whilst Serbia shall focus on the remaining parts of the *acquis* at a further stage. Specific time-limits for approximation of laws are set out for the following areas: competition, state aids, intellectual, industrial and commercial property, public procurement, standardisation and consumer protection. However, it must be borne in mind that the above-mentioned European Partnership also sets out detailed short-term and mid-term priorities, concerning both changes to legislation and practice.

3.1. Institutional Framework for the Translation of the Acquis

In the last few years the translation process was sporadic and uncoordinated and depended on the interest and financial resources of each ministry of other state administration body. This resulted in lack of uniform translation of the *acquis* both in terms of its quality and translation of common notions in areas falling within the Community competence. Moreover, this approach impeded the creation of a standardized glossary of EU terms.

Significant progress which marked a new phase in the translation process began with the establishment of the Translation and Coordination Department (TCD) within the EU Integration Office which laid foundations of this process. Soon after, at the initiative of this Office, the Govern-

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[17] 2008/213/EC: Council Decision of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC

[18] Article 72, paragraph 3 of the SAA

ment of Serbia at its session of 16 April 2009, adopted the "Information on Preparation of the *Acquis Communautaire* in Serbian Language". The institutional framework of the translation process was set up by this Information, whereby the European Integration Office is the central coordination mechanism, while the Republic Secretariat for Legislation, line ministries and other public administration bodies will carry out legal and expert review. A special Working group composed of members from all institutions involved is in charge of final verification of the translated documents.

3.2. Translation Process – Structure of the Translation Process and Achieved Progress

The European Integration Office represents a key state authority in this matter with the task of coordinating the translation of the European Union priority regulations into Serbian and coordinate of translation of Serbian legislation into English language[19]. However, in order to improve the efficiency of the process all line ministries and the Secretariat for Legislation appointed coordinators within their institutions, responsible to maintain cooperation with the Translation and Coordination Department within the European Integration Office. Bearing in mind the previous sporadic translation of the *acquis* it was agreed by the aforementioned Information that all state authorities are required to submit to the TCD all previously translated *acquis* documents into Serbian, as well as translations of domestic legislation into English language. In order to achieve a desirable level of uniformity, the TCD ensures their proper classification and coordinates legal, expert and language reviews. For this purpose, the European Integration Office prepared two major tools to assist the translators in this process. One of them is the Translation Manual recently revised with the Secretariat for Legislation which offers comprehensive guidelines for translating the *acquis* into the Serbian language. The other significant achievement is the *Evrotermis*, a database of terms that is created in the process of translating legal acts of the European Union into the Serbian language. The initial data entry included around 6600 terms extracted from the multilin-

[19] Article 2 of the Decision of the Government of the Republic of Serbia on the establishment of the European Integration Office ("Official Gazette of RS", No. 75/05 and 63/06).

gual lexicon EUROVOC, although it is expected that some of them will be revised in time. The main advantage of this database is the existence of terms in six languages (Serbian, English, French, German, Italian and Spanish), as well as the fact that each entry can have term equivalents in different languages.

The translation process officially began in November 2008 within the framework of the EU funded project "Translation of the *Acquis* in Serbia" with the mission of translating 16,000 pages of the *acquis*. At the very beginning it involved the translation of the primary legislation which was previously partially translated with the aim of properly translating the foundations of the EU corpus of law and facilitating the translation of all other sources of EU law. This process is still ongoing. However, due to the obligations deriving from the Stabilisation and Association Agreement the European Integration Office, that is, the Translation and Coordination Department, decided to start with the translation of the EU secondary legislation. Although there were concerns that this process will be significantly delayed due to the need to verify the priority legislation to be translated with the line ministries, the overall results so far are very promising. One of the reasons is the fact that the list of EU legislation to be translated is prepared according to priorities established by the National Programme for Integration of the Republic of Serbia with the European Union (NPI)[20], based on the priorities contained in the Stabilisation and Association Agreement and on European Partnership recommendations. No less important is the commitment of the European Integration Office to the overall translation process and its efforts to overcome obstacles. This was evident when the Office prepared an interim list of priorities to be translated within the framework of the aforementioned EU project, although its obligation is only to annually prepare the Action Plan for the translation of the *Acquis Communautaire* in Serbian language[21].

Currently, the priority list includes legislation from the field of competition law, intellectual property law and other related internal market leg-

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[20] http://www.seio.sr.gov.yu

[21] The Action Plan sets out the list of priorities, dynamics of the process and cost forecasting for the upcoming year.

islation. Besides, this initial phase of translation includes legislation from the following fields: justice and home affairs, finance, health, environment, agriculture, telecommunications, culture and labour law. However, the intensive "hyper-production" of new legislation in the EU, as well as the continuous amendments of the legislation in force renders the preparation of priority lists more difficult. An initial pool of translators was chosen through the EU funded project, although the European Integration Office already started to widen the list by organising its own competition. Despite the fact that there were serious concerns as to the quality of translators who will be in charge of translation the current progress demonstrates a good quality of translated texts.

Two other problems should be mentioned. One is the technical preparation of the EU *acquis* in any official language which proves to be a very demanding and time consuming process which may delay the overall translation process. This is partly due to the amount of newly published documents in the Official Journal of the EU and partly due to lack of staff in the European Integration Office. The other problem is the expert proofreading of translated texts which again might slow down the process. Bearing in mind the variety of fields covered by EU law[22] the number of experts capable of revising the translated *acquis* is very limited. Although the aforementioned Information of the Government entrusted line ministries with the task of performing the expert proofreading, this phase of the translation process is still problematic. Not all ministries have staff with the adequate knowledge of at least one official language or with the in-depth knowledge of the EU law which is required for this process.

4. Conclusion

It is evident that the importance of languages in the functioning and development of the European Union cannot be understated; moreover, they is now more in focus than they were a decade ago.

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[22] The accession negotiations cover 35 chapters of the *acquis* which proves the complexity and extensiveness of this endeavour.

Serbia, as an aspiring candidate country, has embarked on a demanding and somewhat overwhelming task of translating the EU *acquis* into Serbian language. The approach to this task taken by Serbian authorities is founded on experiences and good practices of other countries, and some lessons have definitely been learned from the 6-month pilot translation project conducted under the auspices of the Serbia and Montenegro EU Integration Office in 2004.

The results accomplished so far are promising.

However, the project has once again brought attention to an important issue – lack of qualified human resources. The majority of translators currently working on the project have studied languages and have very little knowledge of law and legal language, with all its peculiarities, which often present an obstacle in understanding a legal text written in mother tongue, let alone a foreign language.

The Translation Manual and *Evrotermis* present an excellent but insufficient tool. Legal and expert review of all translated documents are well conceived, so as to ensure both legislative and subject-matter accuracy, but at least in the first phase of the project, have proven to be a somewhat more demanding task then initially anticipated.

However, this can be expected to change – as the project develops, the translators will adopt relevant legal and EU-related terminology. This is why it is of paramount importance that this pool of translators, once formed, be preserved throughout the project, hopefully reinforced by additional qualified staff.

It has also become evident that in Serbia there is a general lack of professionals with the potential to qualify as jurist-linguist, a professional indispensable in EU institutions and agencies, particularly those with legislative powers. Given Serbia's determination to become a member of the EU, foreign language learning should be given a more important role in legal studies.

As already mentioned, the body of law to be translated into Serbian language is ample and complex and this task will take years to be achieved. It is therefore understandable that very little attention has been given so far to the fact that in some municipalities in Serbia minority languages may, under certain conditions, also be declared as the official language. At this

stage of the association process, it is clear that the first priority is the translation of primary and secondary legislation into Serbian language, but once Serbia becomes an EU member state, it will have to take additional steps in order to ensure that EU legislation is accessible to all its citizens in a language they can understand. Given the number and structure of Serbian minorities, at least a part of this problem is already resolved, since the neighbouring countries, from which many of the minorities originate, have already translated EU law, and it is easily accessible on the EU website. However, in the long term, TCD will have to consider finding and training translators for other minority languages, for individual cases and documents.

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THE PRE-ACCESSION ADAPTATION OF THE POLISH LAW TO THE EU LAW

Introductory remarks

Poland is a member of the European Union since May 1, 2004. It has to abide to the obligations connected with the membership, whether they stem from directly or indirectly applicable instruments, directly or indirectly effective ones and so on. That is why the topic of the pre-accession adaptation may seem to be a subject of historical importance only, not deserving special attention more than five years after the accession. That is true only partly. First, for the non-member states taking into consideration the perspective of possible future accession it is still important which instruments are to be adopted before the accession and which could be adopted on its day. Secondly, the appropriate adaptation is a deal made for the future, that is the moment of the accession and the time of membership. On the other hand, any mistake made at the occasion of the pre-accession adaptation may have (and usually has) the tendency to persist and can give rise to the claims of the Commission, the other Member States before the ECJ and the private parties before domestic courts.

What deserves our attention is the fact that (at least in Poland) the process of the adaptation was the subject of more interest before than after the accession. It may be said that the rules of adoption and application of the EU law (especially the EC law) by the Members are more or less obvious. According to art. 249 of the EC Treaty, directives leave the Members

some freedom of action. It can be understood only as an obligation to enact domestic laws necessary for the putting into life the aim (purpose) of the directive. This process is very similar to the adaptation efforts of the pre-accession period. From the perspective of states such as Poland the experiences from that period can benefit us in the present implementation of directives.

According to the same article 249 regulations are directly applicable. The ECJ ruled in the famous Variola judgment that the direct application of a regulation would be jeopardized if the member states were allowed to introduce their contents into their domestic law, unless the regulation itself says otherwise.

It would be more difficult to present one universal rule for decisions but the ones addressed to individual parties are by no means legal acts and the problem of their introduction into domestic law does not emerge. On the other hand other decisions cannot give rise themselves to the obligations of the private parties.

The pre-accession adaptation deals with almost all (though evidently not all) problems faced by the member states. It has to do with some problems which are specific for that period and only that period. That is why it seems to deserve special interest.

The scope of the problem

Perhaps every writer wants the author to be as precise as possible. That is why we can expect that the author dealing with the adaptation describes the process in terms of figures of adaptation acts, their articles and pages, the significance of changes and the real effects of the changes. Unfortunately, the writer dealing with the topic of the pre-accession adaptation would rather not be able to fulfill all these requirements or even any of them. This is due to the volume of the acquis. It is composed of the thousands of acts[1].

[1] The list of these acts and their texts are available on the official web site of the EU: www.europa.eu.

There can be no idea of listing those acts in one short article, not even to mention the question of discussing their contents and the influence on the individual Polish legal acts. That is why we should concentrate on more general aspects of the topic.

The volume of the acquis can serve as the most important justification of the entire process of the pre-accession adaptation. Let us consider whether it would be possible to adopt all the acquis on the very day of the accession. Leaving aside the political dimension of the problem (the influence of the adaptation on the success of the accession negotiations) we cannot oversee two technical questions. The first of them is connected with the choice of the domestic law instruments. Unless we assume that all (even the most technical questions) are to be regulated in the acts of Parliament, we must say, that it would be necessary for some time to pass between the day of the entry into force of an act of the Parliament (a statute) and the issue of detailed by-laws on the basis of that statute (in Poland – regulations of the ministers, the Council of Ministers or the President).

The second reason has to deal with the fact that the first day of membership is sufficiently busy for overburdening it with any unnecessary elements. That first day (or rather the first minute and even second of that day) means the entry into force of the liberalization provisions of the accession treaty. It is also the day of the automatic entry into force in the new member of the EC regulations. The obligations contained in decisions are to be respected since that day. Of course, the same is true with respect to all directives as such. It means that at least the pragmatic approach would dictate to do as much as possible before the accession. That pragmatism has much support in the politics. As will be seen the sufficient level of approximation of the domestic law is a precondition of the success of the accession negotiations.

The basic notion – approximation, harmonization or adaptation?

The attention of the Polish legal literature was attracted by the controversy concerning the basic notion to be used in the analysis. The choice was to be made between such notions as: approximation, harmonization or

adaptation, but also references (negative) were made with respect to the notion "unification". That last one is presented as the creation of a new norm of the Community character replacing the national ones. That term may be perceived as reserved for the effects of the EC regulations[2]. A.Wasilkowski presents unification as a qualified means of the approximation[3]. Even if that qualification were correct in general terms, the unification is reserved for Member States and only for them. That term would be just the least probable for the description of the expected changes of the Polish law in the light of the awaited accession.

Many reasons could be invoked to justify the use of the term "approximation". In fact that term was used in the most important legal act dealing with the topic, i.e. the so-called Europe Agreement. Its articles dealing with the approximation will be discussed later. The very term is by no means foreign to the EC Treaty as such. Both article 94 and 95 of the Treaty refer to it. In fact, however, the approximation is by definition the result of any directive or any other act requiring any norm-creating activity of the Member States. We have already mentioned the unification as the extreme case of approximation. But in any case it is not the most typical example of the process of approximation and in this place we will concentrate on the approximation not amounting to the unification. As will be shown, the activities of the Member States and candidate states are very similar.

Some attempts have been made to delimit the scope of the notion "approximation" vis-ŕ-vis the notion "harmonization". In fact, the latter is used more frequently in common discourse to denote the former. That is why we talk about harmonization directives, harmonization in the field of telecommunication and so on. By definition approximation serves to harmonize and harmonization to approximate. That is why the differentiations made by different authors are hardly convincing, leaving aside the very limited possibility of translating those subtleties from one language into the others. For example for W.Czapliński harmonization can take one

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[2] P.J.Slot, Harmonisation, ELRev., 1996, p.378-397.

[3] A.Wasilkowski, Prawo krajowe – prawo wspólnotowe – prawo międzynarodowe. Zagadnienia wstępne, w: Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym, red. M.Kruk, Warszawa, 1997, p.7-18.

of the three forms, namely: coordination, approximation and unification[4]. It does not seem possible to convince all other writers to that way of understanding the two terms. We can find the term harmonization in the wording of the Treaty as well[5].

The term "adaptation" on the other hand is foreign to the wording of the Treaty. In our opinion it should be treated as a virtue not as a vice, as it takes from us the burden of associations with part and only the part of the EC law implementation/application. What can be perceived as a disadvantage for lawyers is the fact that the term cannot be limited to law as such. As we will see, the evaluation of the adaptation process exceeded to a very high extent That term also indicates the unilateral character of the entire process – it is the candidate state that wants to adapt itself to the requirements of the membership. It cannot require as such any direct equivalent. The indirect one is connected with the perspective of the accession. That is why the topic of the present text is adaptation as such. The approximation is its very important but not the only one component.

The perspective of accession and the necessity of the pre-accession adaptation

There can be no doubt that the adaptation is not the aim in itself. It is a means for achieving the goal of accession. For making such efforts reasonable two elements are necessary. First of all, the non-member state has an interest in showing its readiness to accede. Secondly, the EC/EU may be more or less ready to accept a given state, it may also make it clear that no accession is possible. In the last case the sense of taking upon itself the adaptation efforts seems very doubtful. However, it is hardly possible to get a guarantee of membership. So what is at stake is more a signal that a contract to discuss the future membership, not even mentioning its achievement.

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[4] The expertise prepared for the Warsaw University, not published, cited in: P.Saganek, Wybrane problemy dostosowania prawa polskiego do prawa Unii Europejskiej, in: P.Saganek, T.Skoczny, Wybrane problemy i obszary dostosowania prawa polskiego do prawa Unii Europejskiej, Warsaw, 1999, p.32.

[5] See art.93 of the EC Treaty.

In fact Poland and some other states of Central Europe needed not much time but a reasonable effort to get such signals. The first of them was connected with the EEC-Poland association agreement. The "Polish" one was called the Europe Agreement. It was signed in Brussels on 16 December, 1991. Its commercial part entered into force on March 1, 1992, the agreement as such on 1 April 1994. In fact several signals can be found in this document. The first of them is connected with the name of the agreement. It was quite unique for the countries of the Central Europe. The second element was the preamble. The most important in this respect was the last indent thereof, stating that "the final objective of Poland is to become a member of the Community and that this association in the view of the Parties will help to achieve this objective". Also the article dealing specifically with the approximation of the Polish law to the Community law referred to the perspective of accession. The first sentence of article 68 of the Europe Agreement stated that the approximation of the Polish legislation to that of the Community was the major precondition for Poland's economic integration into the Community. That provision as well as the others to be found in Chapter 3 of Part V of the Europe Agreement "Approximation of laws" will be the subject of more detailed analysis. What is interesting for us here is the fact that the dependence of future membership upon the present (that is pre-accession) adaptation and approximation was emphasized. What can be seen as well is a kind of reticence on the part of the Community as such – the accession seems to be the aim of Poland, the other side not assessing its chances in one way or another. It is not secret that it was difficult to obtain the consent of the Community side for the afore-mentioned fragment of the preamble and the very name of the treaty. The "old" Europe was not very happy with the ambitions of the new potential candidates.

Article 68 and its neighbors entered into force only on 1 April 1994. A few months earlier in 1993 the European Council issued another important (though non-binding from the formal point of view) document, so called Copenhagen Criteria. They indicated the requirements for the new members of the EU. According to them membership requires:

- That the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and protection of minorities,

- The existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union,
- The ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union[6].

The third criterion evidently had to do with the pre-accession adaptation. As we have already said it would not be possible to postpone the entire process to the first day of membership or even the last day preceding it. In fact the readiness to start the entire process was a precondition of the start of negotiations as such. The negotiations were in themselves a new stimulus for a speedier adaptation. In this place let us however concentrate on the above-mentioned legal framework of the approximation process.

The approximation to the Community law according to the Europe Agreement

An entire chapter of the Europe Agreement was devoted to the approximation of laws. The first of its provisions is art.68. According to it "The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavors to ensure that future legislation is compatible with Community one".

Article 69 described in the non-exhaustive way the scope of that approximation. According to it: "The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at their workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment."

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[6] On the basis of Commission Opinion o Poland's Application for Membership of the European Union, DOC/97/16, p.5.

Article 70 provided for the Community technical assistance to Poland for the implementation of the approximation. It had to include: the exchange of experts, the provision of information, organization of seminars, training activities and aid for the translation of Community legislation in the relevant sectors.

These articles should be read as a whole. The first determines the legal foundations of the topic of the approximation, the second helps to clarify its scope, the third one refers to the instruments on the EC side. From the perspective of the scholars engaged in specific projects perhaps the last element is the most important. However, it would be very egoistic to defend such a view in general. Of course, the first element is the most important.

As was just presented, it is composed of two sentences. The first refers to all Polish legislation – present and future. The second sentence refers only to the future Polish legislation. There can be no doubt as to the fact that the last sentence is a source of obligation. There could however remain such a doubt as regards the first sentence. What actually results from it? It is more a declaration than obligation. One of the parties declares that it takes into consideration an obvious fact that the approximation of law is a precondition of membership. In fact, there is no automatic effect in this provision in the sense that the full approximation would give rise to any kind of obligation (even political one) of the Community to accept a candidate as a member. There is no such effect in the sense that the future accession treaty from the theoretical point of view would be able to introduce into the Union a state without the approximated law. But as we have already said that last perspective is much less than theoretical, it seems to be materially impossible. This does not change however the legal evaluation of the first sentence of art.68 of the Europe Agreement. All the same the declaration to be found in that sentence meant that Poland could not make any claims had it been denied accession because of the lack of approximation.

There are no such doubts as regards the second sentence. It is evidently a source of obligation. It is however merely a best endeavors obligation. In no case can we establish in this case an obligation of result. There can be no wonder as regards that element. Because of the

lack of any guarantee of accession we can hardly imagine a candidate state which would be ready to take such a unilateral obligation. As will be shown the very notion of approximation is too general to allow for such an obligation being operative. But it was evidently not in place here.

All the same art.68 sentence 2 was treated seriously by Poland and gave rise to legal instruments which are (generally speaking) still in force.

The implementation of art.68

The implementation of art.68 of the Europe Agreement took the shape of provisions dealing with the scrutiny of draft laws with respect to their conformity with the EU law. The first document on the topic was the resolution 16/94[7] of the Council of Ministers adopted on March 29, 1994, that is a few days before the entry into force of the entire Europe Agreement. It regulated "the additional requirements with respect to governmental drafts of normative acts because of the necessity of their conformity with the EU law". The resolution covered only drafts of normative acts of the Council of Ministers taken at the initiative of the members of that Council, the heads of central state organs and voievodas (representatives of the government in the regions). Every such draft was to be accompanied by the opinion on its conformity with the EU law. It was so-called initial opinion. It was prepared by the initiating organ itself (its employees). The opinion had to identify the scope of the approximation to the EU law resulting from a given draft act, the points on which the draft was not in conformity with that law and the expected time and means of the final adaptation to it.

The second element provided for in the resolution was the final opinion on the EU conformity of the draft law. It is to be prepared by the central organ for the European integration. At the moment of the adoption of the resolution it was the Governmental Agent for the European Integration and Foreign Assistance. Later his powers were over-

[7] Mon. Pol. 1994, No 23, pos. 188.

taken by the president of the Committee of the European Integration. As that office is held by the Prime Minister himself, in fact the opinions were signed by the official dealing specifically with the Office of the Committee. Nowadays it is the right and duty of the Secretary of the Office of the Committee for the European Integration.

The resolution in fact covered only a part of normative acts. But evidently it was the most important part. The government is the most frequent initiator of the legislative process, all draft statutes (acts of Parliament) prepared by the government were covered by the above-mentioned procedures. They did not apply to acts initiated by other organs – that is the President, the Senate and the group of the members of Parliament. That loophole was to some extent filled by the changes in the Rules of Procedure of the Parliament (Sejm) from 1997[8].

By that time the resolution 16/94 was no longer in force. It was repealed and its provisions (with slight changes) were overtaken by the Rules of Procedure of the Council of Ministers[9]. Although the rules change as such and successive acts are adopted, the afore-mentioned rules on scrutiny of draft acts are consequently regulated into the successive versions of the rules. The accession to the EU did not change anything in that respect.

The above-mentioned procedures were concerned with the adoption of new acts. They evidently corresponded to the second sentence of article 68. It is worth mentioning however that already in 1995 the Council of Ministers adopted resolution 133 on the adaptation of the existing laws to the EU law. It was the reaction for the so called White Paper. It deserves our attention as well as other acts on the adaptation.

Successive acts on the approximation of the law.

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[8] Mon.Pol. 1997, No 58, pos.558. On that topic: C.Mik, Problemy dostosowania polskiego systemu prawnego do europejskiego prawa wspólnotowego (w kontekście przyszłego członkowstwa Polski w Unii Europejskiej), Przegląd Legislacyjny 1-2/1998, p.74.

[9] Resolution 13 of the Council of Minister of 25 February 1997, Mon. Pol. 15, pos. 144.

White Paper

The Europe Agreement was fortunately not the last act to help us understand the specificity of the pre-accession adaptation and approximation. The other documents were non-binding ones. The first of them is the so-called White Paper. Its official name was: "White Paper: Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union"[10]. As the document stated itself: "it formed part of the pre-accession strategy for the associated countries of central and eastern Europe which was adopted by the Essen European Council in December 1994"[11]. It was to give some guidance for the then candidate states and states which were about to become candidates soon[12]. Evidently that document will be of interest for the present and future candidate states.

The idea of the document was not to list all acts of the EU law. It was limited to some part of it. What is interesting, it related to the area which as such is limited to member states only, that is the internal market. Candidate state cannot count on participation in it without becoming a member or concluding a special agreement like EEA. This area is however strictly connected with harmonization activities which could be said to give rise to the entire branches of the EC policy and law. Their size, complexity and costs make it reasonable to take adaptation activities with respect to them before the accession.

The White Paper as such was accompanied by an Annex of a few hundred pages, listing the EU acts in 23 chapters. The basic idea was to make it easier for the candidate countries to take rational steps with respect to the approximation. The White Paper divided the acts in two groups: Ist stage measures and IInd stage measures. In some cases also the IIIrd state measures were provided for. It was just a suggestion, but a very useful one. Ist stage measures included first of all basic acts, IInd stage acts – implementing acts. Sometimes the sequence reflected the sequence of the adop-

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[10] COM (95) 163 final, document from 3 May, 1995.

[11] White Paper, p.2.

[12] Page 6 of the document.

tion of the EU measures, 1st generation acts finding their place in Ist stage acts, next generations acts – in the IInd or IIIrd stage acts.

Another element emphasized in the White Paper was the insufficiency of the technical approximation of the legal texts. What is at least equally important is the creation of institutions necessary for the application of the EC law. As the White Paper reads: "a merely formal transposition of legislation will not be enough to achieve the desired economic impact or to ensure that the internal market functions effectively after further enlargement. Accordingly equal importance is attached to the establishment of adequate structures for implementation and enforcement which may be the more difficult task"[13].

That is the reason why we opted for the term "adaptation" instead of term "approximation" as the subject of this text. In this context it is worth to cite another fragment of the White Paper, according to which: "In endorsing the proposal for a White Paper on preparing the CEECs for integration into the internal market the European Council recognized that this involves more than the approximation of legislation"[14]. This conclusion was even more obvious in the light of the next documents.

National Strategy of Integration

National Strategy of Integration was a governmental document adopted in January 1997. It is more a political than a legal document. It is however important from our perspective as well. It sets the integration with the EU as a strategic objective of Poland. It also puts on the table the question of the costs of integration. What is the most important for us is the question of legal adaptation to the requirements of membership. It is one of the chapters of the Strategy. It says that: "The aim of the adaptation of the Polish law to the EU law is to eliminate barriers in trade between Poland and the European Union and the creation of a coherent set of rules on which that trade can be developed. For the economy the most important are the norms regulating the legal situation and functioning economic actors and

[13] White Paper, p.2.

[14] White Paper, p. 4.

the norms on economic transactions." The Strategy referred in more detail to those two groups of norms. Evidently they could not be said to exhaust the topic of legal adaptation/approximation or even a substantial part thereof. References to legal measures were however to be found in the chapters devoted to economic adaptation, as well as justice and home affairs. Specially the chapter on economic adaptation included subchapters on: four freedoms, competition policy, protection of consumers, protection of environment, structural policy, macroeconomic policy and agricultural policy. That context allowed to perceive law as an important component of a more broad topic of adaptation to the requirements of membership.

Opinion on the Polish application for membership

The opinion on the Polish application for membership (as well as the parallel opinions on the applications of 9 other states) is sometimes referred to as Agenda 2000. In fact the opinion was adopted in 1997 as an attachment to that famous document dealing with the proposal of the fundamental changes of the EU law and policy (specially agricultural policy). So it is better to refer to it as to the Opinion (or Avis) and not as to the Agenda 2000.

As is well-known the Opinion was positive in its tenor. It is interesting for us not in whole but rather from the perspective of the process of adaptation and approximation. The Opinion had to refer to all three Copenhagen criteria. As was said the third of them seemed to the most strictly connected with law and legal approximation. Even if this was true, the connection did not mean the preponderance of the legal criterion or the subordination of all others toward the legal one. This is clear from the very range of nine topics to which the Opinion referred while discussing the third criterion. They were as follows: internal market without borders, innovation, economic and tax matters, sector policies, coherence of the socio-economic development, quality of life and natural environment, justice and home affairs, external policy and financial questions. Every of these titles is connected with law, but none of them is referred to as "the law on …". It is worth mentioning that the topics discussed when assessing the ability of Poland to the third Copenhagen criterion included i.a. the

number of the users of internet or pc. computers. Such matters are to a high extent distinct from the law as such. They have more to do with the level of civilization of a given country, on which the law has some influence but which as such cannot be decreed. The role of law not being overestimated, there could however be no doubt that the level of approximation was the subject to interest of the Commission while formulating the Opinion. That is why it made some remarks on the steps to be taken by Poland. They included: the introduction of the acquis communautaire in the field of the free movement of goods, further liberalization of the free movement of capital, the introduction of the requirements on the public aid, the adoption of the acquis in the field of telecommunications, the adaptation to the EU standards of the Polish audiovisual law, the tax law (VAT), public procurement and data protection as well as the adoption of veterinary and phitosanitary requirements.

That list could not be treated as a statement that no other areas can be problematic. If the opinion were to be a screening of the entire Polish law vis-ŕ-vis the entire EU law it would need a few thousand pages. Such a complex screening would be to a high extent a waste of time at that moment. All the same it was important as a signal of quite a considerable set of problems but also as a point of reference for the aid which Poland and other states aspiring to the EU membership were offered within the framework of the so-called Partnership for Membership.

Partnership for Membership and response to it

Partnership for Membership was the first after the Europe Agreement binding document connected with the Poland's way to the EU. It was based on the Council Regulation 622/98[15] based on art.235 EC Treaty (now art.308). It dealt with aid offered within the pre-accession strategy to the candidate countries, specially through the establishment of the Partnerships for Membership. The use of plural form was in no case incidental, as partnerships were to be made separately for individual candidate states. They were based on Council decisions. The "Polish" decision[16] was adopt-

[15] OJ 1995 L 85/1.

[16] Decision 98/260, OJ 1998 L 121/6.

ed (as well as eight others) on March 30, 1998. The partnership identified short-term and medium-term priorities. The first included economic reforms, restructuring of the industry, the strengthening of the institutional and administrative potential, internal market, justice and home affairs, agriculture and protection of environment. The second ones included: political criteria, economic policy, the strengthening of the institutional and administrative potential, internal market, justice and home affairs, agriculture, transportation, employment and social matters, protection of environment, regional and cohesion policy. As could be seen four elements were included on both the lists. They are the strengthening of the institutional and administrative potential, internal market, justice and home affairs, agriculture and protection of environment. All of them are strongly connected with law, though not necessarily the technical approximation of the national law to the EU law. It relates first of all to the strengthening of the institutional and administrative potential. It is the second element (the first one being technical approximation) mentioned in the White Paper as equally important element of adaptation to the EU standards. As was already stated, internal market is something accessible only for the members. But at the same time it is a reference not even to a single branch of law but the entire complex of such branches and policies.

It is true that the Partnership was not in itself a timetable of adaptation of laws. In is respect the remark made by us in the previous sub-chapter is fully applicable. The priorities evidently exceeded what would be the technical adaptation to the EU law. The idea of the Partnership was to define broader priority areas and make it possible for the European Community to help candidate states in adaptation efforts. The source of financing was the PHARE program. In fact however, the Partnership required an answer on the part of the candidate states. They took their form in the National Plans of Preparation for Membership. The Polish National Plan was adopted in 1998. It identified 32 areas, detailed tasks and expenditures connected with them. The adaptation to the EU law could be perceived as one of the most important elements connected with the implementation of the Plan. In no case can it however be called the only or even the most important one. Such a legalistic view would not be just. It is evidently not necessary for the proper understanding of the law adaptation and approximation in the pre-accession period.

It could give rise to no doubt during the negotiations. A candidate state had to make decision on which transition periods it can realistically count. Their range gave the answer as to the required adaptation resulting from acts which had to be adopted before the accession. What remained to be decided was the exact date of the adoption of the approximation laws (e.g. one or two years before the accession) and their entry into force (on the day of accession or before). That is why the topic requires more analytical approach.

The theory of adaptation

Under the theory of adaptation we can understand the more general remarks on the process, as opposed to the case-study of one branch of the EC law, one or a few EC acts or one or several Polish acts. Such case–studies are very necessary but rather in order to check the level of adaptation and search for the deficiencies than in order to present the successful processes one by one. All the same the present text is not designed as a case-study. In general however we must conclude that the entire process must be qualified as rather successful. The actual lack of cases against Poland before the ECJ during the first two years after the accession is a rather good record. Though now the number of cases brought by the Commission under art.226 of the EC Treaty is continuously growing[17] their number is virtually in no proportion to the size of the acquis. All the same there is always a grey number of deficiencies, some of which can emerge in the preliminary rulings of the ECJ, it is also the task for the doctrine to look for them. Such analysis have the sense either after the accession or at least after the moment in which the candidate state perceives its law as adapted to the EC law. The candidate state has always such a choice. The only limits are the very date of accession and the influence upon the negotiating process. The last limit is however more of a political than legal character. That is why the theory on the pre-accession adaptation is so necessary.

As was said, the theory of adaptation seems to be the most interesting aspect of the problem. The first question which should be asked is if there are maters with respect to which the pre-cession adaptation is excluded.

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[17] The list of cases available on the Web site www.curia.eu.

Let us consider two elements. The first is the directive on the sale outside the premises of the seller. The second is the free movement of workers as such. We cannot oversee the difference between them. The candidate state is as a rule expected to adopt law on the sale outside the premises of the seller. In that respect its situation is quite similar to the one of the member state. As regards the free movement of workers the situation is quite different. The candidate state cannot expect the freedom of movement of its workers to the EU. Of course, it can open its own market for the workers from the EU but can the EU demand it to do so. In my opinion it cannot make such a demand and we must justly say that it did not try to make such demands with respect to Poland and other candidate states. The same is true with respect to other freedoms (of goods, of establishment, services and capital). Interestingly enough the provisions on these freedoms found their place in the Europe Agreements. That is why it would be reasonable to propose the differentiation between the instruments of harmonization and liberalization. The first would be apt for pre-accession approximation, the second would not. Their scope would result only from the agreements – that is the association and the accession agreements.

The second differentiation is connected with the differences between directives and regulations. As was already said, the first require action of the member states, the second do not, or to be exact - implementation activities are as a rule excluded and perceived as a violation of law itself. It would be reasonable to expect that the same or at list similar situation should apply with respect to the candidates

In that regard we can assume the following conclusion: harmonization directives as a rule require pre-accession approximation; on the other hand - liberalization instruments and regulations do not require it.

This perspective would however be mistaken in more than one respect. Firstly, there are some regulations which require implementation as such. Secondly there are some which do not require implementation but all the same need some form of legislative activity. Thirdly, and what is the most important the regulations require to be applied since the first day of membership. The institutional, organizational and procedural framework must at least be adopted before the accession. We have already referred to that topic while discussing the White Paper. On the other hand, the border

between the liberalization and the harmonization is not easy to delimit. The harmonization in the EC is not the aim in itself. It is (at least from the theoretical point if view) a supplement of the four freedoms of the internal market.

That is why the previous statement is true with respect to what should be adopted (as a rule). It is not the last word as regards what does not need adaptation.

This point of departure is however very useful. In this context we can speak about ideal (model) areas of approximation. In that respect the list in the above-cited article 69 of the Europe Agreement was very instructive. As it included: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at their workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment, only the customs law, rules on competition and transport did not fit into the characteristics of the model area for the pre-accession adaptation. All the same if we have a look at the documents on the Polish way to the EU we can see the intention not to leave aside areas which are evidently based on regulations. What was the reason? In our opinion the reason was the necessity of getting experience before the accession with using similar or identical provisions though certainly not the same ones from the formal point of view. The decision in a given case is not an easy one. Let us consider two examples: regulations on customs law and regulations on agricultural markets. Perhaps it would be very useful to get pre-accession experience on both of them. However, the actual cost of adopting copies of the EC agricultural regulations could be so great to make it actually impossible to take such efforts. In fact the day of the entry into the EU would mean the end of application of such "copies". As can be seen in that situation we discuss more on the cost than on the law as such.

All the same the process of adaptation is one of the most important legal reforms of the last two centuries.

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ESTONIA'S INTEGRATION IN THE EUROPEAN UNION (EU) - FROM ACCESSION TO THE EU TO PARTICIPATION IN THE BALTIC SEA STRATEGY

I. Introduction – Estonia, the EU membership and the Baltic Sea Strategy

1. Estonia – a brief overview

To large extent Estonia's current political and economic state can be considered as a result of its' geographic position, demographic structure and especially its history. After centuries of Danish, Swedish, German, and Russian rule, Estonia obtained independence in 1918. After a short German occupation Estonia was forcibly incorporated into the USSR in 1940 until it regained its freedom in 1991, with the collapse of the Soviet Union. Even though the constant occupation by foreign powers has also caused some reluctance to joining international organisations which seemed to limit the newly gained independence, Estonia soon started negotiating international treaties, to promote economic and political integration in Western Europe. In the spring of 2004 it joined NATO and the EU.

Estonia is located in North-Eastern Europe, bordering the Baltic Sea and Gulf of Finland, between Latvia and Russia with a total of 45,228 sq km. In total it has 633 km land boundaries of which 343 km border with Latvia and 290 km with Russia.

The Estonian population amounts to around 1,3 million inhabitants with a decreasing tendency. As a former Soviet Republic it has different ethnic groups among which Estonians with 67.9% form the biggest group followed by Russians (25.6%). This has an impact on the language so that 67.3% speak Estonian as the official language and 29.7% Russian.[1]

2. Estonia's accession to the EU

The accession process set strict goals which required serious efforts of Estonia. A particularly demanding challenge was the reform of the economy that in the years following independence was in a deep crisis with high inflation rates. Furthermore, accession requirements that implied the translation and adoption of the *acquis communitaires* with a volume of over 80.000 pages[2] imposed serious difficulties to a small[3] country with limited human and financial resources.

However, Estonia succeeded to meet the Copenhagen criteria and was subsequently - along with 9 other candidate countries - at the Copenhagen summit meeting in December 2002 admitted to conclude the accession negotiations. The nations signed the Accession Treaty with the European Union in April 2003. On 14 September 2003 a referendum was held that had a turnout of 64.02% in which 66.84% of the voters supported EU accession. On May 1st, 2004, Estonia became a member of the EU.

3. Estonia today and the EU membership

Independence, the new liberal international orientation and the accession process has strongly influenced Estonia. Even though it has become a member of numerous international organisations, these have not ceased to have a major impact on Estonia's politics after fulfilling the accession criteria.

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[1] The information is based on the data of the CIA-world-factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/en.html .

[2] Unofficial number obtained by a Hungarian linguist lawyer; the numbers vary between 80.000 (2003) and around 160.000 pages in 2009.

[3] The number of the Estonian-speaking population is estimated to be around 1 million.

3.1 Estonia's economy

The accession process has pushed and favoured Estonia's development. Especially when it comes to its economy, it has made constant progress. Directly after gaining independence the aspiration of Estonia to integrate in western European markets has led to drastic political reforms which have resulted in a modern market-based economy and one of the highest per capita income levels in Central and Eastern Europe. Estonia's governments have set up a free market economy giving high incentives for business and foreign investments. The priority has been to sustain high growth rates which succeeded with an average of around 8% per year from 2003 to 2007. Apart from trade in wood products the economy benefits from strong electronics and telecommunications sectors and close trade ties with Finland, Sweden, and Germany. Inspired by the aims to accede to the EU and introducing the Euro the governments have pursued relatively sound fiscal policies, resulting in balanced budgets and low public debt in order to fulfil the convergence criteria. Rapid growth however, has made it difficult to keep inflation and large current-account deficits from increasing and put downward pressure on the Estonian crown (EEK). For that reason the goal to adopt the Euro had repeatedly been postponed. During the last years, Estonia's economy slowed considerably down and fell into recession in mid 2008, which can primarily be regarded as a result of an investment and consumption slump. Today, at the end of 2009 it seems to have stabilised and start to recover from the economic crisis.

3.2 Estonia, energy and the environment

Besides the economic problems that have partially been caused by the financial crisis, Estonia has to face challenges in energy and environment-related questions. Important energy sources are the oil-shale burning power plants in the northeast that highly pollute the air with sulfur dioxide. Even though the amount of pollutants emitted to the air have fallen steadily and the emissions of 2000 were 80% less than in 1980, Estonia still is reported to have one of the biggest ecological footprints per capita, ranking ninth in the world.

3.3 Estonia and compliance with EU law

Today, five years after the accession, Estonia leaves the impression of being a model student: its EU-politics are marked with a high degree of EU-friendliness and will for cooperation. Also the jurisprudence of the constitutional chamber of the Riigikohus, the (highest) state-court can be described as one of the EU-friendliest among the national constitutional/highest court positions in the EU.[4]

This positive impression should not hide the fact that, especially during the beginning of it's membership the working load was immense, and only few officials were sufficiently trained for appropriately dealing with EU law and politics. Nevertheless, with the time Estonia's staff has become proficient with the new system and processes as well as with the difficulties of international negotiations in foreign languages which were not used during the Soviet time. Furthermore, the first five years of EU membership gave the occasion to correct mistakes that had been made under the pressure and constraint of a quick adoption of the *acquis*.

Notwithstanding these improvements one notes that there were diverse infringement procedures initiated against Estonia that finally could comply with EC law and thus avoided a decision of the ECJ.[5] In most of the cases this can be regarded as a result of the volume and complexity of EU-law rather than lack of willingness to comply with its' obligations.

3.4 Résumé: Estonia after five years in the EU

Eventually, -even though hit hard by the economic crisis - Estonia is considered as one of the more successful countries among the latest accession states.

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[4] See: http://home.lanet.lv/~tschmit1/Veranstaltungen/Symposium_16.11.2007.htm; http://lehrstuhl.jura.uni-goettingen.de/tschmitz/Lehre/Jurisprudence-on-integration-2.htm .

[5] http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=estonia&domaine=&mots=&resmax=100 see database of the ECJ, http://curia.europa.eu

Still there remain problems and challenges which partially are rooted in Estonia's history, mentality and geographical location. Yet there are studies that have revealed that Estonia is not alone with some of these problems but shares them with other countries neighbouring the Baltic Sea. The studies have identified several key issues that form part of an increasingly slow progress in integration and development in this macro-region. After a process of international cooperation on different levels these results and proposals have been integrated and communicated in an EU-strategy, the so called Baltic Sea Strategy.

II. The Baltic Sea Strategy

After several conferences[6] on the concept and implementation, in June 2009 the European Commission adopted a communication[7] containing the main points of the Baltic Sea Strategy which was finally adopted by the European Council , on 29 and 30 October 2009.[8]

1. The Background

While at the time of the creation of the European Communities (EC) Schleswig-Holstein in West-Germany was the only region of an EC-member state that had a direct access to the Baltic Sea, today this situation has entirely changed. After seven enlargements of the EC/EU, Russia is the only of the nine countries bordering the Baltic Sea which is no EU member state. Consequently, the Baltic Sea has virtually become an EU-inland sea and brings together Sweden, Denmark, Estonia, Finland, Germany, Latvia, Lithuania and Poland thus making it possible to tackle specific challenges in the area under an EU-framework.

2. Challenges, objectives and framework

These include the deteriorating state of the Baltic Sea, poor transport links, barriers to trade and energy supply concerns. Even though

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[6] http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1430&format=HTML&aged=0&language=DE&guiLanguage=en

[7] http://ec.europa.eu/regional_policy/sources/docoffic/official/communic/baltic/com_baltic_en.pdf

[8] http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf

various efforts have been undertaken over the years these problems have been exacerbated by a lack of effective coordination.

2.1 Challenges

The Baltic Sea Region is facing several challenges of different priority. The states have become aware of the environmental problems, especially that the state of the sea is deteriorating due to excessive discharges of nitrates and phosphates and threaten biodiversity. Furthermore, studies have revealed that the Baltic Sea Region comprises around 106 mil. Citizens, i.e. 21 % of the EU but that the GDP only amount to 16 %. This leads to the aim to increase economic activities implying the need to be better inter-connect the economies but also to extend their trade relations since statistics indicate an over-reliance on trade with direct neighbours.

The Baltic region is hampered by long distances, internally and with the rest of Europe: it takes 36 hours by train to reach Tallinn from Warsaw. Another concern is the isolation of Lithuania, Latvia and Estonia in terms of energy supplies. Finally, with the increasing number of oil tankers using the sea as a route for transportation, the threat of accidents is increasing.

One additional particularity lies in the fact that many of the challenges can only be met by good cooperation with Russia. Consequently, instruments for cooperation on this level have to be identified, build up and integrated in the Baltic Sea Strategy.

2.2 Objectives

Various stakeholders of the region discussed the challenges in several consultation rounds in which state actors as well as non-state actors participated and drafted the objectives of a future strategy.[9] In the end, the Baltic Sea Strategy comprises the presumably most important points of a

[9] The Member States requested the Commission to prepare an EU strategy for the Baltic Sea Region in December 2007. Today's proposal is the result of a public online consultation launched by the Commission in November 2008 (IP/08/1619) and of numerous public debates which took place in the eight Member States involved. The strategy is one of the main priorities of the Swedish EU Presidency in the second half of 2009. http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1326&format=HTML&aged=0&language=EN&guiLanguage=en

high number of proposals to tackle the most imminent problems of this region. As a result, the priorities[10] aim to make the Baltic Sea Region

- Environmentally sustainable;
- Prosperous (especially by promoting innovation in small and medium enterprises);
- Accessible and attractive (in particular by improving transport links);
- Safe and secure.

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[10] More in detail the Baltic Sea Strategy comprises the following aspects as contained in the European Commission communication from 6 June 2009, COM(2009) 248 final, pp. 25 http://ec.europa.eu/regional_policy/sources/docoffic/official/communic/baltic/com_baltic_en.pdf :

I. To Make The Baltic Sea Region An Environmentally Sustainable Place
   1. To reduce nutrient inputs to the sea to acceptable levels
   2. To preserve natural zones and biodiversity, including fisheries
   3. To reduce the use and impact of hazardous substances
   4. To become a model region for clean shipping
   5. To mitigate and adapt to climate change

II. To Make The Baltic Sea Region A Prosperous Place
   6. To remove hindrances to the internal market in the Baltic Sea Region including to improve cooperation in the customs and tax area
   7. To exploit the full potential of the region in research and innovation
   8. Implementing the Small Business Act: to promote entrepreneurship, strengthen SMEs and increase the efficient use of human resources
   9. To reinforce sustainability of agriculture, forestry and fisheries

III. To Make The Baltic Sea Region An Accessible And Attractive Place
   10. To improve the access to, and the efficiency and security of the energy markets
   11. To improve internal and external transport links
   12. To maintain and reinforce attractiveness of the Baltic Sea Region in particular through education, tourism and health

IV. To Make The Baltic Sea Region A Safe And Secure Place
   13. To become a leading region in maritime safety and security
   14. To reinforce protection from major emergencies at sea and on land
   15 To decrease the volume of, and harm done by, cross border crime

2.3 Framework - why the EU?

Even though it appears to be exaggerated to speak of a *spaghetti bowl*[11] the term describes that during the last decades numerous initiatives aimed to improve the relations between the Baltic Sea States. In the end this labyrinth of institutionalised approaches[12] has produced a high number of reports and action plans with a very limited effect. It thus became obvious that there was a strong need for better coordination of the actors involved. The changed circumstances after the EU enlargements and the fact that many of the current problems of this region lie within EU policy fields suggest that the EU, i.e. the Commission takes a lead in this process. The Commission has relatively long experience with the area, since existing EU Structural Funds programmes in the region provide a good basis to strengthen cooperation.

3. Implementation of the strategy

While the challenges and objectives of the Baltic Sea Strategy relatively soon became clear, the second step for the implementation, supervision and financing was more cumbersome. Due to the variety of around 670 proposals in the preparatory phase of the Baltic Sea Strategy the political guidance (governance) is not entirely structured. So far the Strategy comprises an action plan, the institutional issues, the Northern dimension as a plan to include Russia and the funding.[13]

The action plan comprises 80 flagship projects in 15 priority areas, each under the responsibility of a "lead country" or other partners (such as federations of farmers, Innovation Centres, Nordic Council of Ministers etc).[14] In some fields the approach may be described by a division of labour

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[11] The term is used to describe the high number of links of trade agreements that make it difficult to see what trade relations exist between which countries and estimate what they contain.

[12] See for instance the list at: http://ec.europa.eu/regional_policy/cooperation/baltic/pdf/websites.pdf .

[13] Schymik/Krumrey, EU-Strategie für den Ostseeraum, Kerneuropa in der neördlichen Peripherie?, Diskussionspapier der FG 1 2009/05, März 2009, pp. 10, www.swp-berlin.org .

[14] See above footnote 9.

between the participating countries and regions whereas other fields require much more efforts to guarantee the reciprocal benefits. All in all, countries have to cooperate, share results and consult each other. This will be particularly challenging when it comes to the common cooperation with Russia, a context in which it seems to be recommendable to use existing cooperation initiatives, notably the *Northern Dimension*.[15]

3.1 Projects

To meet the four priorities the strategy takes the form of a communication and an action plan with a list of 80 flagship projects, of which some have already been launched.

Examples:

In order to improve the ecological state of the Baltic Sea the member states agreed to remove phosphates in detergent to reduce nutrients in the sea. Concerning the problematic situation of the energy market, the participating states drafted a "Baltic Energy Market Interconnection Plan" which aims to better connect Latvia, Lithuania and Estonia to European networks. Regarding the aim to make the region more accessible and attractive, the project 'Rail Baltica' plans to connect Warsaw to Tallinn by 2013 with a target speed of 120 km per hour. Furthermore, for making the region more attractive and prosperous, a fund for innovation and research will be set-up, using national and private funding to tailor research activities to the specific strengths of the region. Partially for improving the conditions to remove customs procedures, partially to enhance security, the action plan also comprises the creation of a joint maritime surveillance system.

3.2 Funding

An important issue for the implementation and the success of the Baltic Sea Strategy lies in the availability of sufficient financial means. For the Baltic Sea Strategy this is a particularly delicate question as it only

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[15] See the European Commission's website: http://ec.europa.eu/external_relations/north_dim/index_en.htm .

implies 8 of the 27 member states which makes it difficult to achieve the consent of the EU member states that do not participate and benefit from this strategy.

Even though the solution was in fact relatively simple it seems to be promising. The Baltic Sea Strategy does not grant new financial means but aims at using the existing funds in a more efficient way. Since this budget plan does not interfere with the interests of other member states they agreed to the strategy.

This leads to the result that between 2007 and 2013, the Baltic Sea Region will benefit from more than 50 billion Euros of investment support under the Cohesion Policy and other EU funding. The sum includes 27 billion Euros for improved accessibility, nearly 10 billion Euros for the environment, 6.7 billion Euros for competitiveness and 697 million Euros for security and risk prevention.[16]

4. The Baltic Sea Strategy as a new model for regional cooperation

The Baltic Sea Strategy is the first initiative of this kind with which the EU addresses a "macro-region". The reasoning that led to this concept is that the particularities of the Baltic Sea Region demand a specific approach. Since it has been considered to be cumbersome and time-consuming to include all EU member states in the negotiations they were mainly held among the participating ones. Since the Baltic Sea Strategy is a first of a kind strategy, it could inspire similar approaches in areas such as the Mediterranean or Danube basin and might thus be beneficial for other member states.[17] Consequently, the debate on a macro-regional approach forms part of a wider reflection on the future EU Cohesion Policy after 2013. In case of success, the Baltic Sea Strategy may serve as a model for the question whether macro-regions could become an important medium for programming and delivering EU funding.

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[16] IP/09/1326 - Brussels, 16 September 2009

[17] The European Council has asked the Commission to outline plans for this by the end of 2010. IP/09/893).

III. The Baltic Sea Strategy and Estonia

Having identified the four objectives for the Baltic Sea Strategy and drafted projects and a financial plan, the participating actors also had to solve the question of the practical problems of the strategies' implementation. In this regard it was considered to be the most promising approach that participating member states take the lead in the coordination and management of one or more of the issues. Estonia has committed itself to engage in the objective to make the Baltic Sea Region a more prosperous region.

1. Estonia's lead - removing hindrances to the internal market in the Baltic Sea Region

Various analyses have concluded that trade in the Baltic Sea Region needs to be improved and preparatory studies have identified areas that need to be enhanced. In order to achieve this aim, Estonia has committed itself to take the lead for achieving improvements in internal market trade. Despite the fact that all the Baltic Sea Region is almost entirely a part of the internal market, obstacles to trade in goods and services still exist. This is especially delicate as - with the exception of Germany - the markets in the Baltic Sea Region are relatively small. For their size they heavily depend on trade in the region in order to maintain their competitiveness which explains that the Baltic Sea Region is the dominant foreign trade area for the countries. Here the studies observed that the level of trade between the Baltic Sea member states is increasing but at a slower pace than it was expected. Analyses see this as a sign that the integration of the markets is not progressing as it should and especially SMEs face difficulties to benefit optimally from the single market and successfully expand their commercial activities in this region.

Some reasons for the obstacles to the trade in goods carried by sea is also linked to the traditional practice in international trade and law of the seas. Maritime transports are considered to leave the customs territory of the European Community when the ships leave the territorial waters and re-enter in the EU customs territory at the port of arrival. This practice imposes costly and time consuming modalities forming considerable obstacles to trade that need to be reduced or even removed. This situation

however can be improved if coastal authorities apply new technologies for tracking vessels. Concerning the systematic formalities applied to Internal Market goods, the Commission has already taken steps by adopting a Communication on a European maritime transport space without barriers which aims at eliminating or reducing administrative procedures for goods and vessels sailing between EU ports.

A further aspect concerns trade relations to third countries among which Russia as a Baltic Sea neighbour of a considerable market size and within traditional trading routes holds a prominent position. Also in the field of external trade it is important to reduce administrative and other non-tariff barriers to trade in order to facilitate cross-border movement of goods. Possible improvements concern for instance customs procedures and infrastructure.

An additional aspect concerns the need to develop proposals for strengthening international tax cooperation, and to reinforce efforts to combat cross-border tax fraud and evasion.

In sum, the challenge for Estonia's lead of this issue is to find ways to improve conditions to trade and investment to stimulate growth.

2. The main problems

Estonia's task is to identify the relevant barriers to trade and propose solutions to remove them. Frequently, the insufficient trade relations in the Baltic Sea Region result from administrative burdens posed by national legislation. In addition, EU directives are implemented in a non-transparent way, labour markets are strongly regulated and tax incentives are weak. All in all this leads to a lack of competition and results to relatively high price levels.

Strategies to achieve this aim include better information of citizens and businesses to use and enforce in practice their Single Market rights. If these target groups are able to understand the relevant norms and principles, obstacles to trade will be quicker spotted and can be removed.

One frequent problem in regard to external trade concerns long delays at the EU border with Russia which cause high additional costs. The main reason for these difficulties is the growth of EU-Russia trade and slow control procedures that need improvement. Consequently the plan foresees

measures to strengthen cooperation between customs authorities of the EU Member States with Russia and to remove procedural, human resource and infrastructural bottlenecks.

Since the current crisis has amplified the problems in trade relations, the issues of the Baltic Sea Strategy have become even more prominent. Consequently, it has become more important to stimulate further integration of the markets in the Baltic Sea Region and establishing a level playing field for economic relations, trade and investment.

IV. Conclusion

Having become one of the eight EU Member States that are neighbouring the Baltic Sea, Estonia encounters new opportunities to benefit from cooperation with the other member states in this region. On the other hand it also needs to commit itself and assume responsibility to actively participate in this process. Since the Baltic Sea States are confronted with similar problems which could not be solved by previous initiatives, the new approach with the Baltic Sea Strategy under a EU framework promises more commitment by participating states.

Notwithstanding these positive aspects one has to notice that Baltic Sea Strategy has several weaknesses. Firstly, it suffers from the fact that not all EU member states are involved. This will give lower impact as it is improbable that there will be additional financial means. Secondly, the agenda is not legally binding which bears the risk that the positions taken will only be regarded as political statements that lack the necessary commitment for significant changes. Thirdly, the success of the Baltic Sea Strategy depends to a large extent on the participation of Russia. Especially this aspect is difficult to predict since the relations between some of the Baltic Sea States and Russia are sometimes delicate. Furthermore, political relations to Russia have frequently shown to be subject to rapid and considerable changes which might affect the success of the strategy.

Despite these concerns the Baltic Sea Strategy promises to give better results than previously existing projects and organisations. Even if it does not solve the problems targeted it will lead to a deeper integration in this region which can also be regarded as a success.

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LEGAL ASPECT OF THE EUROPEAN INTEGRATION OF SLOVAKIA: FROM EC ASSOCIATION TO EU MEMBERSHIP

Slovakia implemented many changes both legal and political in order to complete successfully its way to the EU and then to be a real part of the EU. This article outlines the main ones from the general point of view as well as from the point of view of the individual policy sector. The emphasis is put on the legal solutions as these enabled the integration of country with a different history and state system into the family of modern European countries. The information provided can be helpful as a best practice to countries which are on their way to the EU as well as a basis for the comparative studies concerning New Member States.

Introduction

The article is composed of two parts.

In the first part the overview of the EU association and accession process and the EU membership with emphasis on legal solutions is described.

In the second part the case study is offered - approximation of Competition law, particularly the integration process in the Antimonopoly Office of the Slovak Republic.

Both parts are closed with the brief comment on the situation after accession in 2004.

Slovak Republic came into existence in 1993 (after Czechoslovakia peacefully split into 2 states). Already in 1989 the Agreement on trade with industrial products between Czechoslovakia and the European Community was signed and in 1991 the Association Agreement was signed.

In 1995 the Association Agreement between Slovakia and the EC entered into force (signed in 1993). The EC signed this kind of agreement with the Central and Eastern European countries in order to support their transformation process and to indicate possible future membership.

In 1995 the Slovak government submitted an official application for the EC membership (with the vision to join in 2000).

However the negotiations started with a group of the Central and Eastern European countries without Slovakia because of the unsatisfactory political development in the country.

Finally, in 2000 after national parliamentary elections the negotiations with Slovakia started. Slovakia was very successful, the negotiations were closed within 2 years and Slovakia joined the EU with other 9 states in 2004.

Slovakia underwent crucial both political and legal changes during last 16 years.

Each stage of integration process can be characterized by different legal instruments applied in the EC/EU – Slovakia relationship.

1. European Integration of Slovakia

Association/Accession process

Association agreement (AA) was the start of bilateral relationship between Slovakia and the EC. The association process proceeded to accession process and finished with signing the Accession Treaty and with the accession of Slovakia to the EU (the association agreement became thus redundant).

Association agreement established the special links between Slovakia and the EC, particularly with a view to future accession. It formed the framework for setting up a political dialogue, establishing business relations within a free trade area, developing economic, cultural, social and

financial cooperation and aligning national legislation with EC legislation. The AA created also common bodies – Association Council, Association Committee, Association subcommittees, Parliamentary Association Committee – composed of representatives of the EC and Slovakia responsible for proper implementation of the agreement.

The approximation of Slovak law to the EU/EC law was one of the commitments expressed in the AA ("all acts that are different from the EC acts and constitute a barrier for the country integration into the internal market" should be subject of approximation). What is more the AA contained the list of areas to be subject of approximation: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, nuclear law and regulation, transport and the environment. The EC committed itself to support Slovakia in this process with the technical assistance via PHARE and Taiex in the form of the exchange of experts, the provision of early information especially on relevant legislation, organization of seminars, training activities, aid for the translation of Community legislation in the relevant sectors.

Negotiations started after period of demarche from the EU to Slovakia (because of political development in the country) in 2000.

In the period between signing the AA and start of negotiations a set of documents was adopted on both sides; with the aim of further approximation of acquis communautaire (including the progress reports made by the Commission) and integration of Slovakia, the Copenhagen criteria were met by Slovakia, much work in approximation was done.

The acquis communautaire was divided into 31 chapters and each of them was separately opened, discussed and closed. The most complicated chapters were competition (particularly State Aid), agriculture and regional policy.

The legal changes in Slovakia were crucial. Vision of EU membership (and OECD membership) was highly motivating and the changes of Slovak legal order were made with this goal, therefore the acquis communautaire was the main source of legislation in Slovakia.

Each ministry and office of the central state administration established the European Integration department which was responsible for approximation process in the field of its competence. The chief negotiator was Mr. Jan Figel who later became the first Slovak commissionaire. He commented the process: "Negotiations of the Slovak Republic with the EU were based on a constructive and realistic attitude. We bore in mind that participation in the integration process was our priority. EU integration was, into a certain degree, an answer to necessary economic and social reforms, to necessary safety enhancement, but also regional development and environmental improvement. We realised that the EU accession meant adoption of the existing contractual and legal status of the Community with possible individual modifications and specific provisions for certain areas. Negotiation strategy of the Slovak Republic was aimed at securing favourable, respectable conditions for EU membership including adequate participation in the administration and decision-making on common European affairs...Our concern was a joint accession together with neighbouring countries in the region – the Czech Republic, Hungary and Poland – by different reasons. Beside political interests, from the view of the position of Slovakia in decisive questions on the continent, it was also an intention to maintain the advantage of the Czech-Slovak Customs Union until the accession, to adjust the Slovak customs regime to Schengen conditions jointly with neighbouring countries, to enforce cross border regional cooperation. Our tactic was not to demand as much as possible and in as many chapters as possible, but to rationally concentrate on priority interests and sensitive issues and to enforce them with help of clear reasons, objective arguments and mutual confidence. In terms of results and implementation of the defined strategy, Slovakia had successfully accomplished its negotiation journey from Helsinki to Copenhagen after 34 months. Results reflect defined priorities and requirements for transitional period are generally and in detail objectively comparable with results of the countries that started negotiations 2 years sooner. The results are decisive, not just gestures and speech. Confidence typical for complicated negotiations is very important though negligible. Slovakia gained confidence of the EU countries and it had gradually enhanced it."

The negotiations concluded with transitional periods:

Chapter 2 – Free Movement of Persons

The 7-year transitional period (structure 2-3-2 years) was agreed to protect the labour market of Member States. During this period all Member States may apply internal restrictive measures towards workers of other Member States. The model is flexible. This means that the decision on the protection of the labour market is up to each of the Member States. The need to apply restrictions in the access to the labour market is to be checked, firstly after 2 years, then after 3 years. After 7 years the transitional period expires. The transitional period was adopted horizontally for all central and east European countries. Some Member States have not applied transitional period for new Member States since their accession (Great Britain, Ireland, Sweden, and Denmark), other countries cancelled the measure on the basis of 2-year experience (Belgium, Finland, Greece, Spain, Italy, Luxembourg, Portugal, and Holland). Germany and Austria have been applying a 7-year transitional period. Measures could be reciprocal.

Chapter 3 – Freedom to Provide Services

Germany and Austria worrying about cross-border provision of services have been applying internal measures in the area of free movement of Slovak workers providing certain types of services. This transitional period is being applied in accordance with a transitional period restricting free movement of employees generally. Types of services are enumerated– these are mostly services in the construction industry, cleaning, gardening, security services and home nursing.

Chapter 4 – Free Movement of Capital

Slovakia negotiated a 7-year transitional period for a possibility of purchasing agricultural and forest land into private hands or for enterprising for all EU citizens. This period may be extended by further 3 years. This ban does not concern individual farmers allowed to purchase land after 3 years since they have settled in the SR and start their business in the area of agriculture and on leased soil.

Chapter 6 – Competition Policy

The most discussed form of state aid was the tax relief. Slovakia negotiated 2 transitional periods for state aid provision in sensitive sectors for Volkswagen, a.s. Bratislava (until 2008 up to 30% of lawful investment costs) and U.S. Steel, s.r.o., Košice (until 2009 provided the overall assistance will not exceed 500 million USD).

Chapter 10 - Taxation

Transitional period related to the VAT - 1-year transitional period for the preservation of the decreased VAT tariff rate for gas and electric energy; 5-year transitional period for the preservation of decreased VAT rate for thermal energy (especially taking into account social impacts on the citizens); 4-year transitional period for the preservation of a decreased VAT rate for constructions and construction works related to housing. These transitional periods were not used as Slovakia had undergone a tax reform uniting the VAT at 19%, so the decreased rate was not necessary. A permanent exemption SR has negotiated for the application of a limit of 35 000 € of annual turnover. Up to this amount entrepreneurs are not obliged to register as VAT payers.

Transitional period for excise duties – 5-year transitional period to reach a minimum excise duty on cigarettes (a schedule for tax increase was set up to the height of its harmonisation with EU legislation); a permanent exemption for floricultural distillation of fruit (50 l of fruit spirit per farmer and household will be taxed up to maximum 50% of standard rate of spirit excise tax).

Chapter 22 – Environment

In terms of implementating European standards the greates demands are on both the state budget and on entrepreneurs, especially in the environmental area. Slovakia had asked for 10 transitional periods, in three cases it decided not to use this possibility, but to attempt for harmonisation with EU directives afterwards as enabled by the relevant European legislature. *Air protection* – transitional period for petrol storage at petrol sta-

tions and its distribution from terminal units to petrol stations (high costs of necessary modification), deadline by the end of 2004, eventually 2007.

Waste economy – transitional period for dangerous waste incineration plants and industrial waste incineration plants (by the end of 2006); transitional periods for package recycling and package waste recycling (by the end of 2007).

Water protection – transitional period for municipal waste waters cleaning (by 2015, according to the rural agglomeration size), modernisation and construction of sewage water plants including sewage economy; transitional period for pollution by dangerous substances discharged into the water environment (by the end of 2006), observance of emission limits pursuant to the list of the appropriate directive.

Industrial pollution inspection – transitional period for integrated prevention and inspection of industrial pollution (by the end of 2011), a complex air monitoring and protection against dangerous substances; transitional period for emissions of certain pollutants by 3 big incineration facilities (by the end of 2007).

The approximation from the legal point of view

In terms of European law, the way how the EU associated countries transpose the EC/EU legal acts was, basically, left on them. However, no domestic barriers of constitutional legal character were accepted as an "excuse" in case of failure to fulfil these obligations.

According to the Slovak legal order obligations can be only imposed by law and the legislative process is too inflexible and time-consuming. Under conditions of the integration effort of the SR it was essential to find a satisfactory solution.

The approximation regulation implied the compromise. It is the type of a legal instrument arisen on the ground of needs of the accession process and it had not existed in the Slovak legal order before.

The purpose of accepting approximation regulations was to accelerate the legislative process and adoption of the essential legal acts in the approximation process.

In 2001 the Constitution of the SR was amended in a way that it enabled the Government of the SR to issue regulations of the government also for implementing the Association Agreement – approximation regulations. Following the Constitution, it is the right of the government to issue approximation regulations, not its obligation. It is possible to impose obligations via approximation regulation.

Whilst the Constitution of the SR enacted the constitutional basis for adopting approximation regulations, particular conditions of their adoption were included in the Act No. 19/2002 Coll. of the 18 December 2001 laying down conditions for issue of approximation regulations of the Government of the Slovak Republic.

In terms of legal force, an approximation regulation has the character of the regulation of the Government of the SR, even though in line with the Constitution of the SR it is possible to impose obligation by it. Such a regulation cannot be contrary to the law. Since a regulation is of lower legal force than the law, it is impossible to alter or cancel the law by approximation regulation. By approximation regulation it is possible to empower the relevant body for issuing the implementing legal act.

In overwhelming majority the regulations related to directives (legal acts of the EC binding as for the objective to be achieved and leaving the choice of forms and means to achieve this aim on the Member States) transposition. In the stage before the Slovak Republic joined the European Union, however, there also were regulations to be transposed (otherwise directly applicable in Member States) in addition to directives.

Approximation regulation can be issued in all the fields set in the Association Agreement, especially in these fields of law:

a) customs law,

b) bank law,

c) administration of accounts and taxes of companies,

d) intellectual property,

e) safety of workers,

f) finance services,

g) protection of customers,

h) technical standards and norms,

i) use of nuclear energy,

j) transport,

k) agriculture,

l) environment.

On the other hand, approximation regulation must not be issued in:

- basic human rights and freedoms
- state budget
- creation of new state authority
- establish new competences of a state authority
- another objects which have to be regulated only by constitution or law.

The safeguard mechanisms against the abuse of the approximation regulations were the special requirements for their adoption - it has to be clear, that it is an approximation regulation issued according to the act 19/2002 Coll., the regulation must contain an annex with a precise identification of transposed legal act of EC/EU (name of the transposed directive, date and place of its publication in OJ), draft of an approximation regulation has to consist of a compatibility clause and concordance table, the government is obliged once a half year to inform the Slovak parliament about the approximation regulations issued under the act 19/2002 coll. in the previous period and about the intention which approximation regulations will be adopted in the future.

To summarize the advantages of approximation regulations these must be mentioned: shorter legislative process, faster transposition of directives and involvement of competent experts only.

The approximation of law was accompanied with the need of new offices establishment – public procurement office, state aid office, personal data protection office, market surveillance bodies and inspections, civil service office. However some of them were abolished in the meantime.

The legal conditions for accession were established in the form of constitution amendments.

The amendment of Slovak constitution in 2001 contained also the provision enabling the EU accesion and at the same time the EC/EU law

supremacy over Slovak laws (but not over constitution) which is one of its main principles was formulated.

Article 7 para. 2 of the Constitution reads "The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its powers to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the government according to Art. 120 para. 2."

EU membership

After accession in 2004 the legal order of the EU became a legal order of Slovakia. The irrefutable presumption that the ignorance of law which was published is no excuse became applicable also for the EC/EU legal acts.

Some of the legal acts are directly applicable in Slovakia now (regulations) and there is no transposition needed.

Slovak experts participate in the legislative procedure; Slovak judges are obliged to respect the EC/EU law when taking the decisions.

The legal instruments used for transposition of those legal pieces which must be transposed (e.g. directives) are already mentioned approximation regulations existing since the association period.

The supremacy principle expressed in the constitution declares the direct effect of some EC/EU legal acts and the transposition obligation in regard to others and ensures that in case of conflict of Slovak legal provision and the EC/EU legal one, the later will be applied.

Slovakia is obliged to transpose the directives and in case of failure to do that it comes to failure to fulfil the obligation by Slovakia as a member state and it can be charged the penalty by the European Court of Justice.

Slovak government issues every year a Report on EU membership (in 2009 it is already 5th one) where mainly the legal development in each field

is described. There is the mechanism for harmonization with EC/EU law in the Slovak state administration. The most important step is to define the responsible ministry or office with regard to each legal piece.

2. CASE STUDY: Competition policy (Antitrust and State Aid)

At the beginning it is important to mention that Competition policy consists of two policies which are implemented separately – Antitrust (including merger control) and State Aid.

Antitrust policy in Slovakia is implemented by the Antimonopoly Office of the Slovak Republic (AMO) and State Aid policy is in the competence of the Ministry of Finance of the Slovak Republic. These two areas have never been implemented by the same authority in Slovakia.

The structure of this chapter responds to this fact. Firstly, it focuses on the work of AMO in antitrust policy. Secondly, the Stated Aid policy development is described.

Antimonopoly Office of the SR and its way during the association and accession process (Negotiation Chapter 6 Competition)

The Antimonopoly Office as a central state administration body was established in 1991 (at that time Slovakia was still the part of Czechoslovakia and the name of the Office was the Slovak Antimonopoly Office). The first Act on competition – Act No. 63/1991 Coll. on Protection of Competition which laid down the rules concerning the cartels (agreements restricting competition), dominant position of undertakings and mergers was adopted.

Its role is to intervene against competition restriction by the undertakings – against agreements restricting competition, abuse of a dominant position and to take preventive control over the market structures through the assessment of mergers. The AMO may sanction also the conduct of other state authorities or municipality bodies when distorting the competition conditions.

The work of the AMO is of the expert-analytical nature, followed by the issuing the decision. The AMO interventions should sensitively fine-tune the operation of market mechanism.

The independency of the AMO is ensured through the way of creation of the position of the Chairman (Chairwoman at the moment) and creation of body competent to decide on appeals against the decision of the AMO, as well as the legal possibility to bring an action against decision of the body before the court.

The chairwoman is not member of the government but she has the right to sit at the meetings of government.

1992 - 1993

The political changes took place in Czechoslovakia, the Slovak Republic was established. The AMO was at that time more oriented at the OECD integration than at the EU integration.

1994

One of the priorities of the AMO became a close communication with the DG Competition at the European Commission (meetings of experts, stages of employees of the AMO in the DG Competition) on the basis of Association Agreement.

The AMO participated in PHARE programme aimed to support the implementation of AA.

The new Act No. 188/1994 Coll. on Protection of Competition was adopted. One of the reasons for its adoption was to harmonise the Slovak Competition rules with the EU Competition rules (in compliance with the AA). Also the status of AMO was strengthened and its position in the privatisation was set up (AMO was competent to give statements to privatisation cases).

1995- 1998

Years characterised by stagnation of Slovak EU integration process due to political reasons.

In 1996 the Association Council, a body established according to the EA, adopted a decision on the approval of Implementation rules for the

application of competition provisions under article 64 section 1 (i), (ii) EA. They contained modification of criteria to be applied for the assessment of agreements restricting competition as well as cases of dominant position on the area of the EC or SR or major part of this area that could unfavourably effect trade between the EC and SR. Rules determined the proceedings followed by responsible institutions– DG Competition and AMO for cases of anti-competition practices, proceedings in case of positive or negative competition conflicts, ways of mutual collaboration, de minimis rule, mutual exchange of relevant information and proceedings for the search of mutually acceptable solution of the particular anti-competition practice and the way of decision making in controversial cases in the bodies set up by the EA. The rules came to effect on 1 January 1997. They had not been published in the Collection of Laws so their applicability in the SR was questionable.

In this year further harmonisation of the Slovak competition law was under consideration, especially with regard to so called block exemptions, e.g. rules for exemption of some agreements restricting competition. Harmonising provisions regarding procedural modifications of the third person rights protection and introduction of competition rules in sectors such as energy, telecommunications, water, capital market, banking, insurance was prepared. This process was directly connected with recommendation following the White Paper.

AMO employees elaborated parts on competition of the European Commission Questionnaire which was supposed to be a background material for the elaboration of Slovakia's assessment as an associated country for accession.

1999

This year was a year of intensive harmonisation legislative activity of the Office.

However an anticompetitive provision was adopted in the Slovak legal order without AMO`s participation a provision of the agricultural law. This excluded agreements on agricultural production of milk, fatstock, oil plants, grains, sugar beet, vegetable, fruit and potatoes which follow harmonisation of production and sales of these products for economically jus-

tified prices from the ban on agreements restricting competition. This totally contradicted competition rules of the EU. It was necessary to cancel the exemption as soon as possible.

The EU Regular Report on the preparedness of the SR for the accession for 1999, where the Commission assessed Slovakia's progress, stated that the major part of antimonopoly legislation had been harmonised with acquis communautaire, however further harmonisation in the field of block exemptions and some other legal provisions was needed. Commission observed that there was a necessity to hire a number of qualified lawyers for the Office (during 1999 AMO hired another four lawyers, the total number of employees being 71 at the end of 1999).

In this period the key document for AMO was the National Programme for the Adoption of acquis communautaire. The planned amendment to the law on the protection of competition was defined as a short-term priority while the adoption of a completely new law was defined as a medium-term priority.

2000

Slovakia was finally invited to negotiations. Chapter 6: Competition was open among the first chapters.

The priorities of AMO were OECD and EU integration. At the end of 2000 Slovakia became the member of OECD.

The EU Regular Report on the preparedness of the SR for the accession for 2000, where the Commission assessed Slovakia's progress, stated that the law in force on the protection of economic competition is to a large extent in harmony with EC rules. Adoption of an amendment to this law was positively assessed. It eliminated the exemption from the ban on agreements restricting competition for farmers in agricultural production of milk, sugar beet, potatoes, fatstock, oil plants, grains, fruit and vegetable, it introduced the de minimis rule for the assessment of agreements restricting competition, it introduced new wording of juridical institute of a negative certificate and modified the so called individual exemption from the application of general ban on agreements restricting competition in the conception of competition community law. According to the Regu-

lar Report it was necessary to adopt secondary legislation concerning the calculation of the turnover and notification of concentration and to ensure further harmonisation, above all in relation to the policy in the field of group exemptions and with the development of acquis communautaire on vertical restrictions. According to the European Commission the AMO should have ensured that the anti-trust rules were effectively enforced and executed and give priority to cases that concerned the most serious law-breaking in the field of competition.

The key document in the accession process was the above mentioned National Programme for the Adoption of acquis communautaire. It identified the short-term and medium-term priorities. A short-term task of the National Programme was to adopt a new law on the protection of competition. The aim of the new law was to react to the experience of AMO with application of the valid law and to some modifications of the community law in the interest of further approximation of the Slovak legal system to that of the EU. The adoption of the new law and its related regulations was supposed to accomplish the harmonisation of rules and proceedings in the area of economic competition with the EU competition legislation and to achieve full approximation with the acquis communautaire for the area of economic competition. The new law on the protection of competition was supposed to come into effect on 1 January 2001 and it was not possible to meet this due to the lengthy legislative process and it was postponed until 1 May 2001.

A medium-term priority of the National Programme for the Adoption of acquis communautaire for chapter Competition was to adopt a decree on group exemptions for agreements restricting competition supposed to come into effect on 1 December 2002. Preparation of this secondary legislation followed from the EU requirements for inclusion of main principles of group exemptions from application of general ban on agreements restricting competition in the Slovak legal system.

Second meeting of the Accession Conference took place in Brussels where 8 chapters were officially opened including chapter Competition. In the negotiation position the SR stated that the country was prepared to implement in full extent the acquis in chapter Economic Competition by 1

January 2004. The new Law on the Protection of Competition was supposed to ensure full approximation of competition legislation in part antitrust. AMO was responsible for this part. The State Aid Office was responsible for the part of state aid.

2001

In 2001 there was adopted new competition legislation:

- Act of the National Council of the Slovak Republic No. 136/2001 Coll. on Protection of Competition and on Amendment of Act of the Slovak National Council No. 347/1990 Coll. on Organisation of Ministries and Other Central State Administrative Bodies of the Slovak Republic as amended.
- Decree of the Antimonopoly Office of the Slovak Republic No. 167/2001 Coll., which sets out details on calculation of turnover.
- Decree of the Antimonopoly Office of the Slovak Republic No. 168/2001 Coll., which sets out details on the conditions of notification of concentration.

One of the objectives of the new Act on Protection of Competition was to strengthen AMO independence and decision-making objectiveness by changing the way of creating the position of the Chairman of the Office who was to be appointed, on the basis of a proposal submitted by the government, by the President of the SR for 5-years term of office. The act allowed the same person to be appointed for only two consecutive office terms with the taxative reasoning of his/her recalling.

Before, the Chairman was appointed by the government and he was revocable by the government – practically he was depending on government.

The Act was also to establish a new body – the Council of the Office.

The Council is a collective body of the AMO deciding on the appeal and other remedies.

Before, it was the Chairman of the Office who had the power to take decision on appeal against the decision of the AMO.

The Council is composed of seven members – Chairman of the Office, Deputy Chairman and experienced experts with legal or economy background who work with the AMO as externs.

Within the Negotiation position to the Chapter 6 Competition the AMO undertook not to require any exemptions, or transitional periods in connection with transposition and implementation of competition acquis communautaire. In the course of 2001 the AMO has, regarding the additional questions of EC, continuously provided more detailed information on updating of exclusive and sole rights provided to individual subjects, on abolishing the state monopolies of commercial nature and on description of valid license system in the SR. In connection with this the indicative plan has been adopted in order to accept EU secondary legislation, related to block exemptions of agreements restricting competition from legal prohibition and also related to the simplified proceedings on assessment of some concentrations. On request of EC the detailed structural review of decisions of the AMO issued in the course of 2000 has been developed and sent as a basis for assessing the implementation of the Act on Protection of Competition and readiness of the SR in this area. It was not possible to preclusively conclude Chapter Competition in 2001 as it is necessary to adopt certain measures regarding the state aid issue.

2002

The act on block exemptions was adopted.

At the end of 2002 the chapter 6 was provisionally closed following intensive negotiations. In this context the common position of the EU was adopted. The SR accepted the acquis communautaire in the Chapter 6 and declared its ability to implement it already before the entry into the EU, with two exceptions regarding the state aid in the form of tax relieves in sensitive sectors (for Volkswagen, a.s. Bratislava by 2008 30% of justified costs and U.S. Steel, s.r.o., Košice by 2009 providing the overall assistance will not exceed 500 mil. USD), which were subject to the negotiated transitional period where the agreed measures are limited in terms of extent and time. It was stated, that the SR achieved

a satisfactory level of approximation of Slovak Competition Law, while greater emphasis needs to be placed on tightening sanction policy, where priority must be given to serious breaks of the competition rules.

2003

Another amendment to Slovak competition legislation in connection with new EC regulation on the implementation of the rules on competition was made as well as strengthening the powers of AMO in regard to inspections within the investigation and sanction policy.

In connection with Commission monitoring report of November 2003 and in accordance with recommendations of the Commission the AMO adopted the internal directive on the procedure for imposing fines.

AMO prepared the twinning light project with the aim to run trainings for judges judging the competition cases (in cooperation with the Ministry of Justice of the SR).

EU membership

The competition legislation is the one adopted in accession period. Additionally the EC regulations are directly applicable in Slovakia.

The AMO and European Commission share the parallel competence in competition cases (their competence basically depends on impact of restriction on common market or Slovak market).

The AMO is a part of European Competition Network (ECN) - the forum where groups of experts in specific sectors (banking, securities, energy, insurance, food, pharmaceuticals, professional services, healthcare, environment, motor vehicles, telecommunications, media, IT & information & communication and railways) discuss competition problems and promote a common approach. In this way, the ECN allows competition authorities to pool their experience and identify best practices. The task and goal of ECN is to create a specific basis for developing and maintaining common competition culture in Europe.

State Aid policy

It is necessary to mention state aid separately as this area was a part of the negotiation chapter 6 Competition. However, the AMO had never made any decisions and neither had it borne any responsibility for the adoption of decisions on state aid in the SR.

The State Aid Office as a separate central body of the state administration was established in 2000. It had 35 employees.

Before 2000 the Ministry of Finance of the SR was in charge of state aid issues. The act on state aid was adopted in 1999.

After establishment of the State Aid Office (SA Office) state aid could have been provided only after its assent.

The task of the SA Office was to establish the transparent notification system which would be fully compatible with the system in the EU. The important task was also strengthening the position of the office and its administrative capacity.

In 2001 SA Office elaborated the report on state aid provided in SR in 2001 and submitted it to the European Commission. The report was elaborated in compliance with the request of Commission.

Due to serious irregularities in the conduct of the SA Office the government asked the Minister of Finance (in September 2001) to prepare a plan for merging the State Aid Office with the Antimonopoly Office. The cabinet endorsed the plan in early February 2002.

The shortcomings in the work of the SA Office were: systemic deficiencies, misconceived concept of state aid, unclear priorities and criteria for the provision of state aid, poor organisational structure, insufficient record-keeping, absence of control, staffing, poor management, absence of a strategy for SAO's institutional development.

State aid issues constituted an important part of Chapter 6 Competition, which was one of the most important chapters for Slovakia to conclude prior to accession. However, the omnipresent problems connected with the provision of state aid represented a major obstacle that impeded the progress of negotiations on this chapter.

Slovakia finally negotiated two transitional periods in chapter 6 Competition concerning the part of state aid (these have been mentioned in the previous parts of this document).

The SA Office was abolished to date of accession – 1st May 2004 and the state aid issues were given to the Ministry of Finance again.

Conclusion

Slovakia underwent the EU integration way in 10 years.

During this way there were some periods of stagnation or shortcoming nevertheless at the end Slovakia joined the EU together with other 9 European states.

One of the main challenges was the legal approximation process. Slovakia adopted many new pieces of legislation, many acts were amended and some were abolished. Some new central administration offices were established.

The constitution was amended in order to prepare the best legal conditions for the accession. A completely new legal instrument was introduced in the Slovak legal order with the purpose to speed up the approximation process and after accession with the aim to ensure the proper and on time transposition of the EC directives.

Now Slovakia is the fulright EU member, the legal order of the EC/EU became its own legal order, it has all the obligations and rights like the other member states, it is fully responsible for failure to fulfil these obligations.

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Constitution of the Slovak Republic

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BAILING OUT IN A COMMUNITY OF STABILITY – CONTROVERSIES OF THE ECONOMIC AND MONETARY UNION IN TIMES OF CRISIS

I. Introduction

Before Laertes leaves the Danish Court his father, Polonius, gives him some useful advices how to behave himself in France: "Neither a borrower nor a lender be; For loan oft loses both itself and friend, And borrowing dulls the edge of husbandry." In times of an economic crises caused by easy credit conditions, sub-prime and predatory lending, mortgage bubble etc., these words seem to be especially wise.

The liquidity crisis of 2008 threatened with global recession. In order to reduce the possibility of fatal economic consequences, the U.S. executed two stimulus packages in framework of which many firms have been bailed-out and large financial obligations have been incurred in form of loans, asset purchases, guarantees, and direct spending. Similar actions have been also taken in Europe. Lots of money were and still are needed to pursue such policy measures. The needed funds are basically raised by borrowing on capital markets. However, this has led to several problems.

Maybe the least troubling one – at the very moment at least – is breaching against EC-Treaty restrictions on government debts. The government deficit limit of 3 % to GDP has been exceeded many times

before the crisis and these breaches have been always forgiven. Nothing else is to await under the present conditions, when the global crisis day to day let us remember to the Great Depression and justifies virtually any kind of Keynesian policy measures.

The liquidity crisis due to the collapse of the financial markets generally and dramatically shortened the available assets on the markets, and the small amount of available liquid assets have been mainly utilized by larger and wealthier states in order to finance expanding fiscal policy. Therefore, the available credits have practically disappeared from the markets for riskier borrowers. The smaller and financially weaker states, which a few months earlier could have easily financed their budget, faced serious problems how to sell their bonds and how to find available assets.

In the absence of assets from financial markets, however, two possibilities remain open:

- Make use of the rights attached to the membership in International Monetary Fund and purchase foreign currencies in exchange for own (Article V. Articles of Agreement of the IMF)

- Apply for a medium-term financial assistance for Member States' balances of payments in accordance with Council Regulation (EC) No 332/2002.

Nevertheless, the EU is a no-bail-out community, which justifies the question, how does the EU financial assistance fit into the system of a No-Bail-Out-Community (III.). A look at the IMF conditionalities justifies a further question: how IMF credit facilities should be treated under EU law (IV.). One can be puzzled how an EU Member State becomes a risky borrower if the guiding principles of the Economic and Monetary Union, such as stable prices, sound public finances and monetary conditions and a sustainable balance of payments are observed (V.). Before we turn us to these questions, it is useful to give a brief overview of the Community medium-term financial assistance mechanism.

II. The Community financial assistance mechanism.

The financial assistance mechanism has been established by a Council Regulation from 2002[1] which – as a result of the financial crisis – has been modified in 2008[2] and in 2009[3] (hereby: Regulation or Regulation 332/2002).

Which countries may apply for Community financial assistance?

Those Member States may benefit from the Community financial assistance, which

- have not adopted the euro and

- are experiencing, or are seriously threatened with, difficulties in their balance of current payments[4] or capital movements.[5]

How does the Community financial assistance function?

The financial mechanism functions like the credits of the European Investment Bank: the Bank has a very good (AAA) credit rating, which means low credit risks and therefore low credit costs. (The credit costs are normally equal to inflation plus credit risks plus administrative cost plus profit). The EIB raises the money from international credit markets equivalent to the amount which a country wants to borrow and grants the loan.

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[1] Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ L 53, 23.2.2002, p. 1–3

[2] Council Regulation (EC) No 1360/2008 of 2 December 2008 amending Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments OJ L 352, 31.12.2008, p. 11.

[3] Council Regulation (EC) No 431/2009 of 18 May 2009 amending Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments OJ L 128, 27.5.2009, p. 1–2.

[4] The current account shows flows of goods, services, primary income, and secondary income between residents and non-residents. For clarifications see the IMF Balance of Payments Manual 2.12-2.19.

[5] IMF Balance of Payments Manual 2.16 "The capital account shows credit and debit entries for nonproduced nonfinancial assets and capital transfers between residents and nonresidents."

The country borrowing from the EIB wins the lower credit costs equal to the margin between its own creditworthiness and the creditworthiness of the EIB.[6]

According to the Council regulation 332/2002, the Community grants finance assistance by using "its creditworthiness to borrow resources that will be placed at the disposal of the Member States concerned in the form of loans." (Recital 5 of Regulation). The Member States profit either from the lower credit costs or from the mere granting of a credit, which they possibly could not obtain otherwise on the market.

How much credit is granted under this facility?

It is not specified in the applicable Council Regulation, but the outstanding amount of loans, which was EUR 12 billion in 2002 and has been increased to 25 billion in 2008 and to 50 billion in 2009.

The procedure of granting the loan

1. Before any steps are taken, the Member State in need is obliged to contact and consult the Commission in order to discuss the problem faced and the possible solutions (Cf. Art. 2 and Art 3 Para. 2 of Regulation 332/2002)
2. The application may submit either the Commission (in agreement with the Member State seeking Community financing) or the Member State in need (Art. 3. Para. 1 of Regulation 332/2002)
3. The Member State submits a draft adjustment programme to the Commission and the Economic and Financial Committee.
4. The Council, after examining the situation in the Member State concerned and the adjustment programme presented in support of its application, decides:

(a) Whether to grant a loan or appropriate financing facility, its amount and its average duration;

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[6] See Article 19 and 22 of the EIB's Statute Cf. Friedrich *Heinemann:* BONITÄTS- UND BAILOUT-EFFEKTE IN DER WIRTSCHAFTS- UND WÄHRUNGSUNION, 115 Zeitschrift für Wirtschafts- und Sozialwissenschaften (1995) 605 at 610.

(b) The economic policy conditions attached to the medium-term financial assistance with a view to re-establishing or ensuring a sustainable balance of payments situation;

(c) the techniques for disbursing the loan or financing facility, the release or drawing-down of which shall, as a rule, be by successive instalments, the release of each instalment being subject to verification of the results achieved in implementing the programme in terms of the objectives set. (Art. 3 Para. 2 of Regulation 332/2002)

5. The Commission and the Member State conclude a Memorandum of Understanding setting out in detail the conditions laid down by the Council (Art. 3a of Regulation 332/2002)
6. The Commission takes the necessary measures to verify at regular intervals, that the economic policy of the Member State in receipt of a Community loan complies with the conditions laid down by the Council. On the basis of the findings of such verification, the Commission decides on the release of further instalments. The Council decides on any adjustments to be made to the initial economic policy conditions. (Art. 5 of Regulation 332/2002)

III. Bailing out in No-Bail-Out-Community?

Sketching the problem

The no-bail-out-rule (Article 103 EC) is one of the fundamental principles of the fiscal constitution of the EC. However, as we have seen above, the Regulation 332/2002 establishes a system, which basically establishes a bail-out mechanism on European level. These seem to contradict eachother.

According to recital (1) of the Regulation 332/2002, Article 119 EC does not define the instrument to be used for granting the mutual assistance envisaged; and therefore was it necessary, due to recital (2), to make possible a quick lending to a Member State.

Article 308 EC serves as legal basis for establishing this lending facility. However, this is only an ancillary legal basis in order to take appropriate measures ”if action by the Community should prove necessary to

attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers". Consequently, using Article 308 as the legal basis for a measure is justified only where no other provision of the treaty gives the community institutions the necessary power to adopt the measure in question[7]; and it is justified if the Treaty expressed or implied excludes such a measure.[8] In order to prove whether using Article 308 EC to "redesign" the Economic and Monetary Union to a bail-out community was justified, we analyse both wording and system of the EC-Treaty.

Grammatical approach

Article 119 EC paragraph 2 reads as follows:

"The Council, acting by a qualified majority, shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

(a) a concerted approach to or within any other international organisations to which Member States may have recourse;

(b) measures needed to avoid deflection of trade where the State which is in difficulties maintains or reintroduces quantitative restrictions against third countries;

(c) the granting of limited credits by other Member States, subject to their agreement."

One can clearly see, opposite to the recital (1) of the Regulation, that Article 119 Paragraph b (2) EC does define the applicable measures. Article 119 Paragraph (2) clearly refers to the assistance as mentioned in Paragraph (1) and provides that this kind of assistance can be granted via three different kinds of measures: common approach to international organizations, trade measures and credits granted by other (!) Member States (and not by the Community). These instruments constitute an enumeration, an exact list of all applicable measures and they are not just a bunch of exam-

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[7] Judgment of the Court of 26 March 1987, Case 45/86 Commission v Council, Para 13.

[8] Cf. Koen Lenaerts and Piet Van Nuffel: CONSTITUTIONAL LAW OF THE EUROPEAN UNION (London: Sweet & Maxwell 2005), 5-018

ples, which can be freely supplemented by secondary legislation. Hence, the wording itself could exclude the application of Article 308 EC. Nevertheless, the wording itself is always a bit ambiguous and Article 308 EC can be interpreted very broadly: e.g this article was also capable of making from a sole individual a whole country during the interpretation of Article 60 EC, at least according to the Court of First Instance and the European Court of Justice in the Kadi-decision.[9] Hence, it is necessary to point out, whether financial assistance fits into the system of the financial constitution of the Community.

Systematic approach I. – the EC Treaty

The few grammatical ambiguities concerning Article 119 EC can be dispelled by a look into Article 103 EC. Article 103 EC prohibits bailing out the Member States either by the Community or by other Member states, unless the Treaty expressly grants an exception. The *telos* of this prohibition follows from Article 104 paragraph (1) EC, which prohibits excessive government deficits.

Three mechanisms of the Treaty serve the effectiveness of this prohibition:

(1) Making credits available only from private markets (Article 101-102 EC)

(2) no bail out (Article 103 EC) and

(3) the excessive deficit procedure (Article 104 Para 2-10 EC).

The last one is an administrative tool, the first two bases on economic reasonableness. The no-bail-out-rule aims to construe a hard budget constraint.[10]

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[9] Cf. Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Communities

[10] On budget constraints János Kornai: THE SOFT BUDGET CONSTRAINT 39 Kyklos pp. 3-30; János Kornai: THE PLACE OF THE SOFT BUDGET CONSTRAINT SYNDROME IN ECONOMIC THEORY 26 Journal of Comparative Economics 1998, pp. 11-17; János Kornai - Eric Maskin - Gérald Roland: UNDERSTANDING THE SOFT BUDGET CONSTRAINT 41 Journal of Economic Literature 2003, 1095-1136.

The term budget constraint is taken over from microeconomics of the household and refers to a rational planning postulate. Two important properties must be emphasised. First, the softening of the budget constraint occurs when the strict relationship between expenditure and earnings has been relaxed because excess of expenditure over earnings will be paid by some other institution. A further condition of softening is that the decision maker expects such external financial assistance with high probability, and this probability is built firmly into his behaviour. To put it short, if you can reasonably count on that somebody pays your bill if you cannot manage to pay, you do not really take much care whether you can pay your bills. You spend reasonably only if you have to bear the consequences and pay the bill at the end of the day.

The financial constitution of the EC is motivated by this idea: excessive spending and deficits can have fatal spill-over effects on the whole community. And therefore, the economic policies of the Member States are regarded as a matter of common concern (Article 99 EC). Spill-over effects can only be avoided if every country behaves disciplined. In order to force them to discipline they may not count on any bail out.

Taking into account the above mentioned considerations, it is hard to believe that a financial assistance can be regarded as necessary in the course of the operation of the common market or one of the objectives of the Community (cf. Art. 308 EC). Far from it! Indeed, it erodes the sharpness of financial constitution, which is based upon the ideas of self-responsibility and commitment to discipline in exchange for budget sovereignty. Responsibility is the price of freedom.

One could conclude, that Article 100 EC could allow such an assistance. Indeed, Article 100 EC grants some exceptions from the "no bail-out" rule laid down in Article 103[11] and empowers the Council to grant Community financial assistance to Member State, which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

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[11] Declaration on Article 100 of the Treaty establishing the European Community annexed to the Treaty of Nice.

However, Regulation 332/2002 is not based upon Article 100 EC but on Article 308 EC, because of the alleged shortcomings of Article 119 EC. Therefore, it is not needed to examine all implications of Article 100 EC.

Systematic approach II. - International context

A financial assistance not only contradicts the system of the EC Treaty, but it is also not necessary according to Article 308 EC because the International Monetary Found has profound institutions to assist in case of balance of payments difficulties and this possibility was borne in mind by the drafters of Article 119 EC.

Article 119 belongs to the oldest provisions of EC Treaty. Its predecessor was Article 108 of EEC Treaty, which had been drafted in the Bretton Woods era, in a system of fixed exchange rates. This system was guarded by the IMF in order to secure international liquidity. IMF was designed for granting loans for fund members, when they short of reserves. Despite of two oil crises, many recessions and the establishing a new common currency, the Member States as Masters of the Treaties did not find it necessary to empower the community to establish a financial assistance mechanism. Far from it! On the one hand, they expressly prohibited any bail out in Article 103 EC; and on the other, upheld the membership of the Member States in the IMF in Article 111 Paragraph 5 EC. These facts show that the Member States did not want to replace IMF financial assistance with a Community financial assistance. If the Member States want to help a Member State to overcome its balance of payments difficulties they can achieve it by a concerted approach within the IMF as Article 119 EC provides. With respect to this possibility, there is no ground why a financial assistance mechanism of the EC should have been established.

IV. Financial assistance and IMF law

Sketching the problem

According to Article V of the Articles of Agreement of the International Monetary Fund each Member of the IMF is entitled to purchase the currencies of other members from the Fund in exchange for an equivalent amount of its own currency in case of balance of payment difficulties. Pur-

chase means borrowing, because the members have to buy their own currency back later. These loans are subject to certain conditions[12] including the duty to present an economic policy plan how to overcome the balance of payment difficulties and how to repay the loan. If this is persuasive enough and corresponds to the policies of the Fund the Fund approves the use of its resources.

However, there is an obvious problem. A Member State, which wants to use IMF resources, is, on the one hand, already to an economic policy within EC, which economic policy is embodied and concretized in its own convergence program; on the other hand, the same country is also bound by an economic policy plan, which has been submitted to the Council in order to receive the EC financial assistance.

Apparently, the possible conflict was borne in mind. Article 2 of the Regulation 332/2002, prescribes a duty to consult with the Commission or other Member States if a member state proposes to call upon sources of financing outside the Community which are subject to economic policy conditions (these are typically IMF loans).

It is not clear, however, whether this duty has any legal consequences concerning the financing facilities outside the Community, their timing or conditions. Furthermore, it is not clear either, how the broad guidelines of the economic policies of the Member States and of the Community (Article 99 Paragraph 2 EC) affect the economic policy conditions attached to the IMF loan, if anyway; how the ECOFIN-Council will monitor the consistency of the economic policy of the concerned Member State with these broad guidelines; how the convergence programs affect the leeway for negotiations with IMF?

How to resolve the possible contradictions?

Article 10 EC puts Member States under a duty to respect the division of powers between the Community and the Member States. Member States must not exercise their powers in such a way as to affect the Com-

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[12] Cf. Ariel Buira: AN ANALYSIS OF IMF CONDITIONALITY /G - 24 discussion paper series, No. 22/ New York, United Nations 2003. Erik Denters: LAW AND POLICY OF THE IMF CONDITIONALITY (The Hague, London: Kluwer, 1996).

munity measures or alter their scope.[13] The Court declared that "each time the community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down *common rules*, *whatever form these may take*, the member states *no longer have the right*, acting *individually* or even collectively, to *undertake obligations* with third countries which affect those rules."[14]

This rule may also apply for economic policy. The Community adopts broad guidelines, which are more or less binding for the Member States, and the Member States themselves prepare their stability and convergence programs, which the ECOFIN-Council examines, whether they are realistic, appropriate and sufficient to achieve the medium-term budgetary objectives and whether they are consistent with the broad economic policy guidelines. On the basis of this analysis, the Council opinion may suggest policy action to be taken by the country in question. Therefore, both the broad guidelines and the stability and convergence programmes surely fall under the expression used by the ECJ "common rules, whatever form these may take". Since the expression "third countries" is interchangeable in this context with the expression "international organizations", the Member States do not have the right to undertake obligations with the IMF if these may affect the common rules, unless the Community grants an exemption.

Based upon this doctrine, the Member State should wait whether the Community grants financial assistance. If yes, the Member State should favour Community assistance over purchasing IMF resources. If not, or the Community financial assistance does not suffice, the Community should grant consent to purchase IMF resources. However, in the latter case, there is not clear how a harmony between EU and IMF economic policy conditions could be established. The problem is, that the duties under Community law do not affect the legality of the negotiations with the IMF respectively the legality of the loan granted. The IMF Treaty is, namely, a r*es inter alios acta,* which *aliis nec nocet nec prodest.*

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[13] Judgment of the Court of 31 March 1971. Case 22-70 Commission v Council, Para 22 (European Agreement on Road Transport, ERTA)

[14] Judgment of the Court of 31 March 1971. Case 22-70 Commission v Council, Para 17 (European Agreement on Road Transport, ERTA)

Nevertheless, neglecting Community interests and not meeting the requirement of consulting with Community institutions may, however, result in action before the Court of Justice for infringement of an obligation under the Treaty.[15]

This, however, does not seem to fit into the general scheme of the Economic and Monetary Union, which is based upon a communitarized monetary policy and a loose coordination of economic policies within the framework of which the ECOFIN-Council mainly suggests, makes the necessary recommendations etc. but never makes "really" binding decision. If the resolutions are not binding and they solely base upon the persuasive force of the peer review, it is hard to explain, why a Member State should be anyway liable for not complying with non binding suggestions and recommendations and why these should preclude the Member States from entering into legal relations with international organizations. Nevertheless, one can ask, whether it makes any sense having detailed primary and secondary legal rules about the coordination of economic policies if they have practically no legal effect.

None of these statements are fully true and all of them contain some elements of the truth. The loose coordination has some presuppositions, namely, budget discipline and commitment to compliance with the guiding principles of the Economic and Monetary Union – stable prices, sound public finances and monetary conditions and a sustainable balance of payments. If a Member State is not capable to comply with these principles by itself it does not "deserve" to be fully free in determining its economic policy. In these cases a closer communitarian control is needed and it can be also justified because of the possible negative spill-over effects of the mismanagement.

It is, however, remarkable that these conclusions are not mentioned in the text of the Treaty even if they seem to have solid foundation in the system and principles of the Economic and Monetary Union.

This leads to a further question: how could Member States get into such serious troubles that they are needed to ask for foreign financial assistance – inside or outside the Community – if their economic policy is peer reviewed by the other Member States.

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[15] Art 104 Para 10 is not applicable for Articles 98-99 EC.

V. Some shortcomings of the European fiscal federalism

The fiscal federalism of Europe is based upon a budget sovereignty of the Member States with a wide margin of manoeuvre presupposing a commitment to sound public finances. This latter one is controlled by peer review, as it is provided by Article 99 Paragraph 3 EC. According to this, the Council monitors economic developments in each of the Member States and in the Community, as well as the consistency of economic policies with the broad economic guidelines and regularly carry out an overall assessment. For the purpose of this multilateral surveillance, Member States forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

Under these circumstances should be foreseeable which countries following such an economic policy which can be risky for the other ones, as well. Hence, Article 99 Paragraph 4 EC prescribes that if the economic policy of a Member State jeopardises the proper functioning of Economic and Monetary Union, the Council may make the necessary recommendations to the Member State concerned. The Council also may, acting by a qualified majority on a proposal from the Commission, decide to make its recommendations public. This should make the country more risky in the eye of the financial markets and should somehow discipline the country by making the credits more expensive.

Other corrective measures, however, are not possible because the corrective arm of the Stability and Growth Pact are only for those countries applicable, which have already adopted euro. One may ask, whether an action for failure to fulfil obligations (Article 226-227 EC) is admissible in these cases. Some commentators suggest that this is the case.[16] They bring forward the argument that Article 104 Paragraph 10 EC is not applicable for Article 99 EC therefore an action for failure to fulfil obligations is not excluded. This argument is true, however, oversimplifies the question.

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[16] Bernhard Kempen: EC TREATY ART. 99 margin note 8. in *EUV/EGV Kommentar* (Rudolf Streinz ed., München: C.H. Beck, 2003).

The question is, namely, what obligation failed the Member State to fulfil. The Member States have basically two different obligations:

a) to forward information to the Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary (Article 99 Paragraph 3 EC)

b) The Member State is addressee of recommendations of the Council to take the necessary adjustment measures or to take prompt corrective measures (Article 10 Para 2 and 3 Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies)

Ad a) an action for breach of community law could be brought before the Court of Justice because of not fulfilling an obligation to provide information, however, it does not really help. This procedure concerns only the information based upon which the economic policy of the Member State is examined, but not the behaviour of the Member State itself.

Ad b) Recommendations have no binding force according to Article 249 EC. If they have no binding legal force it is inconceivable how and why a Member State should be liable for "breaching" against them.

An action for failure to fulfil obligations, as it has been shown above, provides no real remedy in. Furthermore, there is a systematic argument against this kind of action, as well. Member States, which have already adopted Euro, face a clear prohibition of having government deficits larger than 3 % related to GDP (Article 104 EC). However, the enforcing mechanism remains much more of political than of legal nature: the political organs – basically the Council – have wide discretion whether they want to punish a Member State or simply satisfy with naming, blaming and shaming. The legal procedure, an action for failure to fulfil obligations, is expressly excluded (Article 104 paragraph 10). If the procedure is so politicized in cases of a breach against a clear rule why should the Member States face with a much harder pure legal procedure in case of a much lesser binding rule. There is no plausible explanation for this contradiction.

In absence of effective legal measures, Member States will only comply with European interests and requirements if it is in accordance with their actual – often short term oriented – political calculus. Even if the compliance with the guiding principles of the Economic and Monetary Union is in the long-term interest of the Member States, there exists no effective mechanism to enforce them. Under these conditions, the short term interests of lax budget policy often prevail. The lacking real budget constraints also explain why Member States get into financial trouble and why ask for Community financial assistance. This again explains why a lending instrument is needed. Hence, not a missing instrument of assistance but a lacking instrument of enforcement explains and possibly justifies the Community financial assistance mechanism. Unfortunately, the Lisbon Treaty does not make any step forward on this area either.

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LEGAL HARMONISATION WITH THE EU ACQUIS: PUBLIC PROCUREMENT AS A CHALLENGE FOR CROATIA

Introduction

Public procurement could be defined as a process whereby public sector organisations acquire goods, services, works and utilities from the private sector. There are two important parts of the economy that are involved in the public procurement: public sector as contractor and private sector as bidder. The establishment of a legal framework in the area of public procurement and its effective implementation is an important tool for eliminating preferential public procurement practices and favourable market positions of nationally and locally operating firms. Public procurement regulation is an essential instrument in the fight against corruption.

This is particularly relevant for countries that face institutional and governance weaknesses in the public sector such are transition countries with weak institutional capacities and biased judiciaries.[1] In conditions of unsatisfactory legal protection and rule of law, entrepreneurship and market freedoms can not be fully developed. Thus, such societies face lack of division between the public and private sector as public officials obtain economic base for their political power throughout preferential purchasing.

Harmonisation of public procurement procedures is one of the major goals of the EU internal market. The EU candidate countries, like Croatia, are facing serious challenges of full harmonisation with the *acquis communautaire* in this field, its enforcement and institutional building in order to complete the EU accession negotiations.

The importance of the public procurement system in the European Union

Public procurement has many dimensions and it is highly important in the fields of EU integration, completion of the internal market and further EU enlargement, as it is an essential part of the *acquis communitaire* the EU accession states have to implement. Available data show that public procurement encompasses between 13.5% (Bovis, 2007: 63) and 16% (Rolfstam, 2009: 349) of the EU GDP, which means billions of Euro annually. Furthermore, recent EU enlargements have put public procurement "*at the heart of the European integration process*" (Bovis, 2005: xix) because the new EU members were forced to implement public procurement *acquis* as part of the accession process. The procurement regime can also be seen in the context of political modernization as a tool of denationalization of services needed for the good functioning of the society (Soltes, 2008).

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[1] In the terms of political sociology, this kind of social pathology is explained with the expression "state capture" where various groups, often on the basis of the kinship ties, occupy the most important places in the state administration and political system that distorts the normal political, economic and social development.

Public procurement is a powerful tool of economic policy. It can be used as a protection against international competition while national economies work to secure their industrial basis. This kind of public procurement usage is part of the wider economic policies where public authorities invest in R&D and innovation policies to boost economic welfare and global competitiveness. However, data has shown that preferential public purchasing does not create successful allocation of resources and effectiveness but instead the opposite it often brings sub-optimal allocation of resources and welfare loss for the economy (European Commission, 1989).

Public procurement has been one of the last obstacles before the establishment of the EU internal market as it presents its integral part. The EU internal market can be understood as the economic area with free circulation of services and factors of production. It embraces customs union principles and it is a building block for further monetary and economic integration with the adoption of the single currency and common economic policy. Thus, the elimination of barriers and distortions in the public procurement sphere is an essential element for further EU economic and political integration as public procurement system covers legal, economic and public policy considerations at both EU and national level (Bovis, 2005: 24).

In the context of the EU competition policy, liberalization of the public procurement system is fundamental task and has twofold character. Liberalization would eliminate barriers of protectionism and foster industrial competitiveness. Public procurement has already been mentioned in the Commission's White Paper for the completion of the internal market as one of the major non-tariff barriers to further market integration (European Commission, 1985). Elimination of the remaining barriers aims to bring more efficient usage of the resources and abolish preferential purchasing patterns that have secured existence of some industries across the EU. Therefore, the adoption of EU law and implementation of the basic economic freedoms, free movements of goods and services, right of establishment and prohibition of discrimination on national grounds represents the first reason for regulation. The second goal for regulating public procurement regulation is the adoption of a more market-oriented behaviour in the delivery of public services (Bovis, 2005: 8). Delivery of public services has to respect principles of the EU market competition such as trans-

parency, non-discrimination, equal treatment and mutual recognition (Aviani, 2008: 177). In another words, public management ethos and behaviour of the public administration has to adopt "value for money" patterns in public procurement purchasing, focusing on principles such as efficiency, risk management, savings and quality (Bovis, 2005: 31).

Nowadays, public procurement has become one of the fundamental prerequisites of the Growth and Jobs Initiative, or revised Lisbon Agenda. Full adoption of EU market principles in the field of public procurement will grant the EU better allocation of the financial and labour resources, greater efficiency and competitiveness on the global scene. Seen in this light, the role of efficient public procurement is of fundamental importance for innovation. Max Rolfstam (2009) sees it as a regime that should occupy the center of the EU innovation policy making. Its importance as the policy tool for economic development, innovation and reform of the public sector is confirmed by other economists. Jakob Edler and Luka Georghiou, for instance, describe public procurement as a valuable asset that can boost demand, foster innovation in the private sector and improve public services and public infrastructure in general (2007: 954).

In conclusion, the public procurement system in the European Union is more than an ordinary public policy tool. It is the intertwined place that embraces most important questions of the EU such are the questions of enlargement, internal market and Lisbon Agenda. Moreover, being a fundamental prerequisite for the establishment of the internal market, EU public procurement system is closely connected with other important EU public policies. Therefore, EU public procurement system can be seen as the catalyst for environmental, consumer, social and industrial policy that all make the *fora* of the EU public policies.

The regulation of the public markets aims to secure competitive and efficient markets similar to the private sector that will result in positive effects on the supply and demand side. There are overall three main effects that result from the public procurement regulation: trade, competition and restructuring effect. The trade effect relates to with the potential and actual savings the procurement regime would bring to the public sector as transparency and enhanced access to the public market would lower public costs. The European Commission suggested that the elimination of the

discriminatory and preferential public purchasing patters in the Member States could bring savings of ECU 20 billion or 0.5 % of GDP to the European public sector (European Commission, 1988). However, this opening of the market does not guarantee the establishment of fully competitive markets, as public authorities still have discretional power in the selection and award stage, which hinders the adoption of market principles in the public sphere. The competition effect is the natural consequence of the trade effect and price reduction. Lower costs would change corporate behaviour as abolition of the previously preferential and discriminatory practices connected with national firms would change industrial performance. Spill-over effect and raising competitiveness bring questions of innovation, R&D and customer care in the centre of their interest. The restructuring effect is connected with the supply side and it epitomises long-term industrial and sectoral adjustments of the industries that supply the public sector (Bovis, 2005: 2-3). In conclusion, enhanced market access to the public sector would bring price convergence and restructure the European industrial base making the potential for a more efficient allocation of resources.

Further impact of the procurement regulation on the corporate behaviour increases the regional concentration and specialization of the firms. They tend to adopt more integrated approach and build *network organizations* (Bovis, 2005: 4) that joint and coordinate various levels of the company structures that had previously been scattered in many different states.

The WTO umbrella for public procurement rules

Public procurement is not only regulated by the EC law and national legislations, but also on the global level. It is the integral part of the World Trade Organisation (WTO) law, as the general umbrella for the global trade regulation and liberalisation.

The WTO Agreement on Government Procurement (GPA) is the legally binding agreement in the WTO focusing on the subject of government procurement. Its present version was agreed during the Uruguay Round of multilateral negotiations (1986 to 1994), and entered into force on 1st January 1996. The GPA aims to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view

of achieving liberalisation and expansion of world trade. It is a *plurilateral* treaty: administered by a Committee on Government Procurement, which includes only those WTO members that are parties to the GPA (not all WTO members signed Agreement). Having in mind the scope, coverage and applicability of GPA it could be understood as a unique instrument of international law which is based on a series of bilateral agreements, rather than a multilateral arrangement. The GPA regulates access to the government procurement markets specifically, while general market access between the signatories is in principle dealt with under other agreements, notably the GATT[2] (import of goods) and GATS[3] (access to services market).

The Government Procurement Agreement (GPA) stipulates procedures for contracting authorities in signatory states that must be followed when awarding contracts, aiming to ensure transparency, openness, objectivity and legitimacy in the award of public contracts and to facilitate cross-border trade between the signatories. GPA is based on the WTO general principles of non-discrimination. The most important one is the principle of *national treatment*. According to it, the GPA parties must secure to providers and products from foreign signatory states the same treatment as they grant to national ones. Furthermore, the most favoured nation (MFN) principle guarantees treatment not less favourable than that afforded to other parties (Bovis, 2005).

In general, GPA imposes the following obligations regarding supplies and services:

- enactment of particular rules on public procurement in national legislations and establishing specialised state administrative bodies;
- obligation on implementation of public procurement rules for all procurements for supplies and services with value higher than 130 000 Special Drawing Rights (SDR) including open and public tendering.[4] Under the particular preconditions stipulated in the GPA, calls for offers to individual suppliers or selective tenders can be implemented;

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[2] GATT – General Agreement on Tariffs and Trade

[3] GATS – General Agreement on Trade in Services

[4] The thresholds for the applicability of the GPA regime for local government is 200,000 SDR and 400,000 for contracts in the utilities sector (Bovis, 2005, p. 48).

- non-discrimination of foreign bidders;
- notification of WTO on domestic rules and practices.

Since the *acquis* in the field of public procurement is fully aligned with the WTO law on public procurement, the EU is collectively, with all 27 member states, party to the GPA. Countries of the European Economic Area (EEA) are also parties to the GPA, including Iceland as a potential EU candidate country. Croatia is not a party to the GPA but since 5th October 1999 has observer status in the Committee on Government Procurement as WTO member country.

The EU acquis in the field of public procurement – a brief overview

The *acquis* on public procurement includes general principles of transparency, equal treatment, free competition and non-discrimination. In addition, specific EU rules apply to the coordination of the award of public contracts for works, services and supplies, for traditional contracting entities and for special sectors. The *acquis* also specifies rules on review procedures and the availability of remedies with requirement of the specialized implementing bodies.

The EU's public procurement regime was given a strong boost with the European Commission Green Paper on Public Procurement issued in 1996. The political context of EU activities aimed at improving regulation of the public sector was connected with the EU's efforts to achieve area of freedom, justice and security since the mid 1990s and related anticorruption strategies.

The Nice Treaty does not specifically mention public procurement but it does, however, lay down fundamental principles which are generally applicable. The Treaty principle governing public supply contracts is the free movement of goods (Part Three, Title I – Free Movement of Goods, Articles 23-31., of the Treaty) and the consequent ban on quantitative restrictions on imports and exports including all measures having equivalent effect. The mentioned Treaty provisions have seen fruitful interpretation in judicial practice from the European Court of Justice (ECJ). Measure having an effect equivalent to a quantitative restriction means any meas-

ure, be it a law or regulation, an administrative practice or an act of, or attributable to, a public authority, that is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. Such measures may discriminate between domestic and imported or exported goods or they may apply to domestic and imported goods alike. However, there are a number of exceptions to the prohibition of measures in this category. The Treaty places a general ban on discriminatory measures and unfair treatment but this was not sufficient to establish a single market in the specific area of public procurement.

The EC secondary legislation has been enacted in this field,[5] with additional decisions regarding exemption procedures and large numbers of soft law Commission's instruments like guidelines and explanatory. However, the most important directives that regulate the award of the public contracts (public works, public supply and public service contracts) are directives 2004/18/EC and 2004/17/EC. The first one deals with the "traditional contracting authorities" or classical sector while the other refers to the "utilities sector" or authorities and entities that operate in the fields of water, energy, transport and postal services (European Commission, 2005: 2).

The policy goal of that legislation was to open public markets and ensure transfer of competitive and effective practices from the private to the public sector. The Commission's main ambition was to merge previously divided legal instruments that have covered different procurement fields and thus create a coherent and effective procurement regime. Legislative certainty and simplification aims to bring more legal compliance and efficiency as single EU legislation aims to harmonize public procurement regimes on the national levels (Bovis, 2007: 81-82).

The EC secondary law divides public procurement in three categories, namely: rules on public supply contracts, rules on public procurement of

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[5] For the non-comprehensive list of the EC law related to public procurement see: Directive 2007/66/EC, Directive 2004/18/EC, Directive 2004/17/EC, Commission Regulation (EC) 1874/2004, Commission Regulation (EC) 2083/2005, Commission Regulation (EC) 1564/2005, Council Directive 93/36/EEC, Council Directive 93/37/EEC, Council Directive 93/38/EEC, Council Directive 92/50/EEC, Council Directive 92/13/EEC, Council Directive 89/665/EEC, Commission Regulation (EC) No 2151/2003 – CPV.

services and rules on public works contracts. The EC public procurement legislation is based on the three main principles:

- Community-wide advertising of contracts so that firms in all member states have an opportunity to bid for them.
- Banning of technical specifications liable to discriminate against potential foreign bidders.
- Application of objective criteria in tendering and award procedures.

The EU public procurement law as contracting authorities characterizes state and its organs in functional terms where term state covers central, regional, municipal and local government. Beside these governmental levels that are primarily responsible for acquisition of the public procurement, state also delegates some of purchasing operations to its organs. Organs are defined as bodies governed by public law that are established in order to deliver public interest functions. Their operations must not include industrial or commercial character as they are mostly financed and supervised by the central or lower levels of government (Bovis, 2007: 63).

Public procurement contracts are awarded on the basis of two criteria: the lowest price and the economically most advantageous offer. The lowest price criteria is used in the straightforward processes while more complex procurement schemes are rewarded on the basis of the second criteria, the most economically advantageous offer that joints qualitative parameters and social policy objectives in the purchasing (Bovis, 2005: 6). Second criteria usually covers factors of cost-effectiveness, pro?tability, technical merit, product or work quality, aesthetic and functional characteristics and other factors related with the quality of service or goods (Bovis, 2005: 62). In addition, tendering procedures are consisted of open (open to all interested parties), negotiated and restricted tenders (open only to selected candidates). The pattern of the tendering procedure is decided by the relevant authority that only in exceptional circumstances and according to special criteria can exclude particular parties from participating in the contest.

In the cases of violation of EC rules on public procurement European Commission can use, and very often uses, infringement procedure against member states with referral of the case to the European Court of Justice. As in many other areas, ECJ has created wide scope of judicial practice in

the field of public procurement. The ECJ case law on public procurement involves, inter alia, following cases: Mannesmann (C-44/96), Dorsch Consult Ingenieurgesellschaft (C-54/96), Alcatel (C-81/98), Teckal (C-107/98) and Concordia bus Finland (C-513/99). EC secondary legislation on the public procurement establishes a right to a remedy which has to be provided within national law of each member states (e.g. Directive 2007/66/EC). Domestic appeal procedure against public procurement decisions has to envisage EC law and ECJ judicial practice that are supreme to national rules and practices. Part of the EC secondary legislation on public procurement are financial thresholds for public procurements tenders in euro's and corresponsive values in national currencies of member countries outside Euro-zone, which are stipulated in Commissions Regulations (e.g. Commission Regulation 1422/2007).

Harmonisation of Croatian public procurement legislation with the acquis

Croatia has made strong progress towards the EU since 2000. The status of the candidate country for the EU membership obtained in 2004 gave Croatia attributes of the forerunner and model for the countries of the Stabilization and Association Process (SAP). The negotiations on full EU membership were opened in October 2005, while the screening process, as a first step in negotiations, took one year and was completed in 2007. During that period, Croatia has established the institutional set-up for managing the accession process and developed its negotiation structures. The year 2009 has been foreseen as a target date for the conclusion of the Croatian technical negotiations with the EU (European Commission, 2008: 5). However, the Slovenian blockade due to bilateral border dispute slowed down the negotiation process that was again facilitated in October 2009, after lifting up the blockade. Croatia has so far opened 28 and provisionally closed 12 negotiation chapters. According to the EC estimations, Croatia might be able to conclude the negotiations in mid 2010 (European Commission, 2009b: 12).

Croatia, as well as the other EU candidates and potential candidates countries from the SEE region, faces huge challenges in the public procurement area. Institutional capacity building and legal harmonisation have to

be done before the full EU membership. Legal harmonisation with the EU *acquis* has to introduce principles of the EC Treaty in the procurement procedure: the free movement of goods, persons, capital and services, non discrimination on grounds of nationality and equality of treatment. According to the Stabilisation and Association Agreement (Article 69), the legal harmonisation with the *acquis communautaire* should start „*…on the date of signing of the Agreement, and will gradually extend to all the elements of the Community acquis referred to in the Agreement… In particular, at an early stage, it will focus on fundamental elements of the internal market acquis as well as on other trade-related areas…*" (European Commission, 2001). The Article 72 of the SAA specially refers to public contracts: "*The Parties consider the opening-up of the award of public contracts on the basis of non-discrimination and reciprocity, in particular in the WTO context, to be a desirable objective*".

Starting point for harmonization with the *acqui* is to set up a central body (policy unit) responsible for organising and managing the public procurement policy. This body would draft the legislation, disseminate the information and secure oversight of the whole system. Additionally, it would ensure compliance of the rules and provide expert advices and training to the contracting parties. Regarding the implementation and enforcement of the public procurement legislation, monitoring and review bodies should be set up. The administrative control and awarding procedures should be verified independently with secured training and operational support for monitoring bodies and judges (European Commission, 2005).

Public procurement system occupies important share in the Croatian economy. It has reached 44.4 billion HRK in 2007 (16.15% of GDP) which represents significant increase in comparison with the previous year, when the public procurement ratio in the GDP was 11.77%.[6] Public procurement is increased due to the strong economic and investment growth, as FDI influx to Croatia clearly shows.[7] Public expenditures in Croatia repre-

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[6] Strategy for the development of the public procurement system in Republic of Croatia, p. 3.

[7] The FDI increased from 2756 mill EUR in 2006 to 3667 mil EUR in 2007. SEE: Foreign Direct Investment in Central, East and Southeas Europe. The Vienna Institute for International Economic Studies, WIIW Press Release, 09-06-2009.

sent 48% of the GDP that is one of the highest public expenditures within transition economies. Thus, this makes public procurement sector in Croatia even more relevant as this is one of the main devices of the public finances expenditures.

Croatia is the most advanced country within the SEE region regarding the legal harmonisation in the public procurement sphere. After completion of the screening Croatia has fulfilled opening benchmarks in Chapter 5 that covers public procurement and subsequently opened it on 19th December 2008. However, closing benchmarks for public procurement have not yet been fulfilled that omits provisional closure of the Chapter. For the completion of the chapter Croatia should fulfil three benchmarks: complete the legal harmonisation, enforce the administrative capacities, and be able to prove the ability for implementing and monitoring the public procurement system (through establishing the central procurement body at the government level). In the negotiations with the EU, Croatia has not requested any transitional period or derogation in implementing European standards. After entering the EU Croatia will have the obligation to open tender in the EC Official Journal for public procurements which exceed the amount of 300 thousand Croatian Kunas (HRK) for goods and services and 5000 thousand HRK for public works.

Current Croatian legislation on the public procurement includes the following:

- Public Procurement Act (Official Gazette110/07 and 125/08)
- State Commission for the Supervision of Public Procurement Procedure Act (Official Gazette 113/07)
- Public Private Partnerships Act (Official Gazette 129/08)
- Concessions Act (Official Gazette 125/08)
- General Administrative Procedure Act (Official Gazette 53/91)

Public procurement legislation in Croatia has been significantly changed since the signing of the Stabilisation and Association Agreement (SAA) in 2001. This was necessary due to the circumstances; although this approach is not recommendable from the principle of legal certainty. The fist package of legal acts regulating the public procurement area was adopt-

ed in 2001[8] with the Public Procurement Act (2001) as the first act of this kind in Croatia.[9] However, this act was only partly harmonised with the EU principles so due to the new EU directives from 2004,[10] further harmonisation was needed to cope with that change of the procurement *acquis*.

The current Public Procurement Act, which introduced stronger alignment with the *acquis,* came into force on 1st January 2008. The mentioned, new public Procurement Act has brought forward expansion of public procurement procedure and overall compliance with the *acquis*. In many areas Croatian Public Procurement Act goes beyond the EU procurement directives. For instance, general application threshold is significantly lower than the thresholds of the procurement directives. However, overall legal framework has not been completed. Remedies on the public procurement procedures regarding concessions are not fully aligned with the *acquis*. In the time of writing of this article Croatian Parliament is discussing in emergency parliamentary procedure (majority of "European acts" is adopted in this manner of parliamentary procedure) the Amendments to the "State Commission for the Supervision of Public Procurement Procedure Act". This act further regulates the State Commission competences and brings alignment with the relevant EU directives regarding judicial protection.

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[8] The public procurement system was initially regulated by the Public Procurement Act (Official Gazette No. 11/01), the Act on the State Commission for Control of Public Procurements Procedures (Official Gazette No.117/03), the Regulation on the Procurement Procedures for Goods, Works and Services of Lesser Value (Official Gazette No. 14/02) and the Regulation on Announcements and Records of Public Procurement (Official Gazette No. 14/02).

[9] It is interesting to mention that the first Public Procurement Act from 2001 was part of the *impact assessment* pilot project, aiming to introduce better regulation into Croatian legislation. This means that the new act had to be accompanied by analyses of impacts on economic sector, budget and other relevant areas.

[10] Directive 2004/17/EC, coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

In the period after 2000, Croatia has established appropriate institutional capacities within the procurement system. Ministry of the Economy, Labour and Entrepreneurship (MELE) is a main body responsible for the public procurement system in Croatia with its Directorate for the system of public procurement being in charge of development, improvement and coordination of the entire public procurement system. State commission for Supervision of Public Procurement Procedure is an autonomous and independent national body that decides on complaints concerning public procurement procedures. It is both judiciary and administrative body with legality and transparency as main principles of conduct. Commission together with Croatian government drafts proposals for the improvement of the public procurement system and it maintains website that consists legal protection system in the public procurement. Establishment of these two institutions, State Commission and the Directorate, were Croatian benchmarks for the opening of the Public Procurement chapter in the EU negotiations. Implementation Monitoring Committee is a coordination body established by the Croatian government for the implementation of the "Strategy for the development of the public procurement system in the Republic of Croatia" and its Action Plan. It includes the representatives of the relevant ministries, State Commission and other public administration bodies engaged in the implementation process. Ministry of Finance is responsible for fiscal aspects of the public procurement as it drafts budget forecasts and controls collection of concession fees. Ministry of Finance cooperates closely with the Agency for the Public Private Partnership regarding the fiscal risks assessments during the pre-tendering procedure and financial sustainability of the contracts enforcement in the post-tendering phase. Agency is the central national body in charge of implementation of the Act on Public Private Partnerships in Croatia. It aims to prepare high-quality public private partnership projects and successfully implement concluded ones. State Audit Office reports about the compliance with the Public Procurement Act, observes irregularities and cooperates with the relevant authorities in the cases of maladministration. Additionally, it supervises activities of the contracting authorities after the contract conclusion. Office for Suppression of Corruption and Organized Crime (USKOK) is a State Attorney office specialized in corruption and

organized crime that collects reports submitted by the State Audit Office and MELE and conducts measures against the law offenders.

Furthermore, Central State Administrative Office for e-Croatia is a main governmental body responsible for the development of the information system within the state administration. Its actions included policies such are: eTax, eCustoms, eJustice, eHealtcare, eEducation, eCulture and part of its activities is "Strategy for the development of Electronic Government in the Republic of Croatia for the period 2009 – 2012". Positive impacts of the electronic government (eGovernment) practices that Office tries to introduce are better and more efficient public service that serves the needs of society. Similar activities are done by the Financial Agency (FINA) as a state agency that provides services in the financial sector. It has been major governmental partner in the implementation of the project HITRO.HR that is a governmental service that facilitates communication between of the state administration, citizens and business subjects. Finally, Narodne novine (Official Gazette) is a state owned company that maintains electronic system of public procurement publications through the Electronic Public Procurement Classifieds. Thus, its function is dissemination of the proper information to the contracting bodies.

The State Commission for the Supervision of Public Procurement Procedure has introduced since April 2008 practice of publishing its case-law on the internet. Also, registry of public procurements is available online. Practice has shown that most typically cases of public procurement rules violation form the State Commission case-law, not withstanding absence of public procurement tenders or non compliance with direct bidding rules, are the cases where the object of the procurement is specified favour of a certain manufacturer.

Key challenges for Croatia in public procurement implementation during EU accession

The goal of the public procurement system in Croatia is co-ordinated implementation of procedures and the award of public procurement contracts and concessions transparently, providing equal treatment to all those participating in the public procurement system, encouraging competition and sustainable economic development, promoting the use of pub-

lic-private partnerships, and simultaneously providing uniform legal protection.[11]

In the last Commission Progress Report on Croatia (European Commission, 2009a), the public procurement system was seen as one of the most challenging areas for Croatia. The overall estimation is that Croatia made generally good progress in the public procurement area but further progress is urgently needed. The report concludes: "*Good progress can be reported under this chapter in particular as regards completion of the necessary institutional set-up. Overall, preparations are at an advanced stage. However, legislative alignment still needs to be completed. Practical guides for implementing the legislation need to be further developed. Administrative capacity needs to be further enhanced at all levels of the procurement system, in particular with a view to effectively fighting corruption and tackling irregularities*". The Commission points out that the administrative capacity, coordination mechanisms and anti-corruption measures need to be strengthened; while the capacity of the procuring entities to apply the public procurement legislation correctly, efficiently and transparently needs to be enhanced in order to reduce the potential for irregularities, including fraud and corruption in public procurement procedures (European Commission, 2009a: 32-33.). The Accession Partnership, as the main instrument to guide Croatian preparations for the EU accession, after opening of the negotiations on 3rd October 2005, underlined two key priorities regarding public procurement. The first one aims to guarantee a coherent implementation in all public procurement areas while the second one advocates adoption and implementation of the comprehensive public procurement strategy followed by strict enforcement mechanisms.[12]

The key Government measures for strengthening public procurement system in Croatia are those addressed to suppressing corruption and the support for the human potential and institution building.

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[11] Strategy for development of public procurement system in Croatia (2008)

[12] The previously adopted European Partnership stressed that Croatia should ensure an effective and transparent public procurement regime to become fully operational, together with adopting the necessary implementing regulation. The medium term priority is to make substantial progress towards complete alignment with the *acquis*.

Suppressing corruption

Establishment of the legal framework in the public procurement area, its efficient implementation and enforcement are essential instruments for the fight against corruption. Weak institutional and legal capacities provide space for different kinds of corruptive activities. Being the transition country, Croatia faces problems in this area similar to other post-socialist states that have the track of similar political and economic development. Corruption in the public procurement cannot be distinguished from the process of privatization in Croatia that concentrated economic power in the hands of the privileged elites that are closely intertwined with their political sponsors.

Croatia is aware of the need to tackle the corruption problem in the public sector and its linkage with the public procurement system. This is one of the key areas where significant reforms have to be implemented in order to facilitate the full Croatian EU membership. Measures aimed at corruption prevention in the public procurement system include strengthening of the legal framework and supervision mechanisms (prevention, education, and sanctions) and cooperation with other controlling bodies. Additional actions have to include training of the contracting bodies, rising of the public awareness and encouraging the usage of procurement.

Fight against corruption became one of the top priorities of the Croatian government that has performed numerous measures against the corruption in the public procurement sector. National Programme for the fight against the corruption (2006 and 2008) stresses the devastating impacts of corruption and a need to confront it decisively. Regarding the public procurement area, it emphasizes the need to undertake several measures. Firstly, tighter rules followed by their stronger implementation, have to be enforced in the fields of concession and procurements contracts. Secondly, public procurement system has to be analyzed taking into account the risk of choosing the bidders within the contracting process. Thirdly, internal control of the public procurement, both on the state and local level, has to be institutionally strengthened with the possible assistance of the civil society or media as external co-operators.[13] Fourth, there is a need for stronger audit of the budgetary issues, its planning

[13] These measures were recommended to be done by the Directorate for the system of The Public Procurement within the Ministry of the Economy, Labour and Entrepreneurship (MELE) and the state Commission for the Supervision of Public Procurement Procedures.

and implementation by the Ministry of Finance. Finally, there is a need to introduce the electronic public procurement system by the Central State Office for e-Croatia, in the cooperation with the state Commission and MELE.

Croatian Parliament has adopted a revised Anticorruption Strategy[14] in June 2008 that was accompanied with the Action Plan for the Implementation of the Strategy. The Action Plan implementation is conducted in five steps. Improvement of the legal and institutional framework for suppressing corruption is further needed with some already done measures.[15] Furthermore, workshops and seminars have to spread more knowledge about the anti-corruption activities to the whole society with parallel strengthening of the institutions integrity and citizen˘s confidence in the work of the public authorities. Fourth measure faces preconditions for hindering the corruption on all levels. Proposed action wants to analyze competition˘s documentation and process of bids choosing. Last part of the Action plan advocates rising of the public awareness about the negative consequences of the corruption and need to tackle it.[16]

In addition, apart of developing the mentioned National Strategy and its Action Plan, Croatia already adopted Act on the Prevention of Conflict of Interest in Performing Public Functions.[17] This Act regulates the performance of the public functions where state officials have to perform their duties in impartial and honest manner, taking care about their integrity and respect for the public duty. Finally, Croatia also adopted Codes of Ethics for the Public Service[18] that aims to establish appropriate code of conduct in the state administration and raise the level of public confidence in the public service.

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[14] Anticorruption Strategy (in Croatian: Strategija suzbijanja korupcije), Official Gazette 75/2008. http://www.infolex.hr/htm/50498.htm

[15] Concessions Act and Act on Public-Private Partnership from the 2008

[16] Action Plan accompanying the Anticorruption Strategy (in Croatian: Akcijski plan uz strategiju suzbijanja korupcije), Ministry of Justice, Republic of Croatia, June 2008

[17] Act on the Prevention of Conflict of Interest in Performing Public Functions (in Croatian: Zakon o sprječavanju sukoba interesa u obnašanju javnih dužnosti), Official Gazette 163/203 at http://www.infolex.hr/htm/26508.htm

[18] Codes of Ethics for the Public Service (in Croatian: Etički kodeks državnih službenika) at http://www.sabor.hr/Default.aspx?art=1924&sec=510

International ranking according to corruption perceptions indicators is important for a country like Croatia, as it reflects an external image of how the country is seen by the international community, political partners, business analysts and foreign investors. However, despite undertaken efforts, Croatia is still relatively highly positioned according to the corruption perceptions. For example, according to the Transparency International's Corruption Perceptions Index, Croatia was in 2008 positioned on the 62nd place out of 180 countries encompassed by the report, followed by the countries of South-Eastern Europe.[19] The mentioned index indicates the degree of public sector corruption as perceived by business people and country analysts.

Table 1:

Positioning of Croatia according to Corruption Perceptions Index in 2008

Country Rank	Country/Territory	CPI Score 2008	Standard Deviation	Confidence Intervals	Surveys Used
1	Denmark	**9.3**	0.2	9.1-9.4	6
5	Switzerland	**9.0**	0.4	8.7-9.2	6
62	Croatia	**4.4**	0.7	4.0-4.8	8
70	Romania	**3.8**	0.8	3.4-4.2	8
72	Bulgaria	**3.6**	1.1	3.0-4.3	8
72	FYR Macedonia	**3.6**	1.1	2.9-4.2	6
85	Serbia	**3.4**	0.8	3.0-4.0	6
85	Montenegro	**3.4**	1	2.5-4.0	5
85	Albania	**3.4**	0.1	3.3-3.4	5
92	Bosnia and Herzegovina	**3.2**	0.6	2.9-3.5	7
180	Somalia	**1.0**	0.6	0.5-1.4	4

Source: Global Corruption Barometer 2008, Transparency International

Note: Number of countries encompassed by the report is 180. CPI Score: degree of public sector corruption as perceived by business people and country analysts (10=highly clean; 0=highly corrupted)

[19] IT Corruption Perception Index 2008 at http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table

In this context, it is useful to analyse the views of citizens and general public opinion towards the public corruption, as stated in the Transparency International Global Corruption Barometer[20]. According to its' data, Croatian citizens consider the level of corruption among public officials (civil servants) as the second most corrupted sector (4.2 points, where reference points are: 1 not corrupted; 5 extremely corrupted), after the judiciary that "leads" with 4.4 points. As a comparison, it could be mentioned that the average EU 27 level of the corruption perception in the public service is much lower (3.4). Even the average citizens' perception of corruption in Western Balkans and Turkey is on lower level than in Croatia (3.7). In addition, Croatian citizens find political corruption as a very serious problem in 71% cases while in the EU 27 this level is around 36%. At the same time 20% of Croatian citizens are of the opinion that civil service is prone to corruption and 44% think the same for judiciary, while on the EU27 the reference figures are 18% for former and 9% for latter[21].

Table 2:

Citizens' Perception of Corruption in different areas – positioning of Croatia in comparison with the EU and South-eastern European countries

Country/ Territory	Political Parties	Parliament/ Legislature	Business/ Private Sector	Media	Public officials/ Civil Servants	Judiciary	Average Score
EU+ (Average)	3.7	3.4	3.4	3.3	3.4	3.1	3.4
Switzerland	2.9	2.6	3.2	3.1	2.5	2.2	2.8
Western Balkans+Turkey	3.6	3.5	3.7	3.4	3.7	3.5	3.6
Bosnia&Herzegovina	4.4	4.3	4.2	3.7	4.2	4.3	4.2
Croatia	**4.1**	**4.1**	**4.2**	**3.7**	**4.2**	**4.4**	**4.1**
FYR Macedonia	3.8	3.7	3.6	3.3	4.0	4.2	3.8
Kosovo	3.8	3.4	3.7	2.3	3.3	4.0	3.4
Serbia	4.1	3.8	3.9	3.7	3.9	3.9	3.9
Turkey	3.4	3.4	3.6	3.4	3.6	3.3	3.5

Source: Transparency International Global Corruption Barometer 2008
Note: 1=not all corrupt; 5=extremely

[20] For all further data in this part see Global Corruption Barometer 2008 at http://www.transparency.org/policy_research/surveys_indices/gcb/2009; pp 229.

[21] Ibidem, pp 33.

The Commission Report on Croatia for 2008 pays strong attention to the problem of corruption, confirming that "…there has been some progress in the fight against corruption. The legal framework to combat corruption has been further improved. …A new inter-ministerial coordination system for monitoring anti-corruption efforts is in place. The Office for the Fight Against Corruption and Organised Crime, USKOK, continues to become more active... However, corruption still remains widespread. The administrative capacity of state bodies for fighting corruption continues to be insufficient. The police need to become more effective… implementation of anti-corruption efforts has continued to lack strong co-ordination and efficient non-partisan monitoring" (Commission of the European Communities, 2008, pp 10).

To conclude, there is a need to raise awareness of the impacts of corruption at all levels in the society, to build a culture of political accountability and to tackle high level corruption in particular.

Human potential and institution building

Another important area in building an efficient public procurement system is human potential and institution building. During the process of EU accession a number of training courses and activities were implemented in Croatia with the aim to develop professional and educated public administration which will be able to respond to challenges of the EU membership, through building efficient, effective and transparent system of public procurement. The Government introduced the programme of training and professional development which consists of specialised programmes for different target groups (contracting authorities and entities, local government, tenderers, trainers etc).

Several international projects in the area of public procurement could be mentioned as an illustration of the institutional capacity building methods.

- The PHARE 2005 Twinning Light Project "Strengthening administrative capacities for the implementation of new public procurement legislation" was implemented by Croatia and the Min-

istry of the Economy, Labour and Enterprise (the project was finalised in 2008). The project is worth more than 185,000 Euros and was implemented with the twinning partner, the Hungarian Public Procurement Council. The aim was to assist building transparent public procurement system in the context of fight against corruption, and to help prepare Croatian business people for the European market. [22] Within the project, 19 workshops were organised.

- The PHARE 2006 twinning project "Capacity Strengthening of the State Commission for the Supervision of Public Procurement Procedures and the Legal Protection System" (EUR 240,000, duration 6 months) aimed to strengthen and promote the transparent system of public procurement and legal protection in Croatia in accordance with the EU standards, the presentation heard. The twinning partners are the Croatian State Commission for the Supervision of Public Procurement Procedures and the Polish Office for Public Procurement. The project was divided into two parts, namely enhancing the State Commission's administrative capacity by training its members and advisers in the areas of concessions, public/private partnerships, verdicts by the European Court of Justice and framework agreements; and raising the public awareness of legal protection in public procurement through seminars in Osijek, Split and Zagreb[23].
- The project supported by the Netherlands Government aiming to raise the level of professionalization of public procurement functions in Croatia included several workshops and study visits to Netherlands (2008-09).
- Apart of it, the Public Procurement Manual was jointly developed by the Government of Croatia's Public Procurement Office, EU CARDS Program and USAID Croatia in 2006. The Manual is

[22] http://www.mingorp.hr/defaulteng.aspx?id=1086

[23] http://www.safu.hr/en/news/twinning-project-on-capacity-building-in-public-procurement-presented-in-zagreb

a guidebook for efficient public procurement, designed to ensure that public funds are managed in a transparent, efficient and cost-effective manner.

The above mentioned examples show that a numerous training courses have been provided at central and local level for both economic operators and contracting authorities. The training covered in particular the areas of public contracts, concessions and public-private partnerships, legal protection and the issue of ethics and conflicts of interest. However, it seems that there is a need to raise the awareness and develop sensitivity for the problem of potential conflicts of interest and corruption.

Conclusions

Harmonisation of legislation related to public procurement is extremely important task during the EU accession process. The *acquis* on public procurement includes general principles of transparency, equal treatment, free competition and non-discrimination. In addition, specific EU rules apply to the coordination of the award of public contracts for works, services and supplies, for traditional contracting entities and for special sectors. Specialised implementing bodies need to be established as a part of the transformation to market economy.

Croatia is in the advanced stage of legal harmonisation in this area. The key strategic documents and basic legal acts have been adopted, but there is a need for further alignment. Although the main institutions for managing public procurement policy have been established, the key issue is the efficient policy implementation. Strengthening anti-corruption policy remains on the top of agenda in the negotiations process on Chapter 5, Public procurement. There is a need to strengthen Government measures directed towards preventing corruption in public procurement system. It includes strengthening legal framework, strengthening control mechanisms (prevention, education, sanctions), cooperation with other control bodies, training, rising awareness and encouraging the use of procurement.

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DEVELOPMENT OF ENVIRONMENTAL LAW IN THE REPUBLIC OF SLOVENIA UNDER THE INFLUENCE OF EUROPEAN LEGAL RULES

The Republic of Slovenia (hereinafter Slovenia) began with harmonization to the EC law in the field of environmental law before entering the EU, in the beginning of 90-ties. In my report I am dealing with period beginning in these years and up to the latest changes in environmental legislation, including changes of the horizontal and general Environmental Protection Act. Following characteristics are emphasized:

- The first systematic act in the scope of environmental protection was accepted in year 1993 and it is still in force, although several times supplemented and changed. The Environmental Protection Act (hereinafter: EPA) has brought in the Slovenian legal corpus a modern concept of environmental protection, including fundamental principles of environmental protection. This helped a transition from anthropocentrism to ecocentrism. At the beginning of 90-ties the Slovene law was already familiar with modern concept of civil legal protection of the environment and also in the scope of administrative legal protection civil legal instruments were used. Therefore, primary legal remedy in case of burdening the environment is *restitutio in integrum* with the objective to regain the original state as the form of compensation. Only, if this is not possible, the compensation or other action,

which improved the environmental state, are possible. The first version of the EPA has followed modern approaches of environmental protection, especially those accepted in German legal system, Lugano Convention on civil liability for environmental damage etc. The Act has been based on fundamental principles of environmental protection already well established in theory and practice, especially the principle of sustainable and permanent development, the principle that the polluter pays, the principle of predictability, caution, *restitution integrum,* etc..

- Gradually European provisions of Directives, Regulations and also Conventions were implemented in the EPA-1:
  - Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991);
  - Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice
  - in Environmental Matters;
  - Council Directive 96/82/EC of December 1996 on the control of major-accidents hazards involving dangerous substances;
  - Council Directive 96/61/EC of 24 September 1996 concerning pollution prevention and control;
  - Directive 2001/42/EC of the European Parliament and of the Council of June 2001 on the assessment of the effects of certain plans and programmes on the environment;
  - Directive Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment amended by Council Directive 97/11/EEC of March 1997 amending Directive 85/337/EEC 1985 on the assessment of the effects of certain public and private projects on the environment;
  - Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC;

- Directive 2003/35/EEC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directive 85/337/EEC and 96/61/EC;
- Directive 2003/87/EC of the European Parliament and of the Council of October 13 2003 establishing a scheme for greenhouse gas emission allowance trading within Community and amending Council Directive 96/61/EC;
- Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community eco-label award scheme;
- Regulation (EC) no 761/2001 of the European Parliament and of the Council of 19 March 2001on allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS);
- Council Regulation (EEC) No 259/93 of 1February 1993 on the supervision and control of shipments of waste within, into and out of the European Community;
- Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage;
- Directive 2004/101/EC of the European Parliament and of the Council of 27 October 2004 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms;

and that is how the Act slowly became horizontal general act, which has been, in the relation to other acts, general and therefore derogated by them. In parallel the *Nature Conservation Act*, the *Forest Act*, *Ordinances on collection, transport and management of waste* were adopted. Howev-

er the EPA, maybe even more that necessary, is joining number of mentioned directives and now days several general areas are regulated, especially with horizontal provisions, as well as completely specific areas, such as emissions permits trade, concession on public goods, public undertakings, division on competences of environmental protection on national and regional level, etc..

- Pragmatically, it is advantage of the EPA that all mentioned areas are collected in one place only, but also that unified proceedings are in use for different licences and permissions, as a consequence of the IPPC Directive, SEVESO Directive, etc.. Environmental Permits are subject of horizontal legislation, and procedurals rules, especially environmental impacts assessments, etc, are unified.
- Despite the fact that proceedings are unified, they are still multistage and especially the environmental impacts assessment might be problematic from this point of view. Slovenia has been warned that it has to remove administrative burdens. The environment impacts assessment is one of mentioned obstacles. The institute itself is of course necessary, well-mentioned, but still it could be only one fold and not two-folded procedure, as provided in the EPA.
- This year (in April 2009) the Government of Slovenia accepted the *Plan of removal of administrative obstacles*, which, beside other provisions, provided for simplification of proceedings in the scope of environmental intervention, which would at the same time mean easier adoption of project aimed to new infrastructure's erection by removing anomalies or unnecessary burdening.
- The EPA was firstly based on very appropriate economic incentives, especially on the principle of *power of the purse*, which was later abolished by tax legislation. Nowadays the actions of the individuals, organisations or companies, aimed to the improvement in the environmental protection, are not awarded by economic incentives, but rather only with the help of the Ecological

Fund of Slovenia. Slovenia offers financial credits, i.e. loans for environmental projects. Slovenia also finances a part of energy, obtained from renewable sources of energy, such as solar energy, bio mass, bio gas, thermal energy, etc..

- In year 2007 and 2008 one of the biggest questions of appropriateness of the EPA was given to Environmental Permits which are part of the IPPC Directive. In October 2007 the deadline for obtaining the permits has passed. All factories (polluters) that need such permit, had to gain it. Some of them were given the extension, but Slovenia has not fulfilled demands of IPPC Directive. This is why it is expected that the EC Commission will file the law-suit against Slovenia, as media reported end of October 2009.
- At the moment the biggest and the most important topic is the Directive 2009/28/EC on the promotion of the use of energy from renewable sources, which demands Slovenia to use 25% of energy obtained from renewable sources until year 2020. This is an extremely heavy task for Slovenia, which will, according to first anticipations, require more that 100% more financial investments for construction of the objects for obtaining energy from renewable sources. At the same time it is necessary to decrease the use of electric energy from fossil energy sources. The Slovene Energy Association, where companies providing electric energy are represented, has already prepared an Action Plan. Six scenarios are prepared how to accomplish the above objective. In time period of one year Slovenia has to also make an Action Plan, provided in mentioned Directive and the Commission Decision arising from it, and inform the EC Commission, how this objective will be achieved. Fundamental changes should be started immediately. This holds true for legislation area, where question of administrative burdens are considered and also simplification of the proceedings of obtaining documentation and establishing the infrastructure for obtain electric energy from renewable sources of energy. Implementation of this Directive, which is the latest of all environmental directives, has not yet officially begun.

- Slovenia is not always in time with the implementation of the directives in the field of environmental law. The first judgement of the European Court of Justice has considering this issue. Slovenia has not implemented in time the Directive on civil liability for damage, caused to the environment (2004/35/EC), and has been consequently sued by the EC Commission.
- In Slovenia, emission coupons trading is including 98 companies, which have to obtain mentioned coupons. The Government of Slovenia in under the pressure of lobbyists not to reduce the number of coupons. At the same time the Government is under a pressure of the EC Commission demanding the same reduction. Because of the financial economic crisis in year 2009 this has not been a great issue. However due to increased demand on the market after the crisis and hence greater demands for energy, this issue will again be activated.
- Second important act, which strongly affected environmental protection, is the *Nature Conservation Act*. It has implemented in Slovenian legal order provisions of the EU, especially Habitats Directive. On the base of this act many areas in Slovenia became *protected areas* and are nowadays *regional*, *natural* or *national parks*. These have special rules of operation, which have especially interfered with plans of the industry. The situation that stands out is the erection of the wind power plants within one such protection area. Conflicts of economic interests on one side and nature conservation interests on the other are clearly presented. There is a pressure presented by the industry lobby to decrease the number of protection areas.
- Also the Water Act, which implements the Water framework directive, has systematically edited the former Slovenian water act, which was under-regulated. A water-management was *ad hoc* left to individual authorities, which had difficulties in determining their jurisdiction. Nowadays the water regulation and its use is well regulated, drawing the difference between *usual* use of waters and use for *industrial purposes.* The Water Act has also enabled special fund for waters, where income is collected. This

is important for Slovenian rivers, which are causing the most damage at heavy storms. The experts are of the opinion that frequent overflowing are consequence of regulation mistakes, that happened in 70-ties and 80-ties of the last century. Also climate changes helps and floods and torrential destruction have, in last years, caused extremely great damage. Slovenia, being rich with rivers, got mentioned legislation too late, which is partly consequence of framework Directive of the EU not regulating these questions in great detail.

- It has been evaluated, that approximately 90% of all environmental legislation is deriving out of the EU legislation. The main difficulty by transposition and implementation is in duplication of proceedings or in high number of them. A special office of Ministry of Environment and Spatial planning, i.e. the *Agency of the Republic of Slovenia for Environment,* is conducting 251 different administrative proceedings arising from its jurisdiction, meaning that this authority is faced with great overload of different proceedings and permits, issued in these proceedings.
- European legislation is without prejudice to division of jurisdiction between the state and local communities regarding environmental protection, but nevertheless also local communities are bound by it. Slovenian provisions of public undertakings in the field of environmental protection are therefore putting local communities into situation, where they have to respect European legislation in the same way as the State. For example local communities are responsible for treatment of waste waters and a demand from EU is that wastewater treatment plants are constructed. This has caused an expansion of wastewater treatment plants in all Slovenian local communities. Mainly they were built under the concession relations, the result being that Slovenian rivers are not overloaded anymore with sewage and water waste.
- In the latest time more often cases are being noted at the competent administrative authorities and also at the courts dealing with the issue of environmental protection. The matters vary greatly; from the use or possibility of concession on public goods, prohi-

bition of new construction in certain environment, challenge of the permits enabling the construction or the pollution or operation of certain device causing the pollution, civil procedures against certain polluters and demands for compensation, etc.. The first matter demanding the use of more modern provisions at the court on the base of the EPA is from year 1993 and it was the matter of pollution of forests by thermal power plant Šoštanj with sulphur dioxide. The forest which was a few kilometres of air distance away in the wind direction suffered damage. After many years of courts' proceedings, with the use of fundamental principle that polluter pays, the proceeding was not solved in the benefit of injured. The procedure point out the problem characteristic for all such disputes, this is the proof of causal link in the situation of remote and delayed emissions.

- An important pressure on environmental protection on the industry and at the same time an important pressure on decision-making of state authorities in Slovenia, represent civil initiatives. These are more or less organised. Those civil initiatives organised in the form of societies usually lead active politics and are parties in the courts' disputes, especially administrative disputes, those less organised on the other hand try to, with the help of media, achieve certain prohibitions or different actions of those burdening the environment. Slovenia has one of the most strict provisions determining the possibility of organised civil initiatives taking part in the proceedings. Despite this, there are many civil initiatives and cases have arisen, where civil initiatives have in their actions no appropriate arguments. This way they might also impede investors. It such situation the only path for them is court's protection against such civil initiatives or individuals, which in Slovenia has already been experienced. Some new approaches, such as interim measures against individual denigrates certain investor in the media. For the civil initiatives is this a quite major blow, forcing them to protect the right in court's proceedings, which is in many times extremely difficult, connected with costs and lack of appropriate evidence. Path with the use of media is of course easier, but at the case time it could be

more dangerous, taking in regard that media is not functioning on the base of principle of contentious proceedings and are not called to solve the disputes.

- In Slovenia more detailed and better regulation regarding legal civil and collective exercise claims, is missing. Our legal order in familiarized with *actio publiciana*, however it does not have all characteristics or class or group action. The rules are very superficial and in the consequence of which such actions in Slovenia are not known, regarding to the fact that Slovenian legislator usually reacts with new legal provisions in the field of environmental protection, when it is necessary to implement European rules. Also according to this question it is anticipated that the Slovene legislator waiting for European step ahead regarding group actions in the field of environmental protection.

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