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Contributors

Aleksandra Krakiewicz
D. Phil Candidate in International Relations
St. Antony's College
University of Oxford, UK
aleksandra.krakiewicz@politics.ox.ac.uk

Anne Sophie Krossa
Lecturer
Department of Sociology
University of Glessen, Germany
askrossa@web.de

John Law
PhD Student
St Hugh's College
University of Oxford, UK
john.law@st-hughs.ox.ac.uk

Marco Montanari
University of Modena and Reggio Emilia, Italy
montanari.marco@unimore.it

Tereza Novotna
Boston University, USA
tnovotna@bu.edu

J. Michael Payte
Chairman London & European Committee
International Association of Financial Engineers
International Capital Markets Advisory
113000.610@compuserve.com

Thomas Pfister
PhD Student
School of Politics, International Studies and Philosophy
Queen's University Belfast
t.pfister@qub.ac.uk

Gabriele G.S. Suder
Professor of International Business
CERAM Sophia Antipolis, France
gabriele.suder@ceram.fr

Elke Viebrock
Lecturer
Centre for International Public Health Policy
University of Edinburgh, UK
elke.viebrock@ed.ac.uk

Integration of Unequal Units: Comparing the German and the European Unification Processes

Anne Sophie Krossa

Introduction

More than fifteen years after the beginning of the so-called post-communist period in East Central Europe specific problems of the multidimensional changes are discussed with increasing frankness. The importance of topics such as conflicting interests and different identities continues to grow. This is the case in both Germany and the European Union (EU) – both frames for the integration of their Eastern and Western parts

In both cases we can find a basic structure of centre and periphery, which partly reproduces itself on different levels. In a traditional sense, the West plays the part of the centre while the East represents the periphery. This study focuses on the latter. Centre-periphery structures symbolize differences, such as quantitative and qualitative asymmetry. If relations are perceived as correlating systematically with asymmetrical structures, feelings of discontent and reactions of protest and resistance may be favoured in peripheries. Specific forms of identity are then likely to become more characteristic than others. The internal functions and external consequences – especially for the entire system, which includes all parts of the structure – shall be analysed.

My approach is based on the differentiation between the `specific´ and `diffuse´ support for political systems according to Easton (1965). Common features of integration processes within Germany on the one hand, and Europe on the other hand, as well as differences between them will be illustrated. A detailed elaboration of the German-German integration serves as a contrast for the situation of the East Central European Countries within the EU. The analysis of the European process focuses on Poland by way of example. The conclusion concentrates on the importance of the different types of support in the context of collective identity-construction concerning the chosen cases as well as hierarchic structures in general.

1. Theoretical background

Easton (1965) argues that while specific support for a system is based on a concrete satisfactory output – of a political kind which can materialise economically – diffuse support is independent of outputs.[1] It can be rooted in generally shared interests, loyalty, solidarity and legitimacy, is an approval of the system in itself and shows analogies to the concept of identity. In this context, it is necessary to take into consideration the fact that in German-German relations as well as in the European East-Western relations we do not only find a whole system (`Germany´ or `European Union´), but many subsystems too.[2]

Easton´s approach can be applied if an inter-societal, rather than an intra-societal, situation within a shared system is assumed.[3] However, modifying this theory has a condition: both partners, the stronger and the weaker one[4], have to be clearly interested in integration so that a certain common and simultaneously superordinated systemic constraint exists. In both cases this can be assumed as given.

As aspects of identity are focused; this text mainly refers to diffuse support. One important supposition is: the greater diffuse support for a system, the lower its dependence on specific support and *vice versa*. If the system as a whole has a relevant advance of trust at its disposal, the political output of the stronger partner or the material help respectively may be, at least for some time, lower, compared to its dimensions in a situation with hardly any or even no diffuse support. However, it has to be assumed that diffuse support cannot be stable in a long term perspective if specific support was not perceived as sufficient. In other words, if interests are not satisfied to a certain degree, it is possible that the belief in the legitimacy of a situation or relation will decrease. This can withdraw the basis of loyalty and solidarity. But it is not imperative that the interests are of a material kind, rather perceptions of status are focused.[5]

2. The Unification Processes 'East' – 'West' Germany and 'East Central Europe' – 'European Union': Similarities and Differences

At their beginning, both unification processes were based on relatively widespread diffuse support.[6] This was substantiated by elements of collective identity[7]. In the case of Germany there existed a very widespread traditional idea of unity, which can take different shapes, depending on generation especially, and in the European context a conscience of belonging together in principle can also be found. The two cases are most comparable on a structural level. Differences can be analysed with the help of the specific ways in which the Eastern and Western parts approach each other. These concern speed, geographic location and size.

European unification is certainly more extensive and complex because of relatively highly differing degrees of development. From a West European perspective the geographic space, that is `entitled´ to experience loyalty, is relatively harder to define. This is one of the reasons why the European perception of unity was far more asymmetric than in the German-German example (see footnote 6). However, in both cases the citizens of the Eastern regions felt a stronger tie with the West than the other way round. In addition to this pull-factor, the European example shows the important push-factor of an aimed demarcation towards Russia.[8]

The question of German reunification found a fast positive answer, albeit without leaving much room for discussion. Correspondingly, the speed of equipping East Germany institutionally and infrastructurally was high and a shared identity seemed to be rather self-evident. This was favoured by the assumption that *cum grano salis* regional identity is less suitable for instrumentalising a scheme of 'friend and enemy' as national identity, mainly because of the lower number of options for distinction (Bergem 1999: 199). Altogether, the starting-conditions of the German case may be called relatively favourable.

After the initial euphoria, both Eastern regions soon experienced disappointment and disillusion[9]. Disappointed expectations became externalized which meant that deficits of the transformation processes were often not ascribed to the failure of state-socialism but to the partner of unification (Woderich 2000: 104). This is reinforced by persisting differences between East and West, which are often perceived, as directed `from above´. Additionally, these differences, may they be the unequal payment in East and West Germany[10], the interim regulations for free exchange of persons from East Central to Western Europe[11] or the argument about subventions in the field of agriculture[12] are felt by a large proportion of the population.

Forms of identity which develop are also increasingly directed against the perceived dominant partner. Dysfunctional consequences for the system as a whole are then inevitable. However, the course of transformation makes these identity-types seemingly unavoidable because the formal inclusion into the new institutional system makes the exclusion of culture and way of life rather probable. This results in feelings of being a second class-citizen or stranger in one's own country (Woderich 1996: 87f.). But these identities are not a direct reproduction of old patterns. Rather, they are new forms of specific self-view which combine

forms of praxis which people already are accustomed to with current experiences and future prospects (Woderich 1996: 96). This has specific consequences for each system as a whole.

3. The German Unification

As has been mentioned already, in general, the starting conditions of the German unification were more favourable. This refers to a stronger and, at least in the beginning, a far more symmetrical feeling shared unity and identity. However, on closer inspection it is possible to detect that the feeling of belonging together, loyalty or solidarity has partly given way to rather pessimistic attitudes[13]. A majority of East Germans do not perceive themselves as treated equally, thus regionally different identities gain importance[14].

3.1 From euphoria to disillusion

In East Germany the situation developed as follows: after a euphoric phase, which was characterized by a considerable lead of diffuse support, it soon became obvious that bringing the systems into line with each other economically would prove difficult – at least in the short to medium term. The actual problematic structural conditions of East Germany appeared to fade into the background while the West was increasingly blamed for providing insufficient support and responsible for the difficult economic situation in the East. This perception of the Western output favoured the development of low, specific support on the part of the East. At the same time, a specific interpretation emerged that suggested that the West had no sufficient feeling or understanding of solidarity; in other words, it did not invest enough diffuse support in the common project. Therefore the basis of diffuse solidarity of the East was reduced.

At the beginning, this process was primarily about economic issues. The perception of a poor and inadequate political integration completes this picture. For the individual, this is expressed as a feeling of being 'absorbed' or 'annexed', as being inferior in a one-sided process of assimilation, because important political questions are decided 'elsewhere'.[15] The existing feeling of *strangeness* towards the (Western) political system is grounded in the fact that the East Germans fought successfully to take over the democratic institutions but, however, did not ascribe the practical process of institutional transfer to themselves (Woderich 2000: 106). It appeared to be an application of external institutions and their `players´. This, combined with the impression of a 'simulated' rather than actually practiced democracy, favoured a loss of diffuse support[16]. As many East Germans viewed their (political) interests as being unconsidered, they then appeared to question the legitimacy of the system as a whole, which also diminished feelings of loyalty and solidarity.

In light of this, the multidimensional structure of centre and periphery which is related to economic as well as to political interests, became identity-effective. This emphasises how sensitive the relation between diffuse and specific support is. Therefore, both ideal-types can only be separated analytically, because in reality they are not independent of each other. Instead, they stand in a relation of exchange, especially concerning aspects of status.

3.2 The development of an Eastern 'counter-identity'

There have been attempts to reinterpret this perceived multidimensional inferiority. These include a symbolic reference to objects, codes and signs that can create a sense of connection, and relate to a shared world and its specific history, as well as to generate an exclusive knowledge of the (East German) minority, thus converting the structural inferiority into a virtual superiority (Woderich 2000: 109). This is expressed for example by preferences which have exclusive meanings. Discourses about assimilation to West German forms supported a consciousness and an emphasis of East German *markers* as a counter-identity (Bafoil 1995: 5).

The consciousness of an *East-identity* emerged in many and diverse forms. This has also an exclusive dimension because of its characteristic particularism: a demarcation from Western Germany which might have problematic consequences for the joint project `Germany today´ and its important functions and expectations on both sides[17]. 'Obstinate formations of identity'[18] therefore try to restabilise specific traditions as a typical reaction to radical systemic discontinuities – largely independent of their democratic legitimation (Woderich 2000: 112).

Reactions of the West include attempts to understand, but also helplessness, a simple lack of interest and a refusal to accept responsibility for problematic aspects of the integration process. At least indirectly, the East is reproached with a lack of its own initiative and its incapability of effectively handling the means at its disposal. Primarily, this is about financial help that has been and continues to be transferred from West to East Germany[19].

The West is significantly less conscious of political asymmetries. This is not so surprising because, structurally, it is the stronger part. Widespread reactions can only be observed in the context of electoral successes of the socialists (former communists) in the East. In general, the West also developed a regional self-concept which distinguishes itself from the so-called 'Ossi', though this obviously has passed its zenith already[20]. Thus, an asymmetry exists on the level of identity: the West does not need the East for positioning itself; rather it is the other way round[21].

3.3 Structures of identity in today's Germany

As the structure of centre and periphery can be perceived as relevant to both East and West Germany and runs along several levels, it is difficult to fully comprehend. For example, when cleavages are fixed on the level of identity, then the situation has the potential to influence society as a whole. Stabilization of elements of identity with a mainly exclusive character might, however, be problematic for shared systems.

This situation includes the risk of switching from the level of politically negotiable interest-discourses to their 'culturalization'. Individual opinions then become an expression of a cultural character with a tendency of being deeply rooted and hardly changeable (Bergem 1999: 200). Consequently, the policies are thrust into the background because of their supposed ineffectiveness.

This risk grows if specific East-German experiences are not considered in public discourses and, therefore, the specific ways of understanding and life-achievements are not recognized (Woderich 1996: 96). The longer this problematic situation lasts, the stronger the wish and the need of articulation of `East-German problems´ becomes.

4. The process of unification between 'East Central Europe' and the 'European Union'

There are several reasons for choosing the relations between the European Union and Poland as an example of integration between West and East Central European countries. Firstly, aspects of the typical regional course of history have developed especially clear contours in Poland. Historical consciousness is still exceptionally strong there (from a Western, and especially from a German perspective). In addition, the current conflicts between Poland and the EU manifest themselves with particular distinctiveness to the key debates of this article.

I begin with a glance at Polish-European history which provides the basis for the Polish attachment to (Western) Europe and therefore forms the background to the advanced diffuse support for the shared institutional system of the `European Union´.

4.1 'Poland and Europe': a historical relationship

The sense of belonging to (Western) Europe has genuine religious roots: "In the beginning of the 'Europeanisation' of Poland stands the adoption of Christianity from Rome in the year 996" (Krasnodebski 1999: 77, translated quotation). Poland's position as a 'religious border' manifested itself historically as *antemurale christianitatis* and traditionally plays a particular role in understanding the nation. In Poland a close relationship between Catholic faith and national distinction from 'the outside', mainly the non-Catholic 'barbarism', symbolized by Russia, existed. At the same time, religion played a functional role by orientating identity towards Western Europe. Hence, it was an important aspect of an open-mindedness concerning the values and way of life of Western Europe at that time and supported their adoption in Poland. Even today, Christianity has an important meaning as a criterion for cultural-geographical demarcation and as a spring for shared values from an East Central European and especially from a Polish perspective (Klunkert 1996: 234).

This leads to a second relevant traditional line of identity construction involving the analysis of historical developments, namely, the liberal elements of self-understanding, as well as related forms of collective identity. Historically, the roots of this line of tradition in Poland reach back to the 'Republic of Nobility' in the 16th century. At that time, an early democratisation of the state took place (Stölting 1995: 159f). The Polish situation in those days was characterised by the social power in the hands of the nobility that made decisions through an early kind of parliament. This period has since been known as *the golden freedom*. This is the background for the employment of the term 'Pole' in a political sense especially in the 17th century (Krasnodebski 1999: 93). Additionally, these ideologies became concrete in the first written constitution of modern Europe that was passed by the Polish Imperial Diet on May 3rd 1791.[22]

At that time, thanks to the fundamental influence of the French Revolution, nationalism was used to support the creation of politcial entities, in the form of the nation-state. Throughout 18th and 19th century Europe, nationalism was classified as an ideology of liberation in a selective *and* inclusive sense. 'Europe' and 'civil freedom' became weighty slogans. A connection of the national ethos with internationalist and generally humanistic ideals characterised Poland at the beginning of the 19th Century.[23]

Europe had a particular position when actions in the context of conflicts were interpreted not only in the name of national particularism, but also for the `freedom of Europe´. The idea of the democratic constitutional state and the general acceptance of human rights were the most striking features of the historic images of Europe (Klunkert 1996: 235). The political and inclusive character of the corresponding collective identity with its emphasis on the individual (vs. the collective) favoured a kind of liberal patriotism instead of exclusive nationalism.

Paradoxically, at the same time a national mythologisation of history took place.[24] This means, that the liberal element also offered a possibility for identifying *cultural* – and collective – aspects of national identity as *natural* ones. The reciprocal chance of connecting the analytically antithetical categories in this way offers the theoretical basis for the amalgamation of the different identity elements. Although it is questionable about whether it is appropriate to speak of a fracture on the depicted background of the numerous possible connections and real combinations, this is essentially what happened, with an historical *fracture* taking place extending once more the multidimensionality of collective identity in Poland. After the primarily liberal political nationalism the tables had turned again.

The divisions of Poland in 1772, 1791 and 1795 played a decisive role in this process.[25] After the last division the Poles lost the right to exist as a state. On the basis of the long-standing situation of foreign rule in combination with a weak bourgeoisie, the exclusive national element became accentuated at cost of liberal elements. Correspondingly, the former central reference point of national unity – civic rights and liberal freedom – underwent a substantial transformation: romantic ideas of 'common blood', 'common descent' and shared language resulted in the development of an exclusive nationalism (Weiss/Reinprecht 1998: 29). This was a turning-point, which shifted the importance of national identity from humanism to an exclusive perspective.[26]

Like most of the post-communist states Poland was not able to return to real experiences of democracy. This was also true for the interwar period: "The so-called democratic experiments of the interwar period lasted less than a decade and are best understood, in any case, as authoritarian politics in democratic guise" (Bunce 1995: 89)[27]. During this time, the traditional line of identity construction against the East, and primarily in opposition to Russia, was revived. Again, the concept of Poland as an outpost of Europe dominated. This time, the demarcation was less religious and more political – although it certainly followed the same borderlines. The Polish border to the East was considered as being identical with the imagined border of a European identity (Holzer 1996: 88).

The Second World War affected Poland in a particularly hard way. The population found itself again under foreign rule, this time by the German Nazis. Not surprisingly, an exclusive national identity was typical for the Polish population until the end of the Second World War.

Poland didn't become a sovereign state after 1945. The communist system was perceived to be forced upon the Polish people and as extraneous to the 'Polish nature': "From a traditional Polish point of view, bolshevism was a product of a civilising crisis and an extreme expression of authoritarian tendencies within the Russian culture. Therefore it sometimes has been even regarded as `asiatic barbarism´" (Krasnodebski 1999: 74, translated quotation).

Although a `selectively excluding nationalism´ was tolerated from 'above' after 1945, this did not help to establish a real identification between the Polish people and their rulers, because exclusion was mostly aimed at the non-socialist West. The new rulers understood that a limited synthesis of communism and exclusive nationalism was politically expedient, thus rendering it possible to appear as guardians of the historical interests of the nation (Fischer-Galati 1994: 34). In doing so, traditional nationalist concepts were revived, such as "the superiority of a mono-national state over a multinational one and the conviction that the state consisted of a 'racially pure' Polish population" (Holzer 1991: 400, translated quotation). Furthermore, anti-German emotions as well as a 'tactical anti-Semitism' were instrumentalised, while Russia and the Russians, who traditionally have been a target of exclusive nationalistic resentments from the Polish side, served as a 'natural reserve' (Holzer 1991: 400). This concept obviously came into conflict with the traditional lines of identity construction, and therefore did not really support identification with the situation and the system. However, a partial success of this strategy could have been observed.

At the same time, another ideology developed, which can be considered a counterpart: a mythological and 'complete' structure of a moralistic image of the society (Tatur 1994: 28). In this sense, 'European identity', mainly as a 'Central European identity', gained more attention, especially in the 1980s.

Historically the relation to Western Europe is typically linked with a specific mysticism. This emphasises religious ideology, as well as the one of enlightenment and favours the idea of a quasi-natural feeling of unity which forms a basis of diffuse support.

4.2 Images of Europe and of the European Union in Poland after 1989

The images of Europe and the EU are closely linked. Immediately after 1989 the perception of the two as one concept was very common. Today the distinction between European identity and support for European integration within the EU framework is more clear-cut.

4.2.1 Radical Change and Euphoria

While 'Europe' symbolises a shared culture, the EU represents its contemporary institutional composition. In principle, 'Europe' for the East Central European side functions largely as a 'moral justification' for the right to participate in the EU. During and shortly after the upheaval

of 1989, this differentiation between the two terms was not that distinct. On the contrary, the EU was perceived as heir of an old, positively revitalised Polish 'European identity' and therefore was able to set an 'advance of trust'.

The EU has been seen as the (then) present-day shape of Europe. In this sense, it had substantial symbolic value: "The EU has been an important external anchor to the consolidation of democracy since a civic, democratic ethos has been inherently linked to European identity" (Villa Faber Group 2001: 37).

Alongside economic and political interests, a traditional element of identity was also highly significant. Although the interests in the foreground were mostly of material kind, the expectation, or better, the pretence that Western Europe should come up to these interests was mainly based on the symbolic level of the historical and cultural self-understanding of the post-socialist countries of East Central Europe. Part of this was, and still is, based on the claim of historical and cultural `belonging´ to Europe, which "had been violently interrupted for 40 years" (Srubar 1995: 679, translated quotation).

The deep roots of European identity were indicated by the self-denotation as (being part of) 'Central Europe' and by the claim of 'returning to Europe'. These sentiments were frequently expressed during this phase in Poland and emphasised the wish to become a member of the EU. At the beginning of the collapse of the real-socialist regime, unrealistic concepts and images of Europe were widespread. They were additionally pushed by a feeling of threat as a neighbour of Russia. At this time, a psychological repression concerning the past of real-socialism also began. But as the political reality in Europe had changed substantially, the 'frozen' pre-war images of Europe could not be applied anymore (Klunkert 1996: 236).

Holzer (1996: 91) states that the image of Europe in Poland during the first half of the 1990's was mainly determined by economic factors, especially because most of the knowledge was obtained through satellite-television; impressions and pictures of prosperity were perceived as European characteristics. The term 'Europeanization' for a majority symbolised the rise of the living-standards, high wages, quality of life, cleanness and order as well as a high level of technology and work organisation (Holzer 1996: 97).

For more educated parts of Polish society, the cultural factor – an 'old European culture' was, and is, assumed to be more important. These political and intellectual circles interpreted 'Europeanization' as the process of economic integration into the EU on the one hand and the "development of shared European norms of political and civil life (political democracy, human rights, self-administration, rule of law) on the other" (Holzer 1996: 97, translated quotation). The more unrealistic and especially unbalanced the images, expectations and hopes were, the more inevitable have been disappointments.

4.2.2 Changing images of Europe and the European Union

As the misperception of the new situation became obvious, the interpretation of the interconnection between 'Europe' and 'European Union' began to unravel. European identity was more and more understood as not necessarily connected with personal support for EU integration.

The first implementation of new institutions to foster European integration, along with underlying values, was based on a widespread and diffuse support (Easton 1965). This support lost ground when the economic and the political output of the new common system (the EU) fell far below the expectations and was interpreted as inadequate support of 'the other side'. `Insufficient' output withdrew the basis from potentially ongoing diffuse support. This manifested the differentiation between a 'cultural Europe' and an 'economic EU'.

In the economic field, disillusionment was representative of disappointed consumer expectations as well as psychological stress related to issues such as personal job insecurity.

This mainly concerned workers and employees of state-owned enterprises, a large number of smallholders and pensioners. At the political level, the country saw itself confronted with problematic home affairs such as corruption and the need to overcome the political crimes of the communist period.

This preparation process from the side of the new members in East Central Europe meanwhile was considered largely as a unilateral adaptation to the Western European rules. The asymmetrical structure of the access negotiations turned out to be more and more problematic. The East Central Europeans expected equal negotiation in principle, but instead had to accept that their level of access is granted by the West. Critics became louder when the negotiations were perceived as intergovernmental and 'our' (i.e. 'Polish') national interest had to be defended against the national interests of the incumbent EU member states (Villa Faber Group 2001: 1). Two examples illustrate these problems: the negotiation of the constitutional convent and agricultural policy.

Although the new member state countries are directly affected by the results of the discussion about the future shape of the EU, during negotiations they were present as observers only. Being reduced to this status, however, was a source of ongoing disappointment that was easily connected to the already existing scepticism concerning the process of accession. Because of the impression that the EU doesn't attribute adequate meaning to their positions, there was a significant risk that the East Central Europeans would lose interest in the future of the EU (Villa Faber Group 2001: 50) or that they would feel provoked and try to enforce their specific national positions.

The agricultural policy is especially problematic with regard to the East Central European countries.[28] Poland still has a large number of smallholders. On the one hand this means that if the EU would treat the Western and the Eastern peasants equally, it would create immense costs for the Union and additionally confuse the entire income relation. On the other hand, the now decided rejection of equal treatment and the decision to adopt transitional regulations for years, affects huge parts of the population. The political weight of smallholders in Polish society is big enough to provoke crises and shifts in public opinion[29]. At the same time, there is a growing impression of being politically and economically powerless within the 'common system', particularly among political circles in Poland. These circles already anticipate that Poland may play only a secondary role in the process of European integration (Holzer 1996: 101). The wider population also feels powerless face to face with the EU.[30] Klunkert (1996: 238) writes: "This self-observation as being 'Europe's edge' stands in crass opposition to the self-perception as 'Europe's centre', as the historical images of Europe suggest the position of the own culture".

Summing up, it can be said that the perception of the EU as non-transparent, undemocratic and therefore illegitimate, increases. The *relative* turning off from Western Europe intensified when Russia, as a significant push-factor, lost importance as security interests decreased because of the accession to NATO of Poland, Hungary and the Czech Republic.

This opened the way from euphoria and the development of trust to scepticism. Consequently, it became more and more difficult for governing elites to handle the divergence between meeting the requirements of the Union and convincing their population of the necessity and value of the concessions – and possibly ensuring it morally through a 'European community of values'[31].

4.2.3 Poland after the EU Accession Referendum

Poland is the biggest country of the East Central European region. Today it is characterized by huge agricultural and obsolete industrial sectors which pose serious problems to the necessary processes of structural modernization. This situation is the basis of widespread calls for welfare payments and `careful´ restructuring. Attitudes towards the European Union are quite mixed. Until a few weeks *before* the referendum took place on 7-8 June 2003, large parts

of the population were sceptic and perceived European integration as a dominating menace. The committee responsible for the referendum campaign feared a defeat with incalculable societal consequences and, therefore, reacted to these conditions by appealing to a European consciousness. This meant that they used an *emotional* and direct *identity* related argument. For this purpose, Poland typically was called not only `part of Europe´ but `being Europe´.

This strategy was successful: more than 50% participated in the voting and more than 80% voted `yes´. However, enormous expectations were raised leading to the view that a much better future will follow the accession to the European Union. This combination is not without risks. It links identity-aspects relatively closely with a combination of immaterial and material elements, united in the expectation of a better future. Now, the strategy of the campaign committee is to say, "Yes, our situation will improve in an integrated European Union, if *we* work hard on it". The open question is, 'has this been achieved in time or is a new wave of disappointment is already on its way?'

4.2.4 Steps of Development Towards an Antagonism Between `EU´ and `Nation´

If support for a 'common Europe' in Poland should decrease further, antagonisms between 'Europe' and 'the Polish nation' will grow. Indeed, this can already be observed. This development is related to the traditional East Central European understanding of 'nation'. As previously shown, after long periods of foreign rule, the nation is interpreted as the essence of the collective self, including the wish for significant independence as a political subject. If political output is sensed as unsatisfactory due to minimal autonomy and participation, it leads to refusal of an 'EU-hegemony'. Concerning Europe-related aspects of identity, this means that "the more frequently conflicts concerning objectives occur between the European and the national level, the higher the probability of an European identity loosing attractiveness" (Lilli 1998: 154, translated quotation)[32]. In fact, the situation of the still relatively young political sovereignty becomes particularly precarious within the described forms and hierarchic structure of centre and periphery[33].

Positive and negative experiences of Europe and related images and identity attitudes are certainly not distributed equally among the population. Internal conflicts grow as cleavages between 'winners' and 'losers' harden. Analogous to social groups, the political parties polarise increasingly along the topic of 'accession to the Union'[34]. And here the judgements about a 'Europeanisation' of Poland vary. One group of politicians, intellectuals and publicists of the right wing put the so-called 'European cosmopolitanism' in opposition to a 'true' Polish national consciousness, other representatives of the political and intellectual spectrum try to underline the binding of the Polish national consciousness to the idea of Europe (Holzer 1996: 97).

Hence, the cleavage that divides the Polish society did not only develop along the line of 'elites versus masses', although some correlation with the degree of education certainly exists. The topic won increasingly public interest and importance as the date of accession approached. Correspondingly the tone of discussion became sharper. This was especially the case in Poland[35]: "'We are not going to Brussels begging on our knees' expressed Ryszard Czarnecki, the chairman of the state-committee for European integration of that time, before the negotiations for accessing were opened officially in the end of March 1998. And the chief-negotiator, Jan Kolakowski, underlined that Poland will not allow to be pushed into the role of the poor cousin" (Juchler 1999: 486, translated quotation).[36]

Yet the motivations for, refusing the EU are diverse. Nationally oriented persons "originate either from right-wing circles (among them also national-conservative groups of Polish Catholicism), where above all the dangers for the Polish culture are underlined, or from left-wing circles, who appeal to the dangers for the Polish economy" (Holzer 1996: 97, translated quotation).

Discussions about the creation of a supranational 'State of Europe' usually provoke negative reactions. An extreme right-wing view – that is possibly not able to win majorities in this form, but comes close to the core of general worries – is that no new restrictions on Polish sovereignty should be allowed. For this reason, it considered accession to the EU as being out of question. Such positions frequently constructed a remarkable equalisation of European Union and communism and named both as 'people's prisons' (Strobel 2001: 266f.).[37]

Strobel (2001: 277, translated quotation) assumes that "the rightist changed fundamentally the initially positive attitude of the society regarding the EU and the opening towards the West". Although it is not possible to quantify this influence, it certainly goes beyond being marginal to a considerable degree (see Strobel 2001: 280). This is also reflected by the results of public opinion polls regarding the accession to the European Union. While in 1996 79% of the representative random sample supported accession to the EU, in November 2001 it was only 49%. In 1996, 7% were explicitly against the accession, while in November 2001 this share was more than 30% (Mildenberger 2002: 3).[38]

The represented attitudes and ideas offer a basis for a nationally inspired counter-identity that causes problems for the 'project united Europe' particularly when it instrumentalises an antagonism between the nation and the EU. The spectrum of opinions is broad and highly diversified. But certain structures and ways of acting risk the consolidation of problems which can become more complicated as long as they are neither understood nor solved.

4.2.5 Attempts of Compensation on the Basis of Alternative Identity-aspects

For the self image of a group it is of crucial importance to be more successful than others, when it comes to shared social values. If this is not the case, other dimensions of values can experience a revaluation in order to re-establish a balance. In Europe, certain economic values for example are generally highly estimated and often correlate with the distribution of political power (Lilli 1998: 144).

In the Polish case this is expressed through the question 'does the country risk its own identity by `returning to Europe´?' (Bingen 1992: 62). If Europe is equated with relativism, atheism, drugs, pornography, abortion, divorce, homosexuality – in a word, Babylon, Sodom and Gomorrha altogether (Michnik 1993; Buchowski 1997: 34f.) the conclusion can be drawn that states that Poland is `the real Europe´ and that `returning to Europe´ is the task of Western Europe and its deteriorated morals (Bingen 1992: 74). Partly, the idea of a Polish mission – which is well known from the historic images of the Polish nation and its relation to Europe – is taken up and centres around the idea of morally influencing and healing the sick Europe (Strobel 2001: 266).

Conclusions

On one side it is possible agree to Holzer, who assumes that the Polish fears and hopes are more or less comparable to the ones of the old member states. However, he modifies that for Poland, an insecurity about its role and the related positions within the EU context, remain specific (Holzer 1996: 103f.). It is obviously not enough to restrict relations within the European Union to the acceptance of formal aspects and rules, particularly if the process of European integration should not lose its basis because of inadequate specific and diffuse support. However, the structure which on several levels is perceived as being systematically asymmetrical and interpreted as hierarchical means a risk for the common project. Although interests in this project are undeniable on both sides, the potential consequences of the described difficulties are serious, even more as there are already close interdependencies between Western and East Central Europe.

Despite the complex structure of relations, how can the multidimensional national identities on the European level or regional identities on a German level favour a shared foundation of

new types of collective identities? The following arguments shall help answering this question. First of all, the connection of diffuse and specific support has to be considered. It seems that in the long run diffuse support cannot remain stable without specific support. This means, that an output increase – on the side of the West in Germany as well as in Europe – could contribute to avoiding the successful stabilisation of particular and exclusive identities. This is probably most realistic in fields of shared interests. But it has to be kept in mind that such decisions mainly depend on definitions and interpretations.

Two aspects have to be differentiated: while on an economic level a growing material and interests-related output probably would be assessed positively by the weaker partner, politically shared decisions made by equal partners would need to be more extensive. Partly, these two aspects stand in a substitutive relation and with both the West can express loyalty and solidarity.

In the long run the importance of power and policy related questions grow, because it implies the problem of national sovereignty, which is especially precarious for East Central Europe. Only in this way can positions be met which demand either complete sovereignty of the nation or an equal position within the all European context (Holzer 1996: 101). To a lower degree but structurally comparable, people in East Germany are concerned about possibilities of political influence. In both cases, in order to support structural change it is necessary that the same rules become valid for all players as soon as possible.

Only on these grounds can the image of a legitimate relationship be set up or stabilized respectively. This has to allow independent acting according to the special conditions and logics of life in a periphery (Woderich 1996: 96) because it is highly improbable that the economic asymmetry will be overcome within the foreseeable future.

For establishing legitimacy, loyalty and solidarity in both cases a common framework of values, norms and mutual understanding is necessary. The simple logic of a *quid pro quo* exchange is not enough (Bertelsmann Foundation 2001: 37). This would favour European identities which were less dependent on economic trends and would, also correspond with the explained East Central European type of identification structure. In this sense two aspects are of crucial importance: firstly, the idea of a nameable, distinguishable community with so-called `pre-political´ and past-related elements is necessary as well as, secondly, political and mainly future-oriented aspects.

In this context, neither a homogenised `EU-society´, nor a German equivalent with a uniform and `obligatory´ collective European identity, can be perceived as ideal. Rather, a common political and socio-economic space of communication would have to be established. Its basis has to be sufficiently stable to avoid settlements of conflicts. In this way, the developing communicative space could become the basis of a community of interpretation, which, again, could be functional for the development of new forms of identity (Gephart 1999: 167).

Coming to these decisions it is necessary to make both sides aware of the importance of their respective common project and of possible consequences – especially, because of already very far-reaching interdependencies. This, again, concerns the level of `concrete´ interests. If, however, the East European countries remain within the described multidimensional periphery, considerations of the known structural problems and second-rate `solutions´ will continue. In addition, it has to be taken into account that the development of nationalism can be influenced considerably by the logics of relations between centre and periphery (Jacyno 1994: 66). This does not only mean that shaping a common space becomes more and more difficult, but that substantial parts of responsibility for this development will have to be taken by the respective Western regions.

Notes

[1] A more detailed discussion of the two terms and potential additional categories can be found in Westle 1999.
[2] In the German case these are the regions East- and West-Germany and European case the different new and old member states.
[3] The decision for this level of analysis is decisive. Easton´s understanding obviously includes this interpretation: „The members of a political system who are participating in a common political community may well have different cultures and traditions or they may be entirely separate nationalities" (Easton 1965: 177).
[4] Such general differentiations have the advantage to abstract from concrete contents. Therefore, several aspects can be subsumed which might base on perception mainly.
[5] This is also a differentiation from Offe, who developed the idea of a `dilemma of simultaneity (Offe 1991).
[6] In 1989 75% (83%) of citizens of the European Community agreed to the statement that Poland and Hungary shall receive support of the Community for the development of economic cooperation, 74% plead for a membership of the East Central European countries when democracy has been installed (Commission of the European Communities 1989). On the other hand, in 1990 98% of the East Central Europeans agreed with the idea of joining the EC within 10 years (Commission of the European Communities 1990b). In the German-German case in spring 1990 a unification found support of nearly 80% of the FRG-citizens and of 90% of the GDR-citizens (Commission of the European Communities 1990a).
[7] The term `collective identity´ is defined very varyingly. I understand it as an emotional feeling or consciousness of individuals of belonging to a certain collective unity or social `life-community´, which is characterised distinctively by specific features – like culture, language, history, possibly also religion and race – and therefore distinguishes itself from other collectives (Hillmann 1994: 422). It is important that the individual is chosen as a starting-point. Additionally, the multidimensionality of the term (next to conscious perceptions of contingencies we find `naturally understood´ aspects like ethnos) and its flexibility (not all elements have to occur at the same time or equally) are relevant.
[8] In 1990 62% of the Czechoslovaks, 67% of the Hungarians and 77% of the Poles expressed their distrust of Russia (Commission of the European Communities 1990b). In February 2002 nearly 60% of the interviewed Poles answered `yes´ and only about 20% `no´ to the question „Will Russia in the next future (5 to 10 years) try to regain influence in our part of Europe or not?" (CBOS 2002a).
[9] Today, on average only 52% of East Central Europeans view the Union positively, 18% have a negative picture. Nearly one half worries about the integration of the EU (45% in the Czech Republic, 40% in Poland, 39% in Hungary) (Commission of the European Communities 2002b). A similar picture can be observed in Eastern Germany: in 1998 60% of the Eastern Germans (and 33% of the Western Germans), expressed that there was reason for being disappointed because of the course of the unification (Noelle-Neumann/Köcher 2002: 499).
[10] In the East wages at the end of 2001 were on average 91,5% of the Western ones. The difference is even bigger if additional benefits and differing working hours (plus 1.7 hours in the East) are considered as well (Ministry for Labour and Social Order 2001). At the same time 87% of the East Germans claim equality in wages (Noelle-Neumann/Köcher 2002: 504).
[11] This will continue for 7 years: 5 years as a fixed period and afterwards another two years of interim solution.
[12] The EU refuses direct payments of the amount of old member-states for new member-states. Instead, in 2004 the payments start on a level of 25% and shall become equal in 2013 (arguments can be found in: Commission of the European Communities 2002a).
[13] The question, if the West should show more readiness to sacrifice, in 1998 was affirmed by only 29.4% of the West-Germans (East-Germans: 67.7%), in 1991, however, it still was 51.1% of the interviewed persons. In the East, on the other hand, the approval to the opinion, that the East has to be more patient, decreased rapidly: while in 1994 57.8% of the East-Germans agreed, in 1998 it was only 39.1% (West-Germans: 87.2%) (Allbus 1998). Asked if they have the impression that the West-Germans want to contribute to the development of Eastern Germany, in 2000 47% of the East-Germans disagreed (21% ‚yes') (Noelle-Neumann/Köcher 2002: 502).

[14] In 2002 57% of East-Germans felt like ‚second class-citizens' (36% did not) (Noelle-Neumann 2002: 521). All in all, the huge discrepancy between the answers to the numerous questions show a considerably different perception in the East and the West. Also, in 2000 only 51% of the East-Germans believed that the integration will be successful (61% of the West-Germans) (Noelle-Neumann/Köcher 2002: 497). 59% of the East-Germans in 2000 thought that differences and 13% stated that common features with the West predominate (West: 28% common features, 35% differences) (Noelle-Neumann/Köcher 2002: 522).
[15] Therefore, political forms of `desired deviance´ are observable, for example the relatively important position of the socialist (formerly communist) party in the Eastern parts of Germany. Their inclusion in regional governments is seen positively by only 19% of the West-Germans, compared to 47% of the East-Germans (Allensbach 2002).
[16] Significantly less East-Germans mentioned institutions when asked about what they felt pride in their country. In 1996 52.9% of the West-Germans cited the Basic Law compared to 24.1% of the East-Germans (Allbus 1998). Also, in 2000 61% of the West-Germans believed that the problems of the country can be solved with democracy, while only 33% of the East-Germans did so (Noelle-Neumann/Köcher 2000).
[17] This applies as a principle but with no doubt the degree of exclusion is important.
[18] `Obstinate´ is a translation of the German word `eigensinnig´. Literally this means `with its/one´s own sense´.
[19] This is proved by attitudes concerning the statement "What is to become of the people in East-Germany fundamentally depends on what they are ready to achieve" (in 1998 West: 78.9%, East: 34.7%) (Allbus 1998, see footnote 13).
[20] One sign is the Western German tendency to perceive more `normalization´ and `mutual assimilation´ on the one hand and much less differences on the other compared to the East (e.g. Noelle-Neumann/Köcher 2002: 523).
[21] In 2000 in the West only 24% saw themselves as `West-Germans´ and 70% as `Germans´, while in the East 53% perceived themselves primarily as `East-Germans´ (compared to 41% `Germans´) (Noelle-Neumann 2002: 525).
[22] This work was oriented toward the political ideas of the Enlightenment. The constitution delegated the 'sovereignty of the nation' to the parliament. The parliament was transformed to a strong and united agency of legislation by laying down the principle of majority. Consequently it followed the principle of separation of powers and trusted the government with the executive power. This government was responsible towards the parliament. Hence a written constitutional law has been created which was placed over singular influences. This has to be named ‚modern'. But simultaneously the principle of the corporative state has not been touched. The political nation, that appeared as the holder of sovereignty, was not the complete people but the traditional ‚nobility-nation'. This instead consisted of a few rich magnate's families and an exceedingly numerous ‚middle'- and ‚small-nobility'. The 'nobility-nation' nevertheless claimed for itself to have realised the modern, founding on principles of ‚natural-right' constitution with peoples' sovereignty and national freedom (Stollberg-Rilinger 2000: 244f.).
[23] This ethos was able to support the communication with other suppressed peoples (but it didn't necessarily do so). Examples for this are in the 19th century internationalism of the independence movements as well as a specific Polish 'messianism', which plead for the struggle 'for your and for our freedom' (Holzer 1991: 394).
[24] Obviously, in the context of religion as well as ideology of the Enlightenment the bond with (Western) Europe historically quite constantly has been connected with a certain mysticism, which supported the idea of a 'quasi-natural unity'.
[25] In 1772, Prussia, Austria and Russia were dividing parts of Poland among themselves. In 1791 Prussia and Russia did the same, 1795 Prussia and Austria, whereby as a consequence of the last division Poland disappeared completely off the map.
[26]This turn is interpreted by several East Central European authors primarily as an externally dominated aspect. Krasnodebski for example writes: "The Poles have been increasingly considered a big ethnic group without the right of political sovereignty. They changed from being a nation to being an ethny – though this was on no account a self-chosen way" (Krasnodebski 1995, 246, translated quotation). Such a judgement of the history, however, implies the risk of overly extensive externalisation of responsibility for structural changes –

with a potentially problematic impact on the present-day situation. But: Under such circumstances an exclusive self-definition is certainly more probable, but not inevitable.

[27] Indeed, Poland achieved national sovereignty in 1918, but it didn't subsist in a democratic form until the marching in of the Nazi-Germans in 1939. In 1926 Józef Piłsudski with the support of the military triggered a coup d'état, established an only seemingly democratic, authoritarian regime and governed as a dictator until his death in 1935.

[28] This is one of the most problematic arenas within the EU – also independently of the enlargement.

[29] In accordance Polish farmers judge the relations with the EU most critically: 79% believe that mostly the EU has had advantages so far. 82% of them expect future disadvantages of the integration (CBOS 2002c: 5ff.). 56% of the Poles (and 86% of the Polish farmers) agreed that the country should insist on the whole amount of agrarian subventions, even if the negotiations would fail and Poland would have to remain outside the EU (CBOS 2002b).

[30] This certainly is also a well-known feeling of Western populations in this context.

[31] Additionally this meets a certain disillusionment on the side of the West: "The initial euphoria in the East of Europe changed to rage and anxiety, in the centre to frustration and in the West to nervosity and impatience" (Glotz 1992, 51, translated quotation).

[32] A famous Polish intellectual (with Solidarnosc-roots), Adam Michnik, stated, "that the term 'European' in Poland sounds more and more like an invective and is used in political debates as a synonym for 'cosmopolitan who despises his own nation' (cited after Krasnodebski 1993: 267, translated quotation).

[33] Related to this question Srubar mentions „the fear of the East Central European countries that under these conditions they might become a periphery of the EU (…) – perhaps because of their growing dependence on the compensation-payments they could find themselves in the role of receivers of social security at the edge of the Union" (Srubar 1995: 684, translated quotation).

[34] Mildenberger states that the topic of Europe in politics „at the latest since the elections in September 2001 (…) became subject of a polarized and polemic debate between government and opposition, but also within the Polish society" (Mildenberger 2002: 6, translated quotation).

[35] But also in Hungary and the Czech Republic such comments get louder. Vaclav Klaus published on his homepage (9.5.2001, www.klaus.cz) the following: "As a citizen of a non-member state of the EU I have to accept that – unfortunately – membership respectively non-membership became a factor of differentiation that shows, which country is a normal, according to the standard (or standardised), adult, obedient country and which one isn't. (…) For this reason we have no other choice but endeavouring ourselves with maximal intensity to a possibly fast membership – and that notwithstanding our attitudes toward the present-day model of European unification and its hidden ideology. (…) However, I'm convinced that the member states are interested in keeping the status quo as long as possible. Let's disregard rhetorics, the non-member states for them are fully accessible and they have the full possibility to realise their comparative advantages in a one-sided and for them painless way".

[36] At this point, the problematic combination of political and economic aspects becomes evident, because in the context of the accessions a close correlation between some loss of sovereignty and material compensation exists: „the EU is already sold to the Central European public (…) as an exchange in which dissolving sovereignties and clear subordination to the center are compensated with invitations to a cash window in Brussels" (Tamás 2001: 6).

[37] Strobel writes further: "Andrzej Lepper, chairman of the self-help-organisation, Samoobrona' (i.e. self-defence, A.S.K.), that is popular among peasants, called the EU plastically and deterrently a 'new kolkhos'. The differences to the status quo ante were only that the former one had his place of residence in Moscow, whereas the current one were directed from Brussels" (Strobel 2001: 278, translated quotation).

[38] This corresponds with results from the whole East Central European region: 45% in the Czech Republic, 40% in Poland and 39% in Hungary worry about the EU-Integration in general (Kommission der Europäischen Gemeinschaften 2002).

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Right Product, Wrong Packaging: Not 'Constitution', but 'Constitutional Charter'

John Law

1. Introduction

This article seeks to locate the principal cause of Europe's current ratification crisis in the overly-ambitious inclusion of the word 'Constitution', standing alone as a noun, in the title of the document produced by the Convention on the Future of Europe. Whilst the content of the document was measured and appropriate, it is argued, the label given to it was not[1].

The article examines the validity of the proposition that the text is, in fact, an 'EU Constitution' - as the media have portrayed it and as its title, *Treaty Establishing a Constitution for Europe*, would indeed seem to suggest. It finds that, whilst not entirely beyond the realms of theoretical possibility, the re-definition of the very concept of a Constitution that would be required to admit such a styling (i.e. a broadening to encompass a multi-State conception of the term) has not been fully articulated by Europe's political leaders - or even recognised or acknowledged by them, more than circumstantially.

However, following such a path, the article argues, would anyway now be unwise. For seeking to re-engineer the meaning in the public mind of so entrenched and important a notion, one with such powerful historic associations, would represent a hazardous and potentially fatal route to take at the second ratification attempt.

On this basis, the article concludes, the European Council would be best advised at this juncture to take a path of lesser resistance. Such a course could involve making a modest 'clarifying' revision to the title of the text, replacing the single word 'Constitution' with the two words 'Constitutional Charter'. The full modified title would thus read: *Treaty Establishing a Constitutional Charter for Europe*. Crucially, if this option were chosen, the media would have to adapt their shorthand styling of the document from 'EU Constitution' to 'EU Constitutional Charter', in order to keep pace with the advancing political debate and give accurate expression to the change in wording of the title that had taken place. In this way the basic 'sound-bite' message would be transformed, sending out a clear signal to voters that significant change had been implemented.

Through this alteration, the appearance given by the text would be brought back into line with its underlying substance. For the term 'Charter' is recognised in law to be in the order of a treaty between States; so adoption of the term would help clarify the fact that the EU will remain by nature a system of multiple States upon ratification of the text, rather than transforming into a single State in its own right (this can be deduced from analysis of the detailed provisions, as will be shown). Introduction of the term Constitution standing alone as a noun, it must be recognised, did indeed misleadingly seem to imply to the public the birth of a State - the major weakness at the first ratification attempt - even if for informed observers it was plainly apparent that this was not the case.

Since the start of 2007 under the German Presidency of the Union, moves have been underway to canvas possible amendments to the underlying articles of the document. A very wide range of discordant proposals have, however, emerged from within the member States, with at least four camps identifiable: those arguing for an enlarged text, those for an unchanged text, those for a smaller text and those for no text at all. On the basis of the prevailing evidence, therefore, a stalemate looks the most likely outcome from the current round of negotiations.

In this circumstance, confronting the resulting impasse through amending the title could prove an attractive recovery option, when considered in combination with political declarations of the European Council to respond to French and Dutch concerns (following the precedent set at Maastricht and Nice in the cases of the Danes and Irish respectively[2]). After all, the initial document remains a package deal around which all twenty-seven countries had managed to agree; and so far the French and Dutch have yet to identify a single credible complaint to do with the text itself that withstands close scrutiny.

The question *'what was wrong with the initial draft?'*, it seems, was never satisfactorily answered. The fault lay first time round with the title, and the right thing to be doing at this juncture is to correct this deficiency. The text was not a 'Constitution', as we traditionally understand the term, and the text was not a significant departure from the status quo, as compared with previous treaties such as the Single European Act (SEA) and Maastricht which had instituted major reforms. As such, it did not require referenda to ratify. Now that this particular jack is out of its box, however, it is up to politicians to explain what went wrong (i.e. an inappropriate and misleading styling) and either: (i) set out why a text with an amended title should be supported by the public at referenda on a second occasion; or (ii) go down the route of parliamentary ratification, which is arguably the path that should have been taken on the first attempt.

The article proceeds in the following manner. First, the nature of the problem now confronting Europe is analysed, through an examination of the way the title of the text was arrived at in the Convention. Secondly, relevant lessons are recalled from the ratification debates on the Maastricht Treaty of the early 1990s. Thirdly, the premise of the title that the document 'establishes a Constitution' is subjected to investigation. To this end, a number of competing interpretations of the term 'Constitution' and of the word 'establishing' are identified, leading to the construction of a matrix of four possible permutations. Relevant conclusions are drawn from the analysis and recommendations made for achieving greater coherence and clarity. Fourthly, the article identifies two possible shorthand characterisations for the text as credible alternatives to the designation 'EU Constitution', 'EU Constitutional Treaty' and 'EU Constitutional Charter', and establishes long form titles that might give rise to each. It proposes the latter as the more promising of the two potential remedies for Europe's current malady and gives reasons to support this choice.

2. Getting what went wrong right

The first step towards resolving the current dilemma must be to establish clearly the nature of the problem: what went wrong at the first ratification attempt.

Whilst there has been much discussion of the causes of the failed French and Dutch referenda in 2005 (Jeffery 2005; Nicolaidis 2005; Piris 2006), few analyses have identified an inappropriate naming of the text as the key common problem with anything more than passing comment; none has so far conducted a thorough investigation into the dynamics of this question.

It is argued here that an emphasis upon deficiency in the wording of the title is justified, as commentary on the two failed plebiscites has brought out clearly the lack of any one common and coherent complaint to do with the substance of the text itself. Instead, the political debates in the two countries focused on a range of varied concerns, often more of domestic than European relevance, with less overlap between the debates than is commonly

supposed. In this context, the referenda became, to a significant extent, simply opportunities to protest against unloved incumbent national governments[3].

The rapid degeneration of the ballots into occasions for second-order voting was, the article suggests, a direct consequence of confusion over the nature of the text, stemming from ambiguity in the title: what exactly citizens were being asked to vote for was not clear. Uncertainty on this 'top level' issue of prime importance - the central 'message' offered by the text - arguably served to 'switch off' voters at the very first hurdle. Their attention, goodwill and trust once lost could not be regained.

So, it is appropriate to begin the analysis in this section by returning to the drafting of the text in the Convention and examining, in particular, how the title of the document was decided upon. We take up events after the 'listening phase' of the first five months has been completed and the 'study phase' is underway in the Autumn of 2002.

The most striking feature of the output coming from the working groups at this still early point in the Convention's life had been how conservative many of the proposals had seemed - indeed, how the minimalist, lowest common denominator view (more often than not, the British view[4]) had appeared to dominate proceedings. He who holds the pen wields the power, runs the saying, and the UK had managed to install Sir John Kerr in the key post of Secretary General to the Convention. Though technically an administrative office only, Kerr quickly established himself as Convention President Valéry Giscard d'Estaing's right hand man and most trusted confidant. His influence was clearly considerable, being the critical channel through which Giscard would dominate proceedings through control of both working procedure and the technical drafting. With Euro-sceptics as well as Euro-philes present among the delegates, and the candidate countries of Eastern Europe fully represented, the impression had steadily grown that the 'inter-governmentalist' tendency within the Convention was at least matching up to, if not triumphing over, the 'federalist' centralising impulse. On the directing Praesidium, the French and British inclination, through Giscard and Kerr, seemed very much in control, and this suspicion appeared to receive confirmation in the two key institutional innovations proposed, which both concerned beefing-up the body representing the member States through (i) the creation of a post of permanent 'President' of the European Council, and (ii) the elevation of the High Representative for the Common Foreign and Security Policy (CFSP) to the status of 'Union Foreign Minister'.

The idea that the whole project was only marginally more than an exercise in house-keeping - rather than a quantum leap - mid-way through the Convention's life appeared justified; and commentators have indeed reflected this appreciation in their writings after the conclusion of proceedings. Menon, for example, observed '… the treaty amounts to an important tidying-up exercise. … All in all, it is far less radical than several treaties that have preceded it, and pales into insignificance when compared to the reforms achieved by the 1986 Single European Act …' (Menon 2004: 29). Patten, in similar vein, concluded '… the treaty recognised that we had gone about as far as we could or should in developing supranational policies and institutions. The real world of twenty-five nation states and national parliaments had intervened. The supranational bargains already struck were not to be disparaged, but enough was enough. … The treaty sought rightly to draw a line in the sand so far as further integration is concerned' (Patten 2005: 129-130).

There was, furthermore, plenty of evidence emerging to support this view as the detailed articles were gradually fleshed out. The phrase 'ever closer union' was re-formulated (and in the process, apparently, down-graded); there would be no move proposed to majority voting in foreign policy and defence; similarly, there would be no move on tax harmonisation; the early general statements, such as the definition of the Union and the formal elaboration of a principle of 'conferral', appeared to give primacy to the member States as the bed-rock of the EU system and mainspring of legitimacy; and the draft even introduced an express unilateral right of withdrawal for the member States (Article I-60), an innovation where before the Treaty on European Union (TEU) had been silent.

This last point appeared to lay to rest once and for all the spectre of the imminent birth of a single pan-European State. For, as Piris[5] has observed, the removal of ambiguity on the secession issue illuminated in sharp relief the emerging nature of the beast: '… one may note that such a right normally exists in confederations of States but never in federal States. Therefore, this provision on withdrawal could be seen as clarifying a basic issue, i.e. that the Union is actually a voluntary association between States which remain sovereign as to the question of whether or not they remain in that association' (Piris 2006: 130). The introduction of Article I-60, it seems, was no trivial matter, even if the depth of its apparent significance may not have been fully appreciated by all of the Convention delegates[6].

There were, of course, a number of significant compensating advances proposed, strengthening the supra-national aspect of the Union: codifying the legal principles of 'primacy' and 'direct effect'; abandoning the 'pillar' structure of the TEU in favour of a unified framework; the awarding of legal personality to the Union; the inclusion of the European Charter of Fundamental Rights; and a legal base for an EU diplomatic service, the European External Action Service. However, the overall impression was more one of balance between elements strengthening the hand of the member States and those bolstering the Community aspect, than it was of untrammelled centralisation such as had clearly animated both the SEA and TEU.

Set against this background - of only marginal movement from the status quo with much good 'tidying-up'[7] - Giscard's manoeuvrings in the final days of the Convention to forge a product that would mirror the output of the Philadelphia Convention appeared somewhat detached from the underlying reality.

Indeed, from the moment the single but hugely significant word 'Constitution', standing on its own, was incorporated in the title of the Convention's draft document late in the day, replacing what had before been a more subtle descriptive adjective[8], the whole enterprise took on the feel of an accident waiting to happen. It was simply a question of time, it seemed, before the locomotive would hit the obstacle of a sceptical public, lying stationary across the track some way distant. Not *if* there would be a crash; but simply *when*.

Ziller captures well the train of events leading up to this shift of wording: '… The use of the term "Constitution" in discussing Europe's future did not have unanimous support … there was a long-standing preference for the more ambiguous expression "Constitutional Treaty". When Convention President Valéry Giscard d'Estaing presented the initial outline, or *squelette*, of the text, almost no one noticed that both the cover page used on 28 October 2002 and the press release of the next day bore the title "Treaty establishing a Constitution for Europe". … By the end of the Convention's proceedings in June of 2003, it seemed to be taken for granted that the Intergovernmental Conference (IGC) would use the term "Constitution" and the Convention's text was even published under the title "Constitution for Europe"'. (Ziller 2005: 16-17).

In fact, the outline document of 28 October 2002 had borne *both* formulations: '*Preliminary draft Constitutional Treaty*' on the cover page of page one, and '*Treaty Establishing a Constitution for Europe*' heading the actual draft skeleton text on page two (Convention 2002: 1-2). Such was the legerdemain by which the formerly taboo word was slipped into proceedings, bringing it into the Convention mindset, if not open usage, half-way through the Convention's life and preparing the ground for its eventual adoption in the title of the final text.

Giscard himself had plainly stated initially that usage should be otherwise (see Footnote 8). So this seems a clear-cut case of politics in action. This author has heard from a prominent member of the Convention that it was a firm objective of Giscard's at the start to have the final product emerge as a 'Constitution' (in tune with the wishes of this member and certain other leading figures within the Convention, and perhaps responding to pressure from them), even if this was not politically achievable at the beginning of the Convention. He told the member not to worry on this score; the term would emerge 'like a rabbit out of a hat' towards

the end of the process. Thus, it seems self-evident that the phased alteration of the wording of the title was an intentional strategy; it would be naïve to assume otherwise.

The focus upon the role played by the President here thus does not represent undue attention. The finessing of the wording was a subtly deployed and, indeed, barely discernible tactic - but it was one, it is argued, which was deliberate. It is beyond doubt that Giscard did an admirable job of work in steering the Convention through to producing a single coherent draft text; in the respect, however, in which he took upon himself the task of selecting the final - and fatal - form of wording, it seems clear where responsibility for the ratification mix-up that followed lies. This might, without the benefit of hindsight, be considered an easy mistake to have made. Time has shown, however, that it was where the mistake crept in nevertheless[9].

Was it not to be guessed in advance, in the light of the stormy ratification debates at the time of Maastricht, that giving Europe its own 'Constitution', widely seen as the very embodiment of essential sovereignty, would be for even moderate Euro-sceptics like waving a red rag before a bull? The existence of a basic prior political context for adoption of the term is not denied, following the initial proposal by the German Foreign Minister Joschka Fischer and subsequent support from French President Jacques Chirac - the latter from the somewhat counter-intuitive angle of its potential to *limit* the growth of Community competence (Church and Phinnemore 2006: 19; Ziller 2005: 16). Nevertheless, the Convention President's extension of the notion of 'constitutionalisation' to its fullest scope was unwise. It was a move for which the peoples of Europe were not yet ready; and the hostile reaction should not have come entirely as the surprise that it appears to have been.

In the respect, therefore, that the final choice of wording of the title seems to have been a step too far, out of tune with the underlying substance, we can conclude this first section by identifying the inappropriate styling of the text firmly as the principal cause of the difficulties with ratification experienced in the French and Dutch referenda of 2005. A clearer and more precise title, better reflecting the actual nature of the text and free of unhelpful connotations, may not have removed all opposition. However, it might have been sufficient to allow a calmer and more rational debate, focussed on the merits of the document; and this might, in turn, have been enough to tip the balance of forces in favour of a Yes vote, first in France, and then in the Netherlands afterwards[10].

3. Re-learning the lessons of Maastricht

It seemed in 2003 that the lessons of Maastricht a decade prior had not been properly taken to heart. On this occasion, the people had sent two very loud and clear messages to their elected leaders.

'Do less and do it better' was the first and most audible demand, running counter to the apparently remorseless expansion of competences contained in the TEU which threatened to lead in the long run to a 'super-State', almost universally recognised as unwanted. The clamour was for existing powers to be used better before adding more: less waste of public money through fraud, greater administrative efficiency within the bureaucracy, less burdensome regulation and application of the (then new) subsidiarity principle.

The second clear message was for better communication between governors and the governed. Maastricht was the occasion when the public had first connected with, or woken up to, in a meaningful way the process of European integration happening around them and the project ceased to be a passive, élite-led and technocratic affair going on 'behind the backs' of the people (or perhaps, more correctly, without their knowledge and consent). The SEA had not been widely discussed or scrutinised in pubic; the TEU was. Certainly because it was not expected in 1992 that there would be wide public demand for the Maastricht text, a consolidated official version (a 'clean' version) was not available prior to the ratification debates - just the TEU as signed, containing only the untidy and partial amending clauses. A major part of the negative public reception at that time stemmed from the resulting difficulty

in reading the text: those who tried found they could not do so with any ease. The impression of an 'incomprehensible' text once formed was hard to dislodge.

Happily, the European institutions grasped this message in the 1990s and would not make the same mistake at Amsterdam and Nice. They appeared to take on board the novel requirement to communicate clearly and directly with the citizen. A decade later, however, the prime importance of good communication appeared to have been forgotten - or at least lost sight of. In announcing the adoption of a draft *Treaty Establishing a Constitution for Europe*, the Convention introduced a claim which seemed to the public both of huge import and yet strangely fanciful in the same breath. Not only would voters in time declare themselves sceptical and confused about what exactly was being proposed; many commentators openly expressed their concern and doubts and a debate started as to the exact nature of the text - whether Constitution or treaty, or both (Eleftheriadis 2004; Donnelly 2005; MacCormick 2005: 17).

The farcical nature of the public exchanges that followed in the wake of publication of the Convention's document at times bordered almost on the surreal. In the UK, the leading pro-European and former Conservative Deputy Prime Minister, Michael Heseltine, appeared to land himself in difficulty by openly expounding the view that the text was *not* a Constitution: '… anti-Europeans have let their imagination run wild. … Start with the canard that this treaty is a constitution: it is not. A constitution sets out the basic laws of a state; this is a treaty - an agreement between governments - that sets out the basic rules of the European club, which member states have freely joined, and includes provisions for them to leave if they wish to' (Heseltine 2004). This approach offered an open goal to the Euro-sceptics: Conservative MEP Daniel Hannan retorted simply that the words 'establishing a Constitution' were clearly stated in the title and invited his opponent actually to read the document. Unsurprisingly, the British public were left baffled by this exchange, and sceptical as to the coherence of the pro-European case. The essential nature of the document under discussion, it seemed, was by no means clear even to its strongest supporters.

Interestingly, in taking such a line, Heseltine was following in the foot-steps of none other than Kerr a year earlier. In reviewing Norman's synopsis of the Convention, Kerr had written: '… Of course, *The Accidental Constitution* is something of a misnomer. It is not a real constitution and it was not a real convention. Unlike Philadelphia in 1787, a plenipotentiary constituent assembly, Valéry Giscard d'Estaing's convention on the future of Europe had no mandate to lay the foundation of a state, and it did not. Instead it drafted a treaty - an agreement between sovereign states - to simplify and replace the current confusion of treaties. It makes no claim ("We, the people … ") to grassroots legitimacy, bypassing states and governments' (Kerr 2003). The characterisation of the Convention's title as a 'misnomer' by so senior a figure at the very heart of dealings is highly revealing - and can only, it seems, be taken to indicate a radical difference of view between Giscard and his loyal lieutenant over the appropriateness of the final wording. This is, however, no small matter. Whether the text *is* or *is not* a Constitution, must be recognised as being of fundamental importance to the citizen in assisting him to determine the exact nature of the document under consideration and its likely impact. No consumer would buy a product in the marketplace whose nature was not crystal clear and certain. When buying a car, for example, he or she would want to be sure that it is actually a car - and not a lawnmower in disguise. Similarly, clarity of designation was, and will remain, a vital factor in referenda to secure ratification of the current European political document. Mere technicality it is not (Church and Phinnemore 2006: 34).

Piris echoes this concern, observing that ambiguity over the name led to uncertainty about the document's effects in the mind of the voter: whether at heart now a tidying-up exercise (even if an 'important' one) or a major departure, was no longer clear. He remarks: '… one might think that instead of clarifying the debate on Europe for the citizens, … the name "Constitution for Europe" has confused the elements of the choice given to the voters in the referenda: did they have to vote for a strengthening of the EU as it is or for an EU radically transformed into a new project? Strong efforts of explanation had to be made on the part of national governments and political parties to clarify the debate. Obviously, these efforts have not been sufficient' (Piris 2006: 7).

When confusion reigns, sadly, we all get wet. In the respect, therefore, that the Convention's leadership forgot the lessons of Maastricht and brought a significant - and unnecessary - element of uncertainty into the whole project through last-minute finessing of the title, the crisis would appear to have been one largely self-generated.

4. To be, or not to be, a Constitution …

We are led, thus far in the discussion, to believe that it was a mistake to include the word 'Constitution', standing alone as a noun, in the document's title; that Heseltine and Kerr were right; that the document was misnamed; and that it is not actually a Constitution.
What, however, is the analytical justification for this line of thinking? We need to look in more detail at the proposed title and examine at the conceptual level the validity of the proposition it makes: that a treaty can, in fact, establish a Constitution; and that this document is both a treaty *and* a Constitution.

A good place to start is by considering what is meant by the term 'Constitution'. Two distinct approaches to defining the term can be identified: first, a Constitution as the founding document of a State; and, secondly, a Constitution as the founding document of either a single State or a multi-State political system.

Definition (i): A Constitution as the Founding Document of a State

We begin with a narrow definition of the term: a Constitution as the founding document of a State. Ziller brings out the central point that this is the widely accepted (consensus) definition prevailing today. He says: '… The term *Constitution* - the root word for which is common to all romance languages, from English to Swedish (translated as *Verfassung* in German and *forvatning* in Danish but as *grondwet*, i.e., "fundamental law", in Dutch) - is generally associated with the concept of the State (rather than international organisations). This association is frequently taken for granted by a majority of politicians, jurists, social scientists and, above all, ordinary citizens' (Ziller 2005: 15). Other authors, too, highlight the commonplace association of the word with Statehood (Kiljunen 2004: 44; Piris 2006: 18; Stuart 2003: 10)

On this first definition, the claim that the text is a Constitution today - that it 'establishes a Constitution' today, as the title states - is clearly seen to be false. For the EU will remain composed of many States, rather than forming a single State in its own right, upon ratification of the text. There is a wide and firm consensus on this point (Bogdanor 2003: 52; Church and Phinnemore 2006: 10; Kiljunen 2004: 44; MacCormick 2005: 48; Patten 2005: 119, 155; Piris 2006: 190-197; Ziller 2005: 18).

Upon inspection of the body of the text, two factors in particular confirm this view. The first is that the process for future amendment of the text remains unaltered from the present situation: unanimous agreement of the member States in an IGC, followed by ratification according to respective constitutional requirements (Article IV-443). The document is not 'the last treaty under international law' (Grimm 2005: 207), and the process remains essentially external, based upon ratifying new amending treaties, not internal, based upon amending a Constitution. The fundamentals of the pre-existing treaty-making order, therefore, remain undisturbed. The second factor, referred to above, is that the member States have been attributed the ultimate right to reassert their sovereignty through withdrawal (Article I-60). As long as this clause remains in place, the EU cannot be said to possess territorial integrity, a fundamental characteristic of Statehood. Taken together, these two elements demonstrate conclusively that the EU is not, and will not in the near future become, a State.

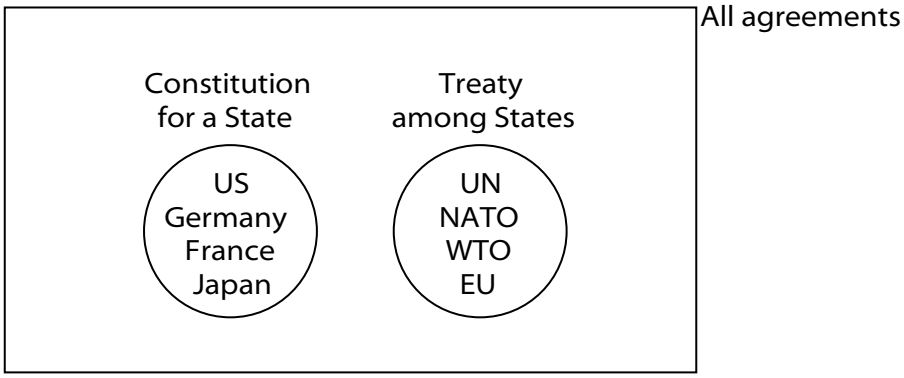
The conceptual framework that Piris develops reinforces this conclusion. He notes first that '… the concept of 'Constitution' is often linked to the concept of 'State', whereas the purpose of (the document) is not at all to establish a federal State'. He then goes on to consider the 'final form' that the European project might take and lays out three possibilities: (i) a mere customs

union with some common policies, (ii) a partially federal union with significant competences but mostly preserving the sovereignty of its constituent member States, and (iii) a fully-fledged federal State. 'It is worth stressing', he says, 'that (the text) gives the second answer to this question, clearly rejecting the other two' (Piris 2006: 18, 33)[11].

So it seems clear that the text is not a Constitution on this first reading, because the EU will remain upon ratification a multi-State system.

We may simply observe here that the first definition frames treaties and Constitutions as mutually-exclusive notions. A treaty is an agreement between multiple States. A Constitution is constitutive of a single State. If many States, a treaty. If one State, a Constitution. A treaty is considered to be external to States (plural), an agreement between them in the realm of public international law; whereas a Constitution is considered to be internal to one State, constitutive of that State and the founding text of domestic law. There is no overlap between the two concepts. This is illustrated diagrammatically in Figure 1 below.

Figure 1: A Narrow Definition of the Term Constitution



On a narrow interpretation of the term Constitution, the current European text could conceivably be *either* a Constitution *or* a treaty - a Constitution for a single pan-European State *or* a treaty among Europe's many nation States. Since we have established that the EU is and will remain composed of many States, the text must be considered a treaty and this alone.

The document could not be both Constitution and treaty simultaneously, for the reason that the EU and its nation States could not both possess Statehood at the same time; this quality must pertain to one or other level. To place the two nouns together in the same title, therefore, appears in this first case erroneous.

It is important to note, however, that treaties have in the past been the medium via which genuine Constitutions for new States have been created. Indeed, Grimm notes that this has traditionally been the 'standard procedure where several states combine to create a greater political whole' (Grimm 2005: 207). However, in this mechanism they cease to be treaties in practice the moment they enter force, by virtue of the revised amendment procedure which defines the (final) change of order from many States linked by a treaty between them to one State with its own Constitution. Upon inauguration of the text, what was external now becomes internal, with future amendments decided upon by the 'entity so constituted' (i.e. by majority vote and no longer by unanimity). As has been noted, legal and political scholars are in agreement that this is *not* the case for the proposed European document: the amendment procedure remains unchanged and the text will remain a treaty upon ratification (Church and Phinnemore 2006: 9, 35; Kiljunen 2004: 44, 46; Piris 2006: 186; Shaw 2005: 1; Ziller 2004: 18-19). So the text, therefore, cannot plausibly be claimed to be a Constitution. As Grimm observes: '… During the decision-making phase, everything remains as it was before. An IGC, which is

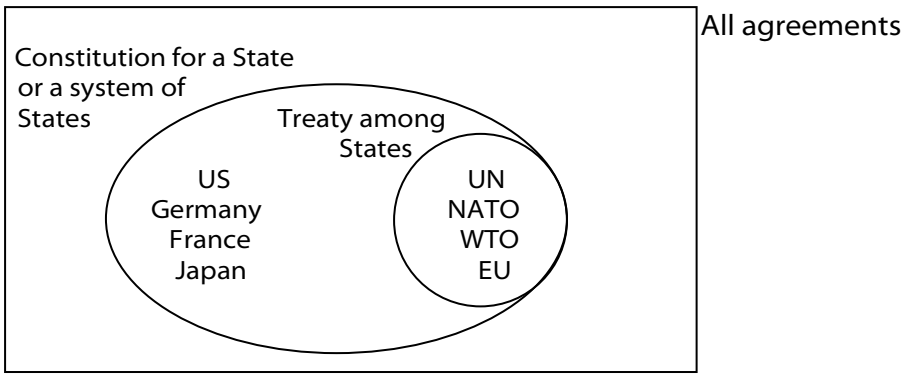
not an organ of the EU, has to approve the draft unanimously - with or without amendments - and then submit it to the member states for ratification. … The document remains in the hands of the member states. Measured against a somewhat meaningful notion of a constitution, this document cannot be considered a constitution' (Grimm 2005: 208).

Definition (ii): A Constitution as the Founding Document of either a Single State or a Multi-State Political System

A second approach is to adopt a broader definition of the term Constitution to allow for the possibility that Europeans are actually engaged in something new: creating a Constitution for a multi-State political system. The term Constitution is here being deliberately expanded (one might say, crudely, 'bent') to fit with innovative practice. This is certainly possible; indeed, it is often how political terms and concepts evolve.

On this wider reading, there is now room for overlap between the concepts of treaty and Constitution, since the meaning of the term Constitution is enlarged to encompass both single and multi-State political systems. This is represented in Figure 2.

Figure 2: A Broad Definition of the Term Constitution



As the EU remains a multi-State political system, it clearly remains correct to describe the proposed EU text as a treaty; but it could also now, under this second definition, legitimately be described as a Constitution.

There are three significant problems with applying such an expanded definition of the term Constitution in justifying the title chosen by the Convention, however. We examine these in turn.

First, by the very nature of doing something new, there is an absence of convincing precedent which makes the concept difficult to sell to the public. There are two examples in existence of Constitutions for political organisations which are not single States: those of the International Labour Organisation (ILO) and of the World Health Organisation (WHO). However, as specialised agencies of the United Nations (UN), these bodies are inter-governmental organisations with a narrow technical-functional remit and are therefore far from close parallels for a comprehensive political system like the EU, which has representative institutions, its own legal order and competences in a very broad range of policy fields. Though perhaps not wholly invalid, these examples seem to offer only weak justification for the shift in the use of terminology proposed[12].

A second difficulty is that attempting conceptual re-definition in the public mind of established and already well entrenched political notions, in the search for understanding and acceptance, would be an uphill struggle and a very steep one. The idea of a Constitution not for a single State but for a multi-State system is a difficult one to communicate to a sceptical

public, already mistrustful of the advancing tentacles of European integration and easily alarmed by the prospect of a European super-State. As was noted above, accepted public usage of the term is at present different.

Thirdly, the perception that the document threatens to undermine national Constitutions and uproot the established basic framework of political ties and democratic connection between voters and their elected politicians at national level, presents a further enormous obstacle to surmount. Unfounded though this fear may be, seeking to overcome it through a tactic of public education alone, however well executed, appears a huge challenge.

Despite these three major reservations of pragmatism, however, it is still nonetheless logically sound to make an argument in favour of understanding the present EU text as one novel instance of a broad definition of the term Constitution, encompassing both single State and multi-State political systems.

Ziller is one author who is happy to follow this approach. He draws the conclusion that '… the Convention's text has in fact become a "Constitution" - but a Constitution adopted by the common agreement of the Member States of the Union in the form of a Treaty and not a Constitution of a collection of individuals designed to create a State' (Ziller 2005: 18).

Similarly, Kiljunen welcomes the notion of a Constitution for what he sees as cooperation in a 'supra-national union' broader than the nation State, but not a State itself. He says of the document: '… Legally speaking, it is an international treaty, and calling it a constitution will not turn it into the constitution of a state, because the Union it governs is not a state' (Kiljunen 2004: 46).

For Ziller and Kiljunen, then, and entirely consistent with this second definition of the term Constitution, the EU text is seen as both a treaty between States *and* a Constitution. On this wide definition, therefore, the title *Treaty Establishing a Constitution for Europe* is seen to be plausible.

Given the prevailing inauspicious political climate, however, this article argues that following such an approach now may not be the wisest course. Choosing to re-enter the same minefield at the second go and attempting to convince voters that an expanded definition of the term Constitution makes sense - that it is appropriate and not a threat - would be a decision involving great risk. A better plan may be to take a path around the minefield, if one exists.

Such are the two possibilities opened up by the competing perspectives of the term Constitution, narrow and broad, given under definitions (i) and (ii) above. Under definition (i), the EU text is conceived as a treaty but *not* a Constitution; whilst under definition (ii), it is seen as both a treaty *and* a Constitution. Under definition (i), the proposed title is erroneous. Under definition (ii), the proposed title is conceivable but difficult to sell to the public.

Two Interpretations of the Word 'Establishing': Static and Dynamic

At this point in the analysis, it is important to bring in an additional perspective which is currently playing a central role in muddying the waters of the debate. It will be argued that the possibilities this view opens up should be firmly excluded.

The perspective brings in a *dynamic* interpretation of the word 'establishing' in the phrase 'establishing a Constitution', alongside the existing *static* interpretation: that the text, as it has been agreed, is not a Constitution presently but is intended to become one at some point in the future - it is a Constitution *in embryo*. It will transform into such a document gradually over time. This will just happen - we will only know after the event.

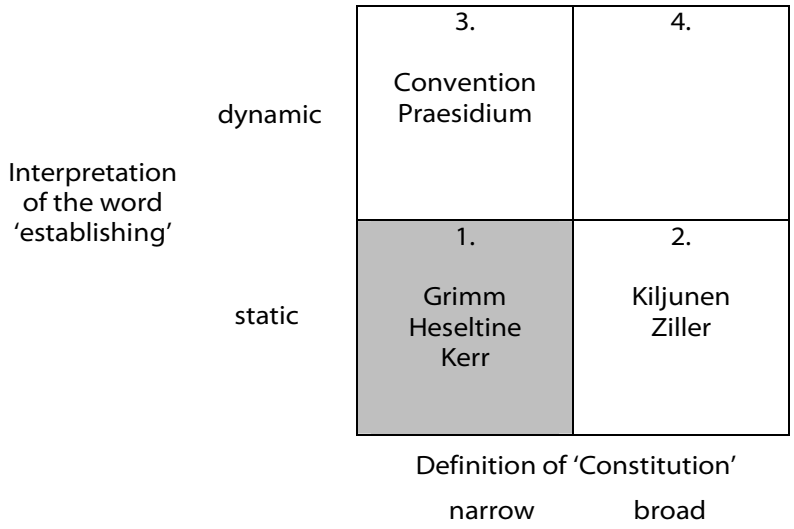
Eleftheriadis calls the rationale for the assignment of a title which is not yet fully appropriate the 'instrumental argument', on the basis that it is the means by which the end will be achieved over time. He associates it with a theory called 'destiny theory' (perhaps better

termed an 'ideology'), the fundamental premise of which is that normatively the goal of integration *per se* is understood to be 'a good thing'[13] (Eleftheriadis 2004: 7-11).

This additional dichotomy opens up a matrix of four possible permutations for interpreting the nature of the text (see Figure 3). Understood in this light, it is scarcely surprising that confusion abounds.

Box 1 (Figure 3) is shaded to highlight that this quadrant is inconsistent with the designation 'Constitution', as has been established above. In the three remaining quadrants, use of the word is argued to be conceivable.

Figure 3: Four Permutations for Interpreting the Phrase 'Establishing a Constitution'



A narrow definition of the term Constitution coupled with a dynamic perspective of the word establishing (box 3) was probably the central view of proponents of a 'Constitution' label on the Convention Praesidium. On this understanding, whilst the text is presently a treaty between States and not a Constitution, it can nevertheless be viewed as laying the foundations for a genuine Constitution (for a State) in time, thus meriting the title attributed to it. The door is here being consciously left open to a more integrated future - a legacy bequeathed to future generations following the Philadelphia model.

Some or indeed many supporting this view may not have fully thought through the logical implications of their recommendation. Andrew Duff, following the original federal vision of Monnet and Spinelli in desiring a federal State, would not have felt the need to deny a goal of Statehood. The majority probably would have done, however, in which case they would have been forced onto the ground of accepting a broad definition of the term Constitution (boxes 2 and 4). Giscard might well have fallen into this camp. This position is consistent with the text remaining a treaty between States. So, one is left wondering why so much fuss was made over one word, fuss that cast in jeopardy ratification of the entire project. The emphasis put on de-emphasising the treaty character of the document appears both inappropriate and a waste of effort.

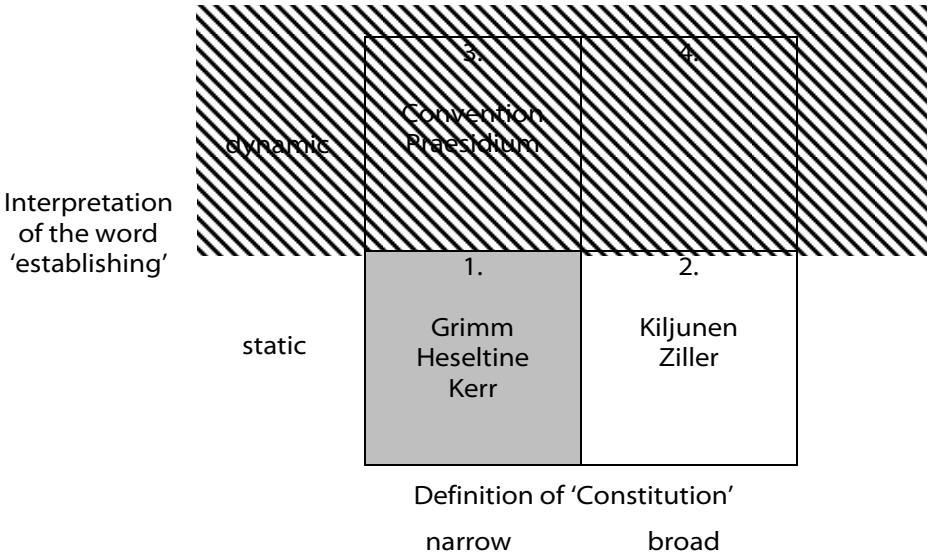
This second dichotomy (static vs. dynamic) adds an additional layer of complexity, obscuring the clarity of the narrow vs. broad dichotomy of definitions (i) and (ii) above. The message being sent out to voters about the nature of the text becomes extremely mixed when the possibility of a forward-looking line of reasoning from a dynamic perspective is overlaid. The nuancing of the word 'establishing' upon which the logic of those in box 3 depends - that the text does not 'establish' a Constitution in the present tense but may do so incrementally over

time - introduces an unwelcome haziness. Furthermore, the approach seems to run head on into the charge of seeking to create a federal State by stealth and lends fuel to the sceptics' claims (apparently here legitimate claims) that there is a hidden agenda to create a federation 'by the back door', rather than employ the mechanisms of open and transparent democratic process. If this is not the case, it might be better not to give this impression by ruling out the possibility.

No other European treaty prior has deployed a dynamic interpretation of the word 'establishing' in its title. On each occasion that it has been used (the Treaty of Paris, the two Treaties of Rome, the failed European Defence Community Treaty and the first draft of the TEU), it has been used to refer to a present action creating an entity with immediate effect. The novel slant on the word introduced in recent discussions is clearly unhelpful; we should be explicit in rejecting it.

If this is given effect, the number of possible permutations of the way in which the title of the text could be interpreted falls from four to two, a much more manageable number. The argument can then be had between two clear possibilities. This is shown in Figure 4. Following the discussion above, on a static view only under a broad definition of the term Constitution is the existing title plausible (box 2).

Figure 4: Excluding the Dynamic Interpretation



Of course, the dynamic approach (as under box 3) is not the view of things in national capitals. Secure in the knowledge that they remain 'masters of the Treaties', with a veto over any future treaty amendments, the perspective of the member States is that no fundamental shift in the locus of power could come about without their express and unanimous approval in an IGC (the same situation as now).

They do not, therefore, anticipate an unsanctioned shift of Statehood and ultimate sovereignty to the European level - as they hold the key. In their view, then, the text remains 'technically a treaty'. Of the two static options, they are clearly forced to accord with box 2, an expanded definition of the term Constitution encompassing both single and multi-State political systems, in seeking to justify the title given to the text.

If this framework of analysis is correct, one of the most glaring missed opportunities of recent times appears to have been the national governments' failure to tone down the wording of the title at the IGC stage, to bring appearance back closer into line with underlying substance. Through their inaction, they were arguably guilty of tacit acquiescence in the mis-selling of the product.

The IGC sat from September 2003 through to June 2004, beginning under the Presidency of the Italian Government and concluding under the Irish Government. The weight and importance of the handful of outstanding issues to be addressed was such that a conclusion to proceedings was not possible at the European Council meeting of December 2003, due to the refusal of Spain and Poland to agree to a reformed system of qualified majority voting (Church and Phinnemore 2006: 26-27; Piris 2006: 49-55). The noise generated by this and other contentious, predominantly institutional, issues perhaps distracted the member States from paying due attention to the labelling that had been attached to the product. In equal measure, there was a general reluctance to re-open the compromises already reached in the Convention; the Presidency at the helm would have feared adding yet another potentially divisive issue to the list of outstanding items still to be settled.

Whatever the true cause of the governments' inaction, the failure to adjust the title in order to bring out more clearly to the public the central quality of the text as remaining fundamentally a treaty in nature - when the media had latched exclusively onto the other word in the title, styling the document just 'the EU Constitution' - seems a costly oversight. This is, however, perhaps not a mistake which it is yet too late to correct.

5. Constitutional Yes, Constitution No

Certainly, the document has aspects that are constitution-like in character. Ziller holds the EU system up in the light of the constitutional thinking of the Enlightenment and brings out clearly three respects in which the text meets well the central characteristics of this tradition: (i) it provides a framework of rights; (ii) it orders the relationship between governors and the governed; and (iii) it institutes a system of checks and balances through a clear separation of powers (Ziller 2005: 2-10).

Shaw considers the EU system to represent a 'partial and evolving constitutional framework'. This evaluation seems about right. She sees the proposed text strengthening many important constitutional elements, which included '… aspects of the structure of the polity (legal personality; 'depillarisation', etc.) and … some strides towards increasing the effectiveness of the Union and its capacity to operate as a legitimate forum for governance in which citizens are given both participatory and representative mechanisms through which they can express their preferences' (Shaw 2005: 1). The writings of other authors corroborate this view of an incrementally emerging constitutionalism (Eleftheriadis 2004: 3-4; MacCormick 2005: 17-25; Piris 2000: 6-16).

So we can certainly identify embryonic constitutional elements that are steadily evolving. It may be appropriate, then, to use the adjective *constitutional* to convey this sense of real but nevertheless, at this stage, still limited and circumscribed constitutional development. However, to most minds, jumping from this rather conservative notion to the bold assertion that the text itself represents a (full-blown) Constitution seems too far a leap. Shaw takes this view, concluding that in spite of the above, '… it would none the less be wrong at this stage to call the document "a Constitution", given the heritage of the concept of constitution. … to me it is a Constitutional Treaty, not a Constitution as such' (Shaw 2005: 1). Again here, other authors echo this point (Moreau Defarges 2004: 63; Patten 2005: 119).

In contrast to the approach of Ziller and Kiljunen, this group prefers to restrict use of the term Constitution to its narrow sense, connected to Statehood, as under definition (i) above. In common with Kerr, Heseltine and Grimm, they regard employment of the word 'Constitution', standing alone as a noun, as too far a leap and thus a misapplication. They prefer instead to retain 'treaty' as the noun whilst admitting use of the word 'constitutional' as a qualifying descriptive adjective.

From the entire analysis to this point, therefore, perhaps rather surprisingly, we can in fact draw out quite a high degree of consensus as to the character of the document. Most

observers (if not all) are comfortable designating it as a treaty (noun) with constitutional (adjective) aspects.

We must also recognise that it is not necessarily wrong to style the document as a 'Constitution': if it is accepted that Europeans are consciously choosing to adopt a novel and broad definition of the term 'Constitution', encompassing political systems composed of multiple States (as under definition (ii) above), the designation of the text as a Constitution need not be seen as inconsistent with the simultaneous assertion that it also remains a treaty. For on this reading, there is overlap between the concepts of treaty and Constitution. Thus, the notion that a treaty can 'establish' a Constitution is seen not to be entirely far-fetched.

However, for reasons of pragmatism, given that one major public crisis of confidence in European integration has already occurred, it is proposed here that an alternative route be taken out of the current impasse. Rather than a second heroic full-frontal assault in persisting with 'Constitution' as a noun, likely to be in vain, it is suggested that an easier path be taken around the obstacle that Europe finds lying in its path. For, as was noted above, choosing to adopt a broad definition of the term 'Constitution', though logically sound, brings with it significant problems. Even if the case is well made and consistently presented in public debate second time round, obstacles such as an absence of precedent, difficulties in shifting public perceptions and the perceived threat to existing national Constitutions may well prove too difficult to overcome.

What, then, might be possible alternative characterisations for the text to replace the current 'EU Constitution'? Two credible short form designations can be identified, (i) 'Constitutional Treaty', and (ii) 'Constitutional Charter'[14]. Each is considered in turn.

(i) Constitutional Treaty

The first option follows logically from the commentary of the large group of authors cited above. It reinstates the original formulation of the Convention, before the last-minute tinkering, 'Constitutional Treaty' (in full *Constitutional Treaty for Europe*). This designation appears technically accurate: a treaty with constitutional aspects.

There is one major problem with seeking to move back to this formulation now, however. This is that the meaning of, and the rationale for, the change would not be immediately obvious to the citizen - nor even would it become wholly apparent upon extensive explanation: it would simply appear to the man in the street as 'playing with words'. It would not anyway stand out that there had been substantial change, as the terms 'Constitution' and 'Constitutional Treaty' were both in currency on the first ratification attempt and used interchangeably by many. In consequence, it is not assured that the media would feel the need to revise their all-important shorthand designation away from 'EU Constitution'. These are sufficient grounds alone to reject this path. It seems crystal clear that meaningful and plainly evident change is required.

In spite of German Chancellor Angela Merkel's (correct) assessment that the term 'Constitutional Treaty' was 'not so bad' (Taylor 2006), we should be reluctant to follow the same route again.

(ii) Constitutional Charter

A second, and more promising, option would be to adopt the principle already employed by the Convention elsewhere in the draft text of codifying the accepted judgements of the European Court of Justice (ECJ) - as was done, for example, for the principles of primacy and direct effect of EU law.

Piris sets out clearly the position taken by the ECJ in designating the Treaties a 'constitutional charter', first in its judgement *Les Verts* of 1986 and on several subsequent occasions since. This ruling stated: '… (the EC is) a Community based on the rule of law, inasmuch as neither its

Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty' (Piris 2000: 8).

One is struck by the apparent restraint of the judges here, in treading carefully when approaching the frontiers of national sovereignty. Their term appears suitably reserved, yet still clearly a significant advance on a conception of the EU's foundations as purely those of an international organisation.

Of note is that Piris himself, when writing prior to the start of the revision process in 2000, advocated a reformulation of the existing treaties into a short 'Treaty Charter' with longer protocols annexed to the back, where he suggested locating the more technical parts such as the detailed legal bases for the various policy fields. In making this proposal, he clearly followed and supported the ECJ's characterisation. A Treaty Charter, he said, '… would not change much legally, and the Treaties would not become a Constitution like that of a State as a result, but it could change things psychologically and politically' (Piris 2000: 41).

A marginal modification (or 'clarification') of the title of the existing text, then, taking up Piris' lead and codifying the ECJ's designation into *Treaty Establishing a Constitutional Charter for Europe*, appears to offer a promising way out of the present dilemma.

We can identify three major benefits linked with this specific proposal:
First, the media would have a clear prompt - and requirement - to readjust their short form title, in order to keep pace with the progressing evolution of the political debate, and the all important sound-bite would thus shift from 'EU Constitution' to 'EU Constitutional Charter'. The wave of publicity generated in making this change, if clearly and consistently explained and justified by politicians, could be sufficient to allow the public to feel that the political élite has listened to their concerns and that meaningful change has been implemented.

Secondly, aiding this process of explanation, there is a solid rationale for the term's introduction in the practice of codifying well-established but presently unwritten legal principles, as deployed elsewhere in the text.

Thirdly, the term Charter is understood in law to be of the order of a treaty between States[15]; so the change would help slay the myth of the underhand creation of a super-State, thus quashing convincingly the Euro-sceptics' main argument.

From a negative angle, it could be argued that past and present employment of the term charter by the EU has been in the context of documents more of a declaratory and non-binding nature (for example, the Social Charter, the European Energy Charter and the Charter of Fundamental Rights). The proposed text, of course, also incorporates the Charter of Fundamental Rights in Part II of the document. Although perhaps not an ideal back-drop, it is argued here that such usage should not be allowed to stand in the way of its further application in the manner proposed. Alternative formulations offering a credible potential solution are in short supply today.

One further significant advantage, connected to seeking to implement change through modification of the title, is that the delicate package-deal struck in the Convention balancing a wide range of interests would not be re-opened. The eighteen member States that have already ratified the first document would not have to go through lengthy procedures again; short amending bills would suffice.

The re-naming suggested would represent a rational response by the EU and one based upon principle: identifying the problem and then correcting it. How better to confront the public's evident scepticism concerning the text, than for the European Council to accept a share of the responsibility, in this regard, and say: '*Sorry, we got it wrong. The nature of the document was not clear from the title given it by the Convention. We hope this new title clarifies the situation*'. This would seem to meet the evident requirement for humility, an apparent pre-requisite if the failed referenda are to succeed on a second occasion.

6. Conclusion

Having set off on our journey anxious to identify the cause of Europe's present constitutional crisis, we have now arrived at our destination. The source of the difficulties Europe faces has been firmly located; but perhaps just as importantly, a potential means of addressing them has been identified.

First, the Convention's text was established as a sensible and balanced package of reforms, a tidying-up exercise 'plus': the right product. Next, the prime cause of all the trouble was located not in the text itself but in the over-ambitious label given to it: the wrong packaging. It was observed that there is a broad range of possible interpretations of the phrase 'establishing a Constitution' in the title of the document, which introduces an unhealthy, and equally an unnecessary, element of confusion.

Although under one definition of the term 'Constitution' the title was seen to be plausible - a broad definition encompassing a political system of multiple States - for practical reasons it was argued that this possibility should be excluded from the present range of options. Instead, in view of the wide consensus that the document represents a treaty (noun) with certain partial and evolving constitutional (adjective) aspects, it was suggested that the ECJ's prevailing designation of the EU Treaties as a 'Constitutional Charter' be adopted. A modified title would thus read *Treaty Establishing a Constitutional Charter for Europe*.

This proposed revised title is not over-stated: it is measured and appropriate. It does not appear to make any over-ambitious claim for the text to be a full-blown Constitution, analogous to that of a State. Instead, the term Constitutional Charter clearly makes a lesser claim and the over-riding character of the text as a treaty would not be obscured. The UN has a Charter. The EU would have a Constitutional Charter. This seems right and appropriate. It represents well the stage of political development that Europe has now reached: a strong union of States and peoples.

I would like to thank Dr. Kalypso Nicolaidis of St. Antony's College, Oxford and John Pinder, Honorary Professor of the College of Europe, Bruges for their comments on this article and the Economic and Social Research Council for its financial support of the doctoral studies during which it was prepared.

Notes

[1] The Convention on the Future of Europe sat in Brussels from February 2002 to July 2003 with a mandate to prepare recommendations, or in the absence of consensus a set of options, for amending the existing European Treaties. It brought together in a unique formation members of national governments, national parliaments, the European Parliament and the European Commission.

[2] At Maastricht, Denmark secured 'clarifications' in the areas of citizenship, the single currency, defence, and justice and home affairs, in the form of a declaration of the Edinburgh European Council of December 1992. Similarly with the Nice Treaty, Ireland secured confirmation of her right to remain militarily neutral in a declaration of the Seville European Council of June 2002.

[3] The findings of the post-referendum surveys by Eurobarometer bring out clearly the lack of cross-over (Eurobarometer 2005a; Eurobarometer 2005b). In descending order of importance, the reasons given by voters for voting No in France and the Netherlands, respectively, were:

France:

- the Constitution would have negative effects on employment in France (31%)
- the economic situation in France was too weak / there was too much unemployment (26%)
- economically speaking, the draft was too 'liberal' (19%)

- opposition to the President of the Republic, the government or to certain political parties (18%)
- there was not enough 'social Europe' (16%)
- the Constitution was too complex (12%)

The Netherlands:

- the lack of information (32%)
- the loss of national sovereignty (19%)
- opposition to the national government or to certain political parties (14%)
- the 'costs' of Europe (13%)

It seems, as Giddens rightly says, that '… the reasons for the rejection of the constitution were not primarily to do with the document itself' (Giddens 2006). He goes on to state that '… the referendums in France and the Netherlands provided a vehicle for the expression of much wider discontents about employment, living standards and migration'. This second claim does represent the general received wisdom at present; however, it only seems, on close inspection, to be supported by the above evidence in loose terms. The perception of a threat to the economic system or 'social model' from globalisation, it appears from the data, was primarily a French concern. Nicolaidis brings out the uniqueness of the French outlook, observing that in France alone did the Left oppose the text. This, she says, contrasted strongly with the fact that '… every socialist and social democratic party in Europe - except for Malta - favoured the constitution and so too did the great majority of trade unions'. The crisis it seems was as much to do with France herself, and her position in a rapidly changing world, as it was to do with Europe. What was new this time, Nicolaidis points out, was the French Left's advocacy of '… a type of pro-European No; that is, making credible the idea that No really meant Yes to "another Europe"' (Nicolaidis 2005: 13-14).

Yet, such a vision was never a realistic proposition. The document added little new to the existing 'acquis' on Single Market matters. The principle of 'free and undistorted' competition (Article I-3.2) that raised so many hackles, for example, was not a new notion but merely a restatement of existing practice, as it has been rightly observed by many commentators. So the grounds for searching for, and the feasibility of finding, a new economic settlement among the now twenty-seven member States of the EU appear limited today. The legislation to implement a large internal market free of impediments to trade, balanced with redistributive and social elements (the Common Agricultural Policy, the structural funds and worker protection initiatives under the Social Charter and other directives), has been built up incrementally over the past half-century of integration, culminating in today's carefully weighted compromise. Equally, externally a clear majority of member States continue to favour openness to trade in the face of globalisation, rather than a protectionist response.

The tools to react to public concerns about unemployment and economic restructuring, say the critics of the French No on economic grounds, are to be found at national, not European, level (Giddens 2006; Piris 2006: 22). So it is from within national politics that solutions must be sought.

[4] Patten says: '… The Constitutional Treaty was widely regarded in the rest of Europe as a triumph for the predominately "British" view of how the EU should work' (Patten 2005: 129); and Ziller observes that '… the UK … obtained more concessions than any other Member State - both in the Convention and during the IGC' (Ziller 2005: 129).

[5] Jean-Claude Piris is Director-General of the Legal Service of the Council of Ministers and was Legal Advisor to the Inter-governmental Conference.

[6] In the famous 'Schuman Declaration' of 9 May 1950 proposing the first European Community in coal and steel, which Jean Monnet had drafted for the French Foreign Minister Robert Schuman, Monnet had included the explicit goal of a 'European federation'. In Article I-60 we see, arguably, the first clear evidence of a definite break with the original vision of a federation / federal State (which, it must be recognised, was a very early general vision of the promised land), in favour of a more confederal design, a confederation of States conceived in strong form. This model should probably nevertheless also be considered a 'federal' form, that is to say confederalism defined as *part of* federalism, not *in opposition* to it. Interestingly, in concluding his *Memoirs* in the late 1970s, Monnet showed an increasing openness to a confederal vision of the *finalité politique*, and one concrete manifestation of it in particular, the European Council.

Leaving to one side, however, the evolution of Monnet's own thought, in an earlier period when more tenaciously attached to federation as a destination, Monnet had made plain the

fact that no federation could incorporate a voluntary right of exit (the point at issue here): 'The withdrawal of a State which has committed itself to the Community should be possible only if all the others agree to such withdrawal and to the conditions in which it takes place. This rule in itself sums up the fundamental transformation which the French proposal seeks to achieve. Over and above coal and steel, it is laying the foundations of a European federation. In a federation, no State can secede by its own unilateral decision. Similarly, there can be no Community except among nations which commit themselves to it with no limit in time and no looking back' (Monnet 1978: 326).

[7] To name but two examples of very positive house-keeping, two thousand eight hundred pages of primary law were reduced massively to five hundred and sixty, and the number of legal instruments was cut from fifteen to just six (Piris 2006: 58, 71).

[8] Giscard had declared the designation *Constitutional Treaty* the one to be used throughout proceedings, telling the inaugural meeting of the Convention on 28 February 2002: '… If we were to reach a consensus on this point (a single proposal), we would thus open the way towards a Constitution for Europe. In order to avoid any disagreement over semantics, let us agree now to call it: a "constitutional treaty for Europe"' (Giscard 2002: 20).

[9] Regarding the modification to the title, it seems the change went undebated in the Convention. Gisela Stuart, a member of the directing Praesidium, offers a pessimistic account of internal Convention procedure, critical of what she saw as Giscard's autocratic management style and the lack of discussion on many substantive points at issue (Stuart 2003: 19-30). In the final stages of the Convention the body had many pressing questions of content to resolve and the issue of how to label the text, it appears, went to some degree lost in the mêlée. Giscard's line appears to have been that there was no time for 're-opening' the question, which had already to his mind been satisfactorily aired at the start of the Convention.

[10] The French voted No on 29 May 2005 by 55% to 45%. The Dutch voted No three days later on 1 June 2005 by 62% to 38%. Although the latter is a more substantial margin, commentators seem agreed that Dutch voters were emboldened by the French No and, freed of inhibitions and any likely consequences for their country, registered a protest vote in numbers larger than might otherwise have been the case.

[11] The characterisation by Piris of the EU as a 'partially federal union' appears entirely consistent with this author's interpretation of the emerging *finalité politique* elaborated in Footnote 6.

[12] To stretch credibility even further and claim the existence of a precedent in the Constitutions of golf clubs and political parties, on the basis that any 'rule-book' or framework for action within an organisation can legitimately be described as a Constitution, as British Foreign Secretary Jack Straw argued (Straw 2002), risks trivialising the debate and incurring voter suspicion and mistrust as a result.

[13] For reasons other than the paternalism inherent in this approach, Eleftheriadis concludes by rejecting it. This leads him firmly and explicitly to prefer the characterisation of the text as a treaty rather than a Constitution.

[14] Other formulations, such as 'Basic Treaty', hold attraction in some quarters. However, the phrase appears to draw its inspiration too heavily from the German *Grundgesetz* or Basic Law, the German Constitution. Too close a parallel with any one national model would be unwelcome in a European setting. Equally, Church and Phinnemore remark than simply seeking to 'relabel' the Constitutional Treaty as a 'Treaty' would be wholly unconvincing (Church and Phinnemore 2006: 172). It does seem both relevant and necessary to retain some form of reference to the constitutional-type nature of the text.

[15] The Treaty Reference Guide of the UN Treaty Collection makes the point succinctly. It identifies charters as one of several 'international instruments binding at international law' falling under the generic heading of 'treaty', the full range being: 'treaties, agreements, conventions, charters, protocols, declarations, memoranda of understanding, *modus vivendi* and exchange of notes'. It observes that all of these types of agreement have broadly the same legal effect: '… Although these instruments differ from each other by title, they all have common features and international law has applied basically the same rules to all of these instruments' (United Nations 1999: 1). It goes on to note that the common rules referred to are found in the 1969 Vienna Convention on the Law of Treaties.

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Morality vs. Legality: European Responses to the Changing Norms Of Military Intervention

Aleksandra Krakiewicz

Introduction

The norms of armed intervention are undergoing significant change. According to the UN Charter, resort to force should only occur for the purpose of either self-defence or collective security authorised by the UN Security Council. More recently, however, new threats to security by global terrorist networks and non-state actors as well as calls for intervention in cases of human rights violations have challenged these exclusive criteria for legitimate use of force. The traditional principles of sovereignty and non-intervention ordering the international system are being redefined in a globalised world. In cases of humanitarian crisis, the emphasis is now shifting away from the right of intervention towards the responsibility of states to protect vulnerable populations at risk from civil wars, insurgencies, state repression and state collapse. In other words, where governments are unwilling or unable to protect their citizens from avoidable catastrophe, the international community of states is now believed to have a responsibility to act. The notion of 'humanitarian intervention' and the 'responsibility to protect', endorsed in the 2005 World Summit Outcome document, will require significant readjustments of the rules of military engagement.

The challenge to the existing normative framework regarding the use of force is further complicated by the fact that the United States is now the world's pre-eminent military power. Its hegemonic position in the post-Cold War world order is raising new questions about the balance of power in the international system. The current Bush administration, moreover, is setting controversial paradigms as far as the extension of the notion of self-defence, pre-emptive action and the legitimacy of unilateralism are concerned. The debate which preceded the attack on Iraq in March 2003 addressed this whole range of issues related to the legality of intervention. The Bush administration put forward several different lines of argument to justify a possible strike against Iraq. From summer 2002 onwards, members of the administration variously suggested that military action was necessary and justified because of the urgent need for an end to the repression of the Iraqi people, for regime change, and for pre-emptive action against an imminent threat. They also spoke of Iraq as the 'next phase' of the war on terrorism. Finally, they stressed the importance of securing the implementation of Security Council resolutions on Iraq, particularly those relating to biological, chemical and nuclear disarmament. When the US finally took military action against Iraq in March, the government relied on one main legal rationale: Iraq's failure to implement certain UN Security Council resolutions, and the coalition's continuing authority to use force based on such resolutions (Roberts 2003: 39).

In view of these controversial developments an essential question is: what type of responses have been given by the United States' principal allies, the Europeans? Since the end of the Cold War order, Europeans have been facing the question of how they want to engage with

the rest of the world, how they define their relationship with the United States and when they are prepared to resort to military force.

It has often been suggested that international law and multilateralism are the constitutive principles Europeans could always be sure to agree on (Risse 2003). In reality, the case is not quite so simple. What constitutes an imminent threat? When is pre-emptive action justified? How can multilateralism be made effective? Does effective multilateralism include the threat of unilateralist action? Reference to a general belief in the importance of international law and the desirability of multilateral action does not actually get us very far in understanding European responses to these pressing questions. In this context, it is often overlooked that the European perception of international justice and multilateralism is not uniform, but that there are instead many differing forms and rationales behind the more general approval of it. The Iraq crisis provides a compelling illustration of these different perceptions.

How did individual European governments relate to the discussion about the legitimacy of the attack against Iraq? This article argues that diverging European positions on the Iraq intervention reflect distinct approaches to the international normative framework regulating the use of force. It identifies two types of positions – legal and moral. Evidence for the validity of this distinction is provided by an examination of the foreign policy lines adopted by Germany, Poland and the United Kingdom. The fact that these three countries provided very different justifications for supporting or opposing the US-led war on Iraq presents us with a complex puzzle. Considering the vital role Germany, Poland and the United Kingdom can be expected to play for the future of European unity; there is a pressing need to explain the reasoning underlying their divergent positions on Iraq. These divergences, it is concluded, will continue to pose problems for forging a concerted European policy on the use of armed force in international affairs.

1. Conceptualising contending approaches to the legitimate use of force

In the context of the Iraq war, the European debate about the legitimate use of force was characterised by two distinct approaches – the one legal and the other moral. The former concentrates on the legality of the use of force on the basis of the UN Charter while the latter is focused on the legitimacy of the use of force in defence of human rights against dictatorships. Analyses of European positions on the war often seem to conflate these two approaches.

The first of these approaches essentially focuses on the rules governing the international system and relations between states; the second, conversely, concerns the moral duty of democracies and relations between states and societies. As Nicole Gnesotto puts it:

> The legalistic rhetoric about the use of force leads to greater importance being given to the stability of the international system compared with the democratisation of societies, and order as opposed to liberty, even if that means ignoring tyrants in the name of international law. [.]The argument of ethics has the opposite defect of attaching greater importance to liberty at the expense of stability in the world, even though it may mean upsetting regional balances and in particular destroying, in the name of democracy, the legal foundations of a system that is essential to the very actions of democracies. (Gnesotto 2003: 31-32).

Thus while the legal approach is more concerned with the rules and procedures of the international community in order to maintain peaceful relations among states, the moral stance stresses the protection of liberal values, human rights and democracy. The latter may thus be prepared to extend the goals of legitimate use of force beyond the conventional notion of self-defence to include humanitarian intervention or regime change. The two approaches also propose different strategies for reforming the existing legal framework of armed intervention. While both may agree that the existing international rules are somewhat flawed, the 'moral' side will choose a proactive approach and act on what it considers to be 'right'. Legalists will insist on waiting until formal reform of the law has occurred and only then act according to those principles. In this sense, the moral approach prioritises substance

whereas the legal approach puts greater emphasis on procedure. In other words, both approaches share a *general* willingness to abide by the law, yet where current legal provisions are deemed insufficient to meet contemporary challenges, representatives of the moral view are ready to act on purely moral grounds.

Therefore, it is important to note that the labels are by no means supposed to imply that the moral view is not concerned with international law and, vice versa, that the legal argument is deprived of ethical foundations. Similarly, the term 'moral' in this context does not imply any kind of value judgement. This stance is not regarded as more just or normatively desirable than the legal approach. The labels are intended to refer to an emphasis made by their adherents; they suggest a particular line of reasoning underlying government decisions. This article posits that the distinction between legal and moral interpretations of the legitimate use of force captures the essence of the divergent arguments put forward by European states with regard to the rightfulness of military intervention in Iraq. In order to illustrate the relevance of this distinction, it examines four central issues in the debate about the legality of the intervention, specifically WMD, human rights, UN Resolutions, and multilateralism. The article shows how the way in which foreign policy elites in each of the three countries under investigation weighed these factors against each other indicates whether priority is given to a legal or a moral interpretation of international norms with regard to military interventions.

2. The United Kingdom

Since the coming to power of the Labour government in 1997, there has been a shift in the content and conduct of British foreign policy. British policy, Foreign Secretary Robin Cook announced in May 1997, was to be guided by the goals of security for all nations, universal moral values, the promotion of democracy and human rights. In short, British foreign policy was to assume an 'ethical dimension' (Wickham-Jones 2000: 4). The two central ethical commitments of the new foreign policy line were, firstly, that Britain must play an active part in the international community by complying with its rules and co-operating with its institutions; and secondly, that Britain should use its influence to protect and strengthen liberal and social democratic values such as human rights, democracy, poverty reduction and good governance (Wheeler and Dunne 2004: 6-7). That these twin foundations may occasionally conflict was soon to become apparent.

Under the New Labour government, British troops have been deployed to Kosovo in 1999, Sierra Leone in 2000, Afghanistan in 2001 and Iraq in 2003. Moral and humanitarian concerns have been brought forward by the government in each of these cases. With regard to the war in Kosovo, Prime Minister Blair declared that it was a 'just war, based not on territorial ambitions but on values' (Wickham-Jones 2000: 16). Yet, how does Blair's definition of what constitutes a 'just war' relate to the existing international normative framework of military intervention? In a critical speech in Chicago in April 1999, Blair put forward the case for suspending the traditional non-intervention norm in grave cases such as genocide. Crucially, Blair also spelled out five criteria which could justify the decision for armed intervention. He said that Britain must be sure of its case, exhaust all diplomatic possibilities, be confident that military force will be successful, commit to long-term post bellum reconstruction and its own interests must be at stake (Blair 1999). As Wheeler and Dunne rightly point out, the glaring omission from this list is the issue of right authority and UN mandate (Wheeler and Dunne 2004: 21). The crucial question of legitimate authority was to come back on Blair. The British reasoning about going to war with Iraq reflected the aforementioned dilemma between adhering to international rules and defending liberal, humanitarian values.

Weapons of mass destruction played a central role in the British justification for war against Iraq. The government engaged in a huge effort to demonstrate to the public that there was sufficient evidence for the existence of those weapons in Iraq and, in an unprecedented move, even published, on 24 September 2002, a security dossier based on the findings of the British Joint Intelligence Committee which presented the available intelligence material regarding Iraq's chemical and biological weapons programme. In February, a second dossier, which came to be known as the 'dodgy Dossier', was released. It was suggested that Saddam

Hussein possessed weapons that could be deployed and reach Britain within forty-five minutes. The implications of this claim were important as they portrayed Iraq as an 'imminent threat' to British security and could thus provide the crucial justification for military action. References to the threat posed by WMD were also extensively made in parliamentary debates, where it was stressed that disarmament was the central goal of the campaign (Blair 2002; Blair 2003; HM Government 2003). However, there was considerable doubt regarding the truthfulness of the allegations.

It is crucial, then, that the argument about WMD was bolstered by severe human rights concerns. In view of a number of possible threats from WMD worldwide, the government had to explain why it was Saddam Hussein who had been singled out. The Prime Minister thus frequently stressed the atrocities and human rights violations committed under Saddam's rule, whether against Kurds, Shia Muslims, Kuwaitis or political opponents (Blair 2002).

Humanitarian intervention poses some difficult challenges to the existing provisions of the UN Charter that are based on the norm of non-intervention in recognition of state sovereignty. As Charles Grant rightly argues:

> […] both Bush and Blair [...] have challenged the Westphalian principle that sovereign states should be immune from outside interference – though from different perspectives. Blair's doctrine of humanitarian intervention is about intervening to prevent abuse of human rights. The Bush doctrine, of pre-emptive war and regime change, is a response to the threat of terrorism and rogue states. (Grant 2003).

It is because of this emphasis on human rights that some commentators have been inclined to conclude that 'where Tony Blair is unusual is the extent to which his policy seems motivated by a sense of moral indignation at human suffering and injustice, and his willingness to take military, and by implication domestic, political risk' (Mangold 2001: 25). The centrality of human rights for New Labour's foreign policy, as already spelled out in Robin Cook's 1997 landmark speech (Cook, quoted in: Wheeler and Dunne 2004: 12-13), continues to provide a crucial source of justification for the use of force in British foreign policy.

The question of just cause for military intervention aside, the question of legal authority is another key tenet in the debate about legitimate use of force. The British government made a considerable effort to secure UN authorisation for a strike against Iraq. Following a meeting between Blair and Bush at Camp David on 7 September 2003, Britain co-operated closely with the Bush administration in order to elaborate a compromise for passing a fresh UN resolution on Iraq. From the British perspective, the aim of the resolution was to tie the US into a multilateral framework while at the same time upholding the US position on the need to set a deadline for Saddam Hussein to disarm. The US-UK proposal was presented to the Security Council and after some modifications regarding the resort to war (the text contains no automatic resort to war but on the other hand there is no explicit requirement to pass a second resolution before military action either), a compromise was reached and Resolution 1441 passed unanimously by the Security Council on 8 November 2002.

With the weapons inspectors not finding any evidence of WMD in Iraq but at the same time Saddam Hussein not co-operating satisfactorily with them, the pressure to prolong inspections or authorise a military strike mounted from early January 2003 onwards. The UK argued strongly in favour of a second resolution authorising the use of force, while France, Germany and Russia remained opposed. The Americans pushed for action so that by mid-March it became clear that a second resolution was unlikely to be passed. Under these circumstances, the British government had to decide whether to stand by the United States and potentially initiate military action without a fresh UN mandate. In the absence of a second resolution, the Prime Minister remained firm in his support for the Bush administration. On 17 March, Bush, Blair and the Spanish Prime Minister Aznar issued a 24hour ultimatum for Saddam to fully comply with UN requirements. On 20 March 2003, British forces joined the US in their attack against Iraq.

It is important to note, however, that the UK government insisted that it had attempted to secure a second resolution not in order to obtain legal authority for military action. The government's view regarding a second resolution was that '*politically*, it is a better way of binding in the international community' (HC Foreign Affairs Committee 2003) Formal legal authority had, according to the Government's interpretation, already been secured through previous Security Council Resolutions since the 1991 Gulf War. More specifically, the British government decided to follow the opinion of the Attorney General, who put forward the argument that past Security Council Resolutions provided a continuing, or revived, authority to use force, even more than a decade later and under different circumstances.[1] Adam Roberts has termed this the concept of 'continuing authority'. Following Iraq's invasion of Kuwait, Resolution 678 (29 November 1990) authorised UN member states to use force not just to expel Iraqi forces from Kuwait, but also 'to secure international peace and security in the area'. Resolution 687 (3 April 1991) set out the terms of the ceasefire and imposed obligations on Iraq to destroy its weapons of mass destruction programmes. Subsequently, numerous Security Council resolutions found Iraq in breach of the ceasefire commitments. It was, therefore, argued by the British government that the legality of action against Iraq did not result from Resolution 1441 in isolation but from Iraq's repeated violation of various UN resolutions and the continuing authority of the international community to take action contained in those resolutions.

However, as Roberts points out, the concept of 'continuing authority' remains contested. He argues that 'the greatest difficulty with 'continuing authority' in the light of events in Iraq in 2003 concerns not so much the proposition itself which is fundamentally strong, but its particular invocation in the crisis'.[2] Numerous members of the international community, including members of the UN Security Council, explicitly rejected the notion as a justification for intervention in Iraq. In addition to a degree of legal uncertainty there was thus substantial political contestation undermining the multilateral framework for dealing with the threat.

The fact that the United Kingdom decided to participate in the US-led strike against Iraq without clear authorisation from the Security Council has prompted some observers to question the British commitment to international legal requirements and the credibility of New Labour's 'ethical' foreign policy. The evidence here suggests that there is no doubt the British government would have preferred to act with a clear mandate from the Security Council and it did seek to find a legal justification for the intervention. In that sense, there is still a general commitment to the UN, its legal framework and multilateralism. The problem was that several other members of the Security Council did not share the British interpretation of the legal foundations for war. Thus, where the UK stands out is in its preparedness to opt for unilateral action where a Security Council consensus could not be achieved. Tony Blair eventually concluded that .the greater danger to the UN is inaction: that to pass Resolution 1441 and then refuse to enforce it would do the most deadly damage to the UN's future strength, confirming it as an instrument of diplomacy but not of action, forcing nations down the very unilateralist path we wish to avoid. (Blair 2003).

This aspect relates to essential current questions in the debate about maintaining credibility and effectiveness in international co-operation and inside the UN in particular. When, if ever, is one willing to back multilateralism by the threat or even actual use of unilateral action? It seems that the answer given by the Blair government is that if multilateral agreement fails, resort to unilateralism and flexible 'coalitions of the willing' cannot be ruled out. It is plain that the British government prefers action through multilateral organisations, in particular the United Nations and is concerned about the possible weakening of this organisation as a result of the Iraq crisis. However, Blair has also made clear that, where effectiveness and credibility are at stake, unilateral engagement cannot be excluded as an option. The coalition with the United States was thus viewed as legitimate to commence military action against the regime of Saddam Hussein.

The British position therefore fulfils the criteria of the moral approach to international norms. It represents a complex view, trying to find a balance between prevailing norms and multilateral institutions on the one hand, and an effective response to new security threats and human rights violations on the other. Crucially however, where the two are in conflict, as

in the Iraq context, the UK government gives priority to moral considerations over legal arguments.

3. Poland

In 1999, in a parliamentary debate about the NATO intervention in Kosovo, Foreign Minister Geremek summarised his government's position as follows:

> The ideal case is to have a Security Council mandate for such missions. At the same time, however [...] given the entire veto technology in the Security Council, one must not make NATO's moves contingent on the votes of either Russia or China, or both. NATO's missions going beyond Article 5 in emergencies may be pursued by NATO when they are consistent with the principles of the United Nations Charter and are in the service of the values enshrined therein' (Geremek 1999).

Reflecting this view, Polish political elites concurred that although the situation was not ideal, where human rights were at stake, their defence should take precedence over the sovereignty of a state (Oscia 2003: 30-31). During the debate over the legality of the Kosovo war, Poland had therefore let itself be known as an ally for whom the lack of a solid legal basis was no obstacle to allied operations. Was there a similar attitude to the Iraq intervention, and if so, on what other grounds did Poland seek to legitimise the war?

One striking feature in the Polish debate has been the readiness with which Saddam's possession of WMD was assumed. The Polish government argued 'that the threat posed by weapons of mass destruction in the hands of the Iraqi dictator, especially in the context of international terrorism, fully justifies military action, which aims at preventing the potential use of those weapons' (Government declaration 2003). Moreover, the Foreign Minister suggested that one should actually not ask what evidence there was for Iraq's WMD. Instead, he said, the burden of proof was on Iraq to show that it had destroyed its weapons (Cimoszewicz 2003b). In view of the controversy about what constituted sufficient evidence of Saddam's WMD, and who had the authority to decide what evidence was deemed sufficient, Warsaw's position shows little consideration for contentious legal matters. It is also somewhat different from the British case, where the government went to great lengths to prove to the public, Parliament and its own party that Iraq's WMD did indeed pose a threat to international security.

A second factor with great impact on the Polish debate in the lead-up to the invasion was the concern for human rights. The argument was made that Saddam Hussein had to be prevented from further human rights violations and atrocities against his own population. Liberating the Iraqi people and giving them the chance for democratic nation-building were set out as important objectives of the intervention. A factor that strongly influenced the Polish debate in this context was the analogies drawn with Poland's own history. The first analogy regarded the appeasement strategy of Western powers vis-à-vis the Third Reich. It was in this vein that Adam Rotfeld compared the Europe-wide peace demonstrations of 15 February to the enthusiastic reception of Arthur Neville Chamberlain on his return from Munich in 1938, where he had agreed to grant the Sudetenland to Nazi Germany. Rotfeld commented that 'Chamberlain thought he had secured peace for all times, [and a few months later] Hitler's Germany occupied Czechoslovakia and a year later attacked Poland' (Rotfeld 2003). It was argued, therefore, that Poland and the international community could not stand by to watch Saddam Hussein continue with his despotic rule.

The second analogy concerned the Polish communist past and its struggle for liberation from Soviet domination. Several commentators agree that it was due to Poland's past as a communist state that the country felt it had a special responsibility to support the spread of democracy to other parts of the world (Rotfeld 2003; Oscia 2004). The arguments put forward by policy-makers did, in fact, reflect Warsaw's broader commitment to proactive engagement aimed at promoting Western values of freedom and democracy worldwide. Similarly, the Polish vision for the role of NATO marks Poland out as a staunch supporter of a redefined

NATO mission to act as a guardian of freedom, democracy and human rights (Cimoszewicz 2002b). This sense of a moral duty to act was used by Polish elites as a central source of justification for the invasion. Yet, beyond historical and moral arguments, what legal basis was regarded as legitimating the attack?

In an official statement the Polish foreign ministry argued that Resolution 687 did not annul the authority to use force that derived from Resolution 678. Rather, it set out the conditions for Iraqi disarmament and a mechanism for monitoring progress made in this respect. A whole array of Security Council resolutions found Iraq in breach of the outlined provisions. Resolution 1441 was then the 'last chance' for Iraq to fully comply with UN demands. The warning that Iraq had to expect 'serious consequences' in case of continued defiance was interpreted to include the use of force. Therefore, although reference is made to the continued authority of previous Resolutions, it seems that Polish authorities considered Resolution 1441 in itself as a sufficient justification for the attack. In view of the international controversy surrounding the interpretation of Resolution 1441, and some parties explicitly rejecting the notion that the use of force was implicit in the wording of Resolution 1441, Polish reliance on this particular provision is somewhat problematic. It would be hard to sustain the claim that Warsaw's line of reasoning provided solid legal grounds for the intervention.

The attitude Polish elites displayed towards securing a UN mandate for the war in Iraq conforms to Warsaw's more general approach to international norms. Poland would like to see significant reforms of the UN Charter if the latter is to remain the principle basis of international law. The call for a re-consideration of prevailing norms governing military interventions derives from a perception of a changed nature of the international system. In the context of the intervention in Iraq, the Polish government declared it was aware of the contending opinions on the legal basis for military action. It concluded that the differences resulted from an international situation that had no precedent and posed a threat to international peace and security that was of a qualitatively different character than in the past (Polish Government 2003). Reflecting this attitude, President Kwasniewski suggested that 'today's reality prescribes the adoption of a new legal act that would live up to current challenges and lay out a political philosophy for today and the future' (Kwasniewski 2003).

In line with this position, Foreign Minister, Cimoszewicz, presented a proposal for political reform of the UN system to the General Assembly in September 2002 aimed at adjusting the UN to the new requirements of the 21st century (Cimoszewicz 2002a; Cimoszewicz 2003a; Rotfeld 2002). The essence of the proposal is to keep the UN Charter as a foundation text and supplement it with a new political document that could address current challenges to international peace and security. The new provisions would involve making the UN machinery more efficient, establishing a system of cooperation with regional organisations and strengthening ties with non-state international actors. The need to reform the principles underlying UN actions is also mentioned. With regard to the prevailing non-intervention norm, the proposals are in line with similar statements made by the Foreign Minister and the President. President Kwasniewski has argued, for example, that the principle of state sovereignty cannot be used as a 'shield against international law. […] The international community must have the possibility to intervene. Those who break the law cannot go unpunished' (Kwasniewski 2003). On the one hand, this can be viewed as a strong call to abide by and enforce international law. On the other hand, Kawsniewski's statement poses a substantial challenge to the notion of sovereignty, the basic ordering principle of the international system, and its function as the foundation of the non-intervention norm. It is thus clear that, in line with the defining criteria of the moral approach to international norms, the maintenance of stability in international order is not given priority over other considerations, such as the liberation of repressed peoples. In this sense, recent policy developments in Poland seem to indicate an affinity in outlook between Washington and Warsaw on vital security policy principles. The two defining tenets of Polish strategic culture, which coincide with current American security thinking, are, firstly, a disposition to favour proactive engagement and secondly, a desire to revise existing international norms in the light of recent challenges to international security. This attitude could already be observed during the 1999 Kosovo war. Unlike Germany or France, Poland did not see a serious debate

about the legality of NATO action without a UN mandate. It was assumed that although it would be better to act with a UN mandate, international law was less important than preventing the spread of instability in the Balkans (Zaborowski 2003: 6). In the case of Iraq, Polish elite support for Washington's policy remained strong throughout the conflict and no demands were made for an explicit authorisation of the use of force by the Security Council. Maintaining the partnership with America was given priority over working towards a broader international consensus. Thus, when deemed necessary, Warsaw is not reluctant to take unilateral action.

On the whole, the evidence presented here suggests that Warsaw's approach to international norms falls into the category described as 'moral' due to the willingness to revise the existing legal framework through proactive engagement in conflict resolution. In this sense, there are some important parallels with the British line of argument discussed above. Yet, questions regarding the legitimacy of war were much less disputed among the Polish political elite, particularly with respect to the evidence for Iraq's WMD programme. Thus although both Poland and the United Kingdom fall into the 'moral' category, Poland's strong willingness to rely on purely moral arguments places it somewhat closer to the current US line of reasoning.

4. Germany

Over the last fifteen years, Germany has undergone significant changes in its attitudes towards military force. From a policy of complete abstention from military deployments in any of NATO's so-called 'out-of-area missions', Berlin had moved to participation in a range of operations in the Balkans, East Timor and Afghanistan. This development is remarkable, considering the previous cross-party consensus until 1990 that the constitution did not allow for a deployment of German forces beyond NATO territory and for any purposes other than the defence of the Federal Republic. It was during the 1990 Gulf War that this domestic consensus began to crumble and, crucially, that Germany's allies started voicing expectations of a German engagement that went beyond financial and logistic support. The domestic controversy on the issue was settled by a ruling of the German Constitutional Court on 12 June 1994, which declared Bundeswehr operations within a 'system of collective security' compatible with the Basic Law under Art. 24 (2). The ruling paved the ground for military action to become a legitimate tool in German foreign policy (Bos 2003: 218-219). It is important to stress that under the red-green government, the interpretation of Germany's special moral obligations in this respect has significantly evolved. The traditional argument that German history imposed a logic of restraint was reversed to suggest that Germany had a special duty to participate, also militarily, in international conflict resolution. Hence the fundamental question to be addressed in this context is what limits and possibilities there are for Germany's willingness to use military force.

There is indeed a significant number of authors who argue that Berlin's Iraq policy was determined by ideational factors and Germany's persisting 'culture of restraint' concerning the resort to military force (Dalgaard-Nielsen 2003; Larres 2003; Müller 2003). According to this view, unless most Western democracies are on board, and unless a military intervention serves a convincing humanitarian purpose, Germans will be reluctant to line up. Schröder's opposition to another Gulf war may have been politically opportunistic, but it also reflected the particular nature of Germany's strategic culture (Dalgaard-Nielsen 2003: 110). So does the German government's attitude reveal a fundamentally different approach to international norms that can serve to explain the German opposition to war in Iraq?

First, it is important to note that the German government questioned the WMD argument as a valid justification for war against Iraq using several different lines of argument. Foreign Minister Fischer cast doubt whether WMD were really the underlying motive for Washington's Iraq policy. In a speech to Parliament on 15 November, he suggested that if an actual threat assessment regarding WMD were carried out, it would certainly not lead to the conclusion that Iraq should currently be the central focus of concern (Fischer 2002b). Chancellor Schröder made similar remarks and insisted that in the absence of clear intelligence

information on Iraq's weapons arsenal, UN inspections should continue (Schröder 2002; Schröder 2003a).

Furthermore, the German government ruled out the possibility of the issue of WMD becoming entangled with the global fight on terrorism. Fischer frequently referred to this problem as one of getting the priorities right. For him, the first priority should be the fight against international terrorism and the second should be the resolution of regional conflicts (Fischer 2002b). As Harnisch writes, in Germany a consensus emerged that pre-emptive military action against terrorists with a UN mandate was acceptable, but this consensus did not include pre-emptive military action against (potential) weapons of mass destruction in member states of the 'axis of evil'. Thus, the Schröder government opposed a 'silent extension' of the mission spectrum with respect to the proliferation of weapons of mass destruction, in particular in Iraq (Harnisch 2004: 10).

Human rights violations by the regime of Saddam Hussein were, of course, acknowledged and condemned by German authorities. Saddam's rule was referred to as 'a brutal tyranny', 'a terrible regime for the Iraqi people' and a threat to the entire region. It was noted that Iraq had attacked neighbouring Iran and Kuwait, fired missiles against Israel and used chemical gas against its own Kurdish population (Fischer 2002a). However, in the absence of clear legal provisions under the existing UN framework, there was no argument made that the violation of human rights by Saddam could justify a military attack. Instead, Foreign Minister Fischer stressed the German commitment to established criteria of the just war framework, namely last resort, proportionality, compelling evidence of an imminent threat and right authority. Moreover, he expressed considerable concern about the destabilising effects an intervention could have on the entire region. In this context, he pointed out the large post-bellum responsibility the coalition would have to assume to reconstruct and stabilise the country and region.

During negotiations over Resolution 1441, Fischer stressed that the text should not contain any automatism that would justify immediate military action in the case of Iraqi non-compliance and that Germany would instead advocate a two-resolution approach. Moreover, the importance of multilateralism and international co-operation was stressed as a matter of general principle but also as a crucial achievement in the global fight against terrorism which should not be jeopardised by imprudent unilateralist action. The federal Government's position was that the attacks of 9/11 had created new 'opportunities to further the development of multilateralism, to stimulate a more intensive dialogue of civilisations and to create a platform from which to strike at the roots of terrorism' (Federal Foreign Office 2002).

However, the strong statement by the German government was that in the particular case of Iraq, Germany would not participate in military action even with a UN mandate. This declaration had been made by Chancellor Schröder during his election campaign and was re-stated by Foreign Minister Fischer on 27 September 2002 (Harnisch 2004: 12). Can their position be explained in the context of Germany's continued reluctance to use military force? The Chancellor was certainly concerned not to let war become just another 'normal' means of politics and reiterated that resort to military force, no matter by whom, had to rest on certain principles and possibilities enshrined in the UN Charter (Schröder 2003b). It also seems plausible to suggest, however, that the categorical rejection of the use of force in the Iraq case was a result of the German 'culture of reticence' coinciding with a new German assertiveness in foreign policy, and vis-à-vis the US in particular. Moreover, there was considerable domestic pressure on the Government not to upset public opinion in the lead up to elections and preserve the unity of the red-green coalition, which had already been considerably strained by the Kosovo and Afghanistan interventions.

The German red-green government has been an active supporter of UN reform, including most notably important proposals for restructuring the Security Council as well as enhancing the cooperation with non-government organisations and improving the protection of economic and social human rights.[3] However, with regard to the legitimate use of force, the German government represents an attitude towards international norms that differs markedly from the Polish and British approach in the sense that it adopts a stricter interpretation of the

existing legal framework. There is great reluctance to extend the mission of UN action to allow more readily for military intervention for goals such as regime change, democratisation or the fight against weapons of mass destruction. Instead, strong emphasis is placed on maintaining order and stability in the international system, for which observance of the existing rules of the United Nations was deemed essential. Germany thus conforms to the model of a legal approach to international norms.

Conclusion

The reform process of the United Nations is at a crucial stage and key aspects of the existing framework for the legitimate use of force are currently being re-defined. With the Bush administration proposing a number of new concepts and paradigms, such as the extension of the notion of self-defence and pre-emptive action, it is important for Europeans to participate in and shape the current reform debate. The above discussion of intra-European disagreements over the rightfulness of the military campaign in Iraq, however, has identified several important differences among European governments pertinent to some of the most topical problems in the reform of the international norms of military intervention. Germany continues to adhere to a markedly more legal approach, whereas the United Kingdom and Poland take a more moral approach in the sense that they are willing to act on ethical principle in the absence of revised legal provisions to respond to the new challenges to global security. Beyond their general support for the United Nations and international law, European governments thus seem to be giving rather different responses to some of the important challenges posed by the new international security situation and US proposals on this matter. The question remains: how significant are these differences for the prospect of future European unity?

It is important to note that the European debate about rightful intervention is characterised by arguments about the 'when' rather than the 'if'. Among European governments, we do not find the traditional non-interventionist positions of either pacifism, which rules out intervention altogether, or realism, which rules out intervention for humanitarian or other reasons beyond narrowly defined security interests. There is, therefore, some fundamental underlying agreement on the need to intervene in the name of human rights and democracy and as a result of a new, broader understanding of security. A European consensus on the necessary conditions for such interventions has, however, evidently not been reached.

It is clear that the Iraq crisis did not mark the end of CFSP or ESDP. On the contrary, several aspects of ESDP have been strengthened and common missions such as EUPM in Bosnia, Operation Concordia and Operation Artemis have been launched during and shortly after the Iraq crisis. In this sense, the Iraq crisis may even be said to have had a 'cathartic' effect on common European defence (Menon 2004).

However, with regard to the specific question of the rightful use of military force, no such progress could be seen. After the Iraq crisis had revealed discrepancies in European positions on this matter, it was widely regarded as an important step forward that the EU presented, in December 2003, its first common Security Strategy. The European Security Strategy concludes that 'we need to develop a strategic culture that fosters early, rapid, and when necessary, robust intervention' (European Security Strategy 2003: 11). It therefore recognises, for the first time in the history of CFSP/ESDP, that the use of force may be required. What is missing from that document, however, is a discussion of when robust military intervention would be deemed necessary and legitimate. In the light of the findings of this article, this glaring omission may not be surprising; but it is, nonetheless, highly problematic because it illustrates the continuing inability on the part of European governments to agree on a common response to the changing norms of military intervention. The disagreements on this issue can be expected to cause considerable difficulty in forging a Europe-wide consensus with regard to the use of force in EU foreign policy.

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Notes

[1] It should be noted that there is now considerable controversy regarding the political pressure Lord Goldsmith was put under to make the legal case for invading Iraq. There are allegations that he changed his original position to support the government's cause and that this deliberately coincided with the crucial Commons vote on the invasion. If these allegations were to be confirmed in the future, this would support the present argument that legal considerations were less important for British decision-makers than their moral arguments. See for example: The Independent, 25 March 2005.
[2] In particular, even if the US and its allies have continuing authority to use force, it remains a question whether that entitled them to launch a full-scale attack to achieve regime change. In addition the notion of 'continuing authority' is undermined by the unclear evidence that Iraq still possessed WMD. There was scope for disagreement as to whether the UN verification system, operating under Resolution 1441, should have been set aside in favour of armed force when the inspectors were able to visit sites throughout Iraq and the disarmament process had produced at least some results. Adam Roberts, cited in .Foreign Policy Aspects of the War on Terrorism., HC 405.
[3] Reform of the Security Council has become the focus of German reform proposals. Other important initiatives have included the 'Global Partnership' resolution, support for the Global-Contact-Initiative and a range of other resolutions on co-operation with the private economy and NGOs. See Christian Hacke, Die Außenpolitik der Bundesrepublik Deutschland. Von Konrad Adenauer bis Gerhard Schröder, Frankfurt a. M.: Ullstein, 2003, esp. p. 483-500 and Manfred Knapp, .Die Rolle Deutschlands in den Vereinten Nationen., Aus Politik und Zeitgeschichte, B27-28/2002.

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The Eastern Enlargement of the European Union: Public Discourses in the Czech and Slovak Republics

Tereza Novotna

Introduction

On 1 May 2004 ten countries of Central-Eastern and Southeastern Europe joined the European Union (EU) – eight post-communist states and two Mediterranean, among them the Czech and Slovak Republics. Nowadays it seems that the 'Eastern enlargement' of the EU was almost inevitable. If we consider only countries of the former Soviet bloc, the process of accession was marked by their effort to accept and implement a tremendous amount of European legislation and to execute other EU requirements, accompanied by domestic democratisation and economic transition. In this respect, both the Czech and Slovak Republics are typical cases. Their starting point, except for minor differences such as Slovakia's smaller size and larger economic burden compared to the Czech Republic, was the same. Therefore, the comparison of their advancement over ten years on the way to the EU can reveal the source of their final success and can serve as a guide for current candidate countries. How, then, can we measure and distinguish between their achievements? Both the Czech and Slovak Republics joined the EU at the same time, which means that they simultaneously managed to fulfil the necessary political, legal, and economic prerequisites demanded by the opposite side. In that sense, there is actually no difference between the two countries; we can say that when both states met the required criteria, it was clear that they were unquestionably going to become members of the EU.

To find a difference in their common success, we have to look elsewhere. The simplest possibility that offers itself is to examine separately their negotiation processes. From this point of view, there are several ways of assessing the accomplishments of the Czech Republic and Slovakia: comparing the amount of time needed for the successful completion of negotiations; comparing the speed (and thus the willingness and preparedness) of the respective governments to close individual negotiation chapters; or, if we would rather emphasize the ability to bargain exemptions as much as possible, comparing the number and significance of final transition periods. All of these options more or less depend on economic and legal reforms and on the implementation of the European *acquis communautaire*. An estimation of progress toward accession can be gauged from various reports of the EU bodies and concluding accession treaties. If all the laws and reforms are implemented, it is only a matter of time before both the Czech and Slovak Republics, and in general any candidate country, enters the EU.

This very mechanistic and thus very comfortable (especially for the politicians of candidate countries) attitude to the entire negotiation process neglects an essential part of accession: on one side, the political and civic readiness of candidate states to become members of the EU and, on the other side, their political and civic motivation. It will be argued that the chief obstacles on the 'way back to Europe' were not so much a formal and administrative *acquis* implementation, but internal political weakness and unsatisfactory public discourse on the merits of joining the EU. Slovakia, with its initial incorporation into the so-called second wave of candidate countries due to its domestic political situation, is the best illustration of the

former obstacle, while the Czech Republic, with its relatively low level of 'yes-votes' in the closing referendum, is an exemplar for the latter.

The paper is divided as follows: the first two sections summarise the conditions for the previous and new enlargements and give a historical perspective on Czech-Slovak relations and the preliminary stage of negotiations including the Europe Agreements. The third section is devoted to the political development in Slovakia, the fourth section discusses the internal Czech political situation and development until 1999. The fifth section examines the final five years before the accession. The conclusion refers to referenda and evaluates the Czech and Slovak experience on the way to the European Union.

1. Historical perspective I: the beginnings of the new enlargement

Before its eastward expansion, the EU had already been enlarged several times. When in 1989 the Soviet bloc collapsed and former communist regimes in Central and Eastern Europe (CEE) embarked on the path to democracy and free market economies, it soon became apparent that for political, economic, and security reasons it was necessary for the European Communities to consider further enlargement to the East. The West European countries felt a 'collective responsibility' for their fellow Europeans who were oppressed for more than forty years and felt obligated to help them in their 'return to Europe' (Sedelmeier 2000). Moreover, it was a unique historical opportunity to extend the zone of security and peace and to foster stability across the European continent. In economic terms, the positive outlook promised the enlarged EU access to the biggest single market in the world. On the negative side of the balance sheet, there were concerns about the costs of the enlargement (particularly with respect to Common Agricultural Policy (CAP), structural funds, and labour migration) and about consequences for institutional functioning of the EU (Glenn 2003). The uncertainty about the costs and benefits was at the beginning of the 1990s even more pressing, since it was absolutely unclear if the hoped-for democratic and economic developments in CEE would in fact occur. On the other hand, the clause of *Article 49* of the *Maastricht Treaty* stating that 'any European state which respects the principles in Article 6(1) [liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law] may apply to become a member of the Union' (Glenn 2003: 214) became an evident stimulus in a decision that offered EU membership to post-communist countries. Eventually, some authors would consider this moral imperative a kind of 'rhetorical entrapment' (Moravcsik and Vachudova 2002; Schimmelfennig 2001) that did not allow EU member states to get out of their initial promises and forced them to continue on the initiated path to Eastern enlargement, whether they still wanted it or not.

Nevertheless, EU members were very cautious in their decision-making. Following a short delay of about four years, caused by the simultaneous internal reforms leading to the establishment of the European Union, it was agreed at the 1993 European Council summit in Copenhagen, that 'the associated countries in Central and Eastern Europe that so desire shall become members of the European Union.' From this time on, Eastern enlargement was really no longer a question of 'if,' but 'when.' Concerning the timing, the European Council states: 'Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required.' At the same time, the summit defined three groups of membership criteria, which are known as the 'Copenhagen criteria':

1) *democratic*: stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities;
2) *economic*: the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the European Union;
3) *legislative*: the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

Furthermore, in December 1995 the European Council summit in Madrid added the fourth condition:

4) *administrative*: the creation of the conditions for candidate's integration through the adjustment of its administrative structures.

The rationale for the fourth additional criterion was the EU's concern that while the candidate countries may transpose the European legislation literally into national legislation, they may implement it ineffectively or through inappropriate administrative and judicial structures. The fear of European officials was quite understandable, since the bureaucracies of CEE had become notorious for their low respect for the rule of law, inclination to corruption and bribery, and unproductive working attitudes, all inheritances from the communist period.

In general, the Copenhagen Criteria put pressure on candidates' governments and limited their bargaining positions, since the criteria were understood as nonnegotiable prerequisites for any further discussion between candidate and member states. In the literature, the situation is referred to as the 'principle of conditionality' in which 'one partner has leverage over another through their ability to withhold a desired benefit, in this case, EU membership' (Glenn 2003: 216). The meeting of criteria thus became a condition *sine qua non*, which, in practice, resulted in changing domestic policies and institutions in order to bring them into line with EU requirements. The prospect of full membership tied to the necessity of conforming to EU standards definitely had a positive effect on reforms within the candidate countries and sped up democratisation and economic transformation (Mattli and Plümper 2004). In the later stages, however, this 'asymmetrical process in which the incumbent members, in the driving seat, engage with the candidates, which are supplicants and dependants' (Wallace 2000: 151) led to awkward consequences. The candidate governments (such as the left-centrist coalition in the Czech Republic since 1998) in a frenzied endeavour to endorse and implement as many of the 'European laws' as possible in the shortest time possible, somehow forgot to continue explaining to the public that EU membership was something more than new laws and regulations. Governments tended to shift the blame for accepting unpopular restrictive measures to the EU; though the measures would have to be approved anyway, they could easily be rationalised by the obligation to fulfil EU criteria. Moreover, from time to time, the governing parties managed to 'smuggle' some of their ideological proposals under European reasoning despite otherwise unbreakable parliamentary opposition. Nevertheless, let us go back first to the beginning of the century and to the situation in, at that time, Czechoslovakia.

2. Historical perspectives II: the beginnings of the relationship between the Czech and Slovak Republics and the EU

Czechoslovakia was established as an independent state in 1918 as a result of international treaties after World War I. During the period of the First Republic (1918-38), Czechoslovakia was a democratic state, even though it suffered from national rivalries between the Czech and Slovak majority on one side, and German and Hungarian minorities on the other. In the 1920s and 1930s, Czechoslovakia belonged to one of the most prosperous European regions. Following the Second World War, Germans were expelled from the Czech lands, while the Hungarian minority mostly remained (currently, about 11% of the Slovakian population is Magyar). After a short quasi-democratic period, Czechoslovakia fell under Soviet rule in 1948, the last country from Central Europe to do so. The rigid communist regime collapsed (again, the last one to do so) during the 'Velvet Revolution' in November 1989 and was followed by the dissolution of Czechoslovakia during the 'Velvet Divorce' in December 1992.

This brief historical overview brings us to the beginning of the 1990s and provides us with a sense of the prospects and hopes that Czechoslovakia (and later both successor republics) possessed and also evoked in other European countries. It was expected that the democratic and economic reforms would not encounter any serious obstructions. Czechoslovakia was perceived as one of the most progressive candidates. Therefore, in December 1989 a four-year *Agreement on Trade in Industrial Products* was signed between the Czechoslovak and European Community (EC) representatives. This contract was replaced in May 1990 by the *Agreement on Trade and Commercial and Economic Cooperation*, valid for ten years, and by the *Interim Agreement*, which entered into force in March 1992. Both the *Trade and Commercial*

and *Interim Agreements* established a free trade zone between Czechoslovakia and the EC and were supplemented in December 1991 by the so-called Association Agreement (*The European Agreement on Association of the Czech and Slovak Federative Republic to the European Community*). The conclusion of the Association Agreement was perceived as a great triumph, moreover, when Czechoslovakia was among the first countries to undersign it; it seemed to be explicit evidence of the primacy of Czechoslovakia within the group of candidate countries. In particular, the Minister of Finance and later Czech Prime Minister Václav Klaus spoke about the 'Central European tiger' and his rhetoric only reinforced the sense of Czechoslovak exceptionalism. Since the collapse of communism, Czechoslovak public discourse (and later Czech discourse) thus considered joining the EU as something unavoidable and logical, for it would really be absurd for EU members to reject such a studious and gifted pupil. Even though the imminent economic difficulties (which some predicted at the start of the decade and persist even now) cooled down the early Czechoslovak (or rather Czech) optimism, the self-evidence of the eventual accession was a sustained feature of the national discourse until its realisation. One of the harmful consequences that this excessive self-confidence bred was the scarce cooperation within the Central European region. Although in 1989 the Central European Initiative known as the Visegrad (or V3, later V4) group was established, comprising of Czechoslovakia (later Czech and Slovak Republics), Hungary, and Poland, and which envisaged the creation of a free trade area (Uvalic 2002), owing to the lack of interest, primarily on the Czech side, the initiative steadily died out until its mission shrank to symbolic political declarations and cultural matters. Therefore, the CEE countries did not form a firm block as the Scandinavian countries had done, which was certainly detrimental to their bargaining power.

Because of the division of Czechoslovakia, the Association Agreement could not be ratified and, therefore, could not enter into force. The EC recognised the necessity to conclude new agreements with both republics separately and did so during the Luxembourg European Council summit in October 1993. The so-called *Europe Agreements (establishing an association between the European Communities and the Czech/Slovak Republic*) have identical texts for the Czech and Slovak Republics and, due to a coincidence with the declaration of the Copenhagen criteria, are more constraining than the prior Association Agreement with Czechoslovakia (focusing predominantly on free trade and technical assistance but avoiding the political and legal requirements). Except for the abolition of trade customs and other restrictions pertaining to dumping prizes and monopolies, they established Association Councils which were to meet regularly and examine 'the application of this Agreement and the accomplishment of the Czech [Slovak] Republic's economic reforms' (*Europe Agreement: Title II, General Principles, Article 7 (2)*). The goal of the Agreements is to provide a framework for political dialogue, to promote the expansion of trade and harmonious economic relations, to provide financial and technical assistance to the respective Republics, and to promote cooperation in cultural matters. On the other hand, contrary to the prior 'Czechoslovak' Agreement, the new Europe Agreements offered an unambiguous perspective on EU membership (Sedelmeier 2000: 178), stating that their aim is 'to provide an appropriate framework for the Czech [Slovak] Republic's gradual integration into the Community' (*Europe Agreement: Article 1(2)*). *Title V, Chapter III, Article 69* talks about the approximation of laws and the major precondition for both Republics to 'ensure that [their] legislation will be gradually made compatible with that of the Community.' A year later, in 1994, the European Council in Essen set up the so-called pre-Accession strategy that was designed to improve preparation of candidate countries for EU membership. The strategy was based on the application of the Europe Agreements through the Association Councils, on financial support through the EU Phare Programme, and on a 'structured dialogue' that was supposed to unite all member and candidate states in solving questions of a common interest. Even though the Association Councils were the key bodies serving to aid candidate countries in their pre-accession efforts, they have also been denounced as 'institutional satellites' of the EU. The criticism was mainly aimed at the fact that the EU continued to develop new regulatory policies, which then had to be transposed into candidates' legislations, while simultaneously negotiating with the applicant countries and binding them with the prior agreements. The EU thus unilaterally defined and constantly modified the body of rules, which candidates had to accept (De Witte 2002: 237). Nevertheless, this situation was not entirely new, since this had happened during previous enlargements, albeit not to the extent witnessed at this time.

3. The political perspective: internal development in the Czech and Slovak Republics in 1990s

Following the split of Czechoslovakia, a shift in public discourse occurred and the Czech Republic became the prime heir of the former Czechoslovak enthusiastic spirit. The Czech Republic underwent a fairly successful economic transformation (although there remained large state-owned banks and industry companies to be privatised and problems with the 'tunnelling'); the internal political situation was stable. Statistical data (World Bank 2002) from the first half of the 1990s seem to justify the self-confidence of the Czech people as well as the politicians: the private sector grew to 65% of GDP in 1994 (the best result of all candidate countries), foreign direct investment amounted to 2.9% of GDP in 1995 (the third best result after Hungary and Estonia), and the Czech Republic scored almost 0.85 on the liberalization index (ranging from 0 to 1) of the World Bank in 1995 (the best result, tied with Hungary). The Slovak outcomes were much less impressive, though still better than most other countries. To do justice, we must admit that the Slovak economy inherited a more damaging legacy from the communist times: a greater share of polluting factories, the military and other heavy industries, and a less skilled labour force (Tétreault, Teske 1997). Nonetheless, the Slovak 'lagging behind' was not so serious that Slovakia could not catch up and even surpass its 'older brother.' In principle, what both countries show is that the economic transition was accomplished several years before the actual enlargement and hence disprove the fears that the accession of CEE countries would bear extreme costs for member states. In the words of game theory, the enlargement was eventually a 'win-win' situation where both sides gain (Hall, Quaisse 2001).

However severe the economic situation might have been, it was not a primary concern to the Slovak public, particularly in the immediate aftermath of independence. What mattered most was the regained national sovereignty – the 'regained' original sovereignty being that from the period during World War II when Slovaks had their own state (though strongly authoritative, even fascist) or that of the Moravian Empire about a thousand years ago (an opinion often subject to ridicule) – and the possibility to finally realise fully the Slovak 'right of self-determination.' In this period of heightened nationalism, the endeavours to become a member of a supranational collective such as the EU had to play second fiddle. If Slovak politicians mentioned the accession, they talked about their pleasure when Slovakia would have its own 'star' on the European flag; nonsense in itself. The Slovak public, therefore, perceived any issue pertaining to joining the EU (and NATO) as secondary and of minor importance, especially since the shade of the former Czechoslovak feeling of its unavoidability covertly endured in Slovakia as well. The national leader who (together with V. Klaus) 'divorced' Czechoslovakia and brought the Slovak Republic to existence (and who, therefore, enjoyed immense public popularity) was Vladimir Meciar, the Prime Minister and head of the Movement for Democratic Slovakia – *Hnutie za demokratické Slovensko* (HZDS). His party has been successful in all the parliamentary elections[1] since independence and became a driving force in the Slovak 'national way' to democracy and prosperity. The 'reign' of V. Meciar (1993-98) is, however, ambiguous; it is usually ranked somewhere between a kind of populism and semi-authoritarianism. In foreign affairs, Meciar's government maintained EU and NATO accession as a state priority;[2] nevertheless, it has been accused of an Eastward-looking orientation in policy, particularly in regard to foreign trade (Nello 2002: 296). Eventually, on 27 June 1995 Prime Minister V. Meciar submitted the application of the Slovak Republic for EU membership at the European Council summit in Cannes, while Czech Prime Minister V. Klaus applied for EU membership six months later, on 23 January 1996 at the summit in Rome. Despite Slovak official declarations and foreign policy steps, the most striking problem became the deteriorating domestic political situation. The dissatisfaction with Slovak progress was reflected in several EU documents: the EU-demarches from December 1994 and November 1995, the Presidency declaration from March 1998, and, most importantly, the *Resolution on the Need to Respect Human and Democratic Rights in the Slovak Republic* adopted by the European Parliament on 16 November 1995 (and repeated in December 1996). After enumerating grievances against the Slovak Republic (e.g. attempts to deprive democratically elected representatives from opposition parties of their seats in parliament, political intrusion into police investigation and media), the November *EP Resolution (4)* concludes: 'The European Parliament points out to the Government of the

Slovak Republic that, if it continues to follow policies which show insufficient respect for democracy, human and minority rights and the rule of law, it will be necessary for the European Union to reconsider its programmes of assistance and cooperation under the Europe Agreement which might have to be suspended.' This was not just an admonition of an immature youngster, but a sign of an understandable anger threatening practical consequences in the foreseeable future. Unfortunately, Meciar's government found demarches and resolutions as nothing more than EU interference in Slovak internal matters,[3] while the opposition and President warned of the Slovak Republic's pending isolation (Slivkova 1999: 8).

On 16 July 1997 the European Commission published the strategic document *Agenda 2000: For a Stronger and a Wider Union*. In its introduction, the Commission announced that at the request of the Council, the Commission worked up *Opinions on Applications for Membership* of ten candidate countries. In its opinion, the Commission took into account answers to the Commission's questionnaires submitted by the candidate countries a year ago, evaluations on progress toward realization of Copenhagen requirements, and reports and resolutions of the European Parliament and other governmental and non-governmental institutions. It came as no surprise that the Commission maintained that, even though a number of countries needed to move forward in the practical application of democracy and protection of minorities, there was only a single candidate state – Slovakia – that did not meet the political criteria adopted by the Copenhagen Council summit. In the detailed *Opinion on Slovakia's Application for Membership of the European Union, C. Summary and Conclusion*, the Commission explained that 'government does not sufficiently respect the powers devolved by the constitution to other bodies and that it too often disregards the rights of opposition… the use made by the government of the police and the secret services is worrying… Despite recommendations made by the European Union in a number of demarches and declarations, there has been no noticeable improvement.' The opinion concluded, 'Slovakia does not fulfil in a satisfying manner the political conditions… because of the instability of Slovakia's institutions, their lack of rootedness in political life and the shortcomings in the functioning of its democracy. This situation is so much regrettable since Slovakia could satisfy the economic criteria in the medium term and is firmly committed to take on the acquis.' For a comparison, let us quote from an analogous *Opinion on the Czech Republic's Application for Membership*: 'The Czech Republic's political institutions function properly and in conditions of stability… There are no major problems over respect for fundamental rights… the Czech Republic can be regarded as a functioning market economy… further administrative reforms will be indispensable if the Czech Republic is to have the structures to apply and enforce the acquis fully.' As a final proposal, the Commission suggested that Hungary, Poland, Estonia, the Czech Republic, and Slovenia could in a mid-term perspective meet all the criteria for membership, and accession negotiations should be opened with them. The European Council at the summit in Luxembourg in December 1997 followed the Commission's recommendation and initiated negotiations with five candidates; Slovakia was excluded from this 'first wave' and incorporated into the 'second wave.' As E. Slivkova noted, 'Slovakia missed the most suitable moment for starting negotiations' (Slivkova 1999: 13).

4. On the way to the European Union: the true prospect of the enlargement

On 31 March 1998 the EU opened accession negotiations with six 'first wave' countries (Cyprus was added) and the preliminary period of the 'screening' (i.e. comparing the candidate's legislation with that of the EU), divided into 31 so-called chapters, was launched. After each chapter's legislation is 'screened,' a candidate country prepares its position document determining when it will transpose the given part of acquis. The position document is handed over to the Commission which then outlines the common position of the member countries. If the Council approves the common position, the negotiation process begins. In contrast to previous enlargements, however, the renewed 'classical community method' did not allow for permanent opt-outs (e.g. from the Monetary Union); applicants were expected to accept the obligations of membership in full (Glenn 2003). The only exception they could achieve were 'transition periods' enabling postponement of the deadline for full acquis implementation by several years. In special cases, 'permanent

exceptions' were also admitted. This situation generated even more pressure for the candidate countries, since they could be sure that, in any case, the complex body of regulations would be implemented sooner or later. In the Czech Republic, for example, the necessity to approve 'European laws' accelerated the 'state of legislative emergency' that reduced the Czech legislative process: specific bills could be passed in one reading with no amending proposals unless two parliamentary factions or 50 deputies protest against them. Although this stipulation assured that any governing coalition did not produce excessively ideological proposals under the 'European label,' to some extent it was a limitation of the legislative branch and outweighed the balance of power on the executive side – paradoxically, the democratic feature that was so valuable to European partners.

The Czech Republic, meanwhile, experienced several substantial changes: an economic downturn and corruption affairs that led to the collapse of the right-wing cabinet of V. Klaus, subsequent exceptional elections, and an advance of the opposing social democrats to power.[4] A major shift in the 'European' public discourse followed one such scandal in V. Klaus' Civic Democrats – *Občanská demokratická strana* (ODS). Once the political party that enthusiastically presided over the transformation and applied for EU membership, the ODS was becoming more and more pessimistic about the Republic's prospects (blaming the governing social democrats) and more and more euroskeptical (resembling, some times rather tragicomically, British conservatives). The new atmosphere within the party can be illustrated in a few quotations from the 'Czech Eurorealist Manifesto,'[5] a small work of four politically engaged intellectuals, one of whom is now a Member of the European Parliament (MEP). Although the Manifesto sets out two strategic priorities – integration into the EU and NATO – it sees EU membership as the 'most extensive modern voluntary hand-over of part of our sovereignty to a 'supranational' level,' and the Economic and Monetary Union as primarily a political project (which has to be, therefore, preceded by a referendum); the negotiation process is seen as a skilful tactic which transformed the EU's enlargement into a competition by which the EU manages to rearrange the candidate queue according to its opportune needs; and the requirement to implement the entire *acquis* is an 'anti-dumping measure that quickly liquidates even the rest of the comparative advantages that the Central-Eastern European economies so far possessed' and which 'is not so much about meeting declared 'high' standards, but is mainly a protectionist weapon defending the European market before the external competition.' Before serving his term in the 'underdeveloped' European Parliament, the MEP author of the Manifesto issued a proclamation announcing, 'because of the non-existence of the 'European' public and 'European' voters, the European Parliament can never become a developed parliament.' As a consequence of all these assumptions, the Manifesto insists that the Czech Republic has two vital interests: participation in EU decision-making processes and involvement in the single market, not as an inferior and secondary, but full-fledged member. At the same time, the Czech Republic should be attached to the intergovernmental model that is not 'projected from desks of European political and bureaucratic elites' and in which, by keeping the right of veto, national identity 'is not reduced to a sort of negligible cultural-folklore element.' If the Czech Republic does not reach these prerequisites for its *entry*, the Manifesto offers two viable alternatives, either a bilateral solution 'based on the Swiss model' or closer economic ties with the United States and the North American continent, for 'in the globalized trade exchange, geographical distance loses its significance' (joining the US as a Central European fifty-first state was not suggested). This lengthy citation from one party's programmatic paper expresses the mood that tended to rule over about half of Czech society. The discourse between politicians and the public was a puzzling mixture of the continuing exceptionalism with unfounded fears and doubts about the 'European socialist superstate,' mix of a theoretical knowledge with demagogy and populism. In addition the euro-optimists seasoned increasingly nationalistic discussions with glorifications of the EU and immoderate expectations from its membership. Besides this, the former front-runner had difficulties keeping up with other 'first wavers' and this necessarily affected the overall atmosphere in Czech society and its relationship with the outside world, particularly the EU.

On the other side of the Czech-Slovak border, the situation started to look much rosier. Although the EU demarches did not have a desirable outcome, the incorporation of Slovakia among the 'second wave' candidates certainly produced a wake-up call. The Slovak

disappointment was accentuated by the decision on the first NATO enlargement, again with a Slovak absence. The public began to realise that with such a domestic policy it could really soon belong to the 'Wild East.' The intensifying excesses of Meciar's government (e.g. with respect to the Hungarian and Roma population or electoral rule, see Toma and Kovac 2001, Goldman 1999) led to reverse consequences – an amounting unified resistance. Before the elections in 1998, the fragmented opposition integrated itself into one party block and, with a remarkable 84% turnout, removed V. Meciar and his coalition from power. The new cabinet's leader and head of the second strongest party, Mikuláš Dzurinda, went on his first official visit to Brussels and embarked on the path to democracy stabilisation, protection of national minorities (e.g. by a new minority language law adopted in July 1999), and economic recovery. The European Union showed its appreciation for the Slovak progress repeatedly in 1999 and 2000: 'Slovakia continues to meet the political criteria for accession which the last report had recognized, for the first time, as having been fulfilled. Slovakia has further advanced in the consolidation of its democratic system and in the normal functioning of its institutions' (*2002 Regular Report on Slovakia's Progress Towards the Accession*, November 2002). Slovakia also improved its economic shape. The successful development was completed in December 1999 when at the Helsinki European Council summit the EU member states accepted Slovakia as a candidate for EU membership and on February 15th, 2000 the official negotiations on the Slovak accession began in Brussels. Even though (or perhaps because) Slovakia was two years behind, it became one of the most industrious and wholehearted newcomers. The passionate atmosphere of the early nineties switched in the two parts of former Czechoslovakia.

5. 'Konec dobrý, všechno dobré' ('All's good that ends well')

According to L. Friis and A. Murphy (2000), the 1999 Helsinki summit, which in fact merged the first and second waves into one, was a rational solution to the 'complex juggling act' of how to crack such intricate problems as the issue of Czech and Slovak borders and custom union that both countries shared. If one of those states would have become an EU member and the other did not, the customs union would have to have been abolished. From this point of view, the decision to open the negotiations was a result of EU officials' rational problem-solving rather than evidence of Slovakia's progress. Along these lines, the 'regatta' or 'Big Bang' option (as opposed to 'minimal' or 'two waves' enlargement) was also an answer to the frightening 'queue-management' (Friis, Murphy 2000). After Helsinki, everything went along smoothly. Both countries focused on chapter negotiations: the Czech Republic had the advantage of an earlier start and thus was able to conclude one-third of the chapters by the end of 1999. The Slovak Republic was offered a 'package deal' to begin with and concluded negotiations of one third of the chapters in eight months by October 2000 (which is another sign of Slovak renewed eagerness, but also of a lesser bargaining competency). For the final round, chapter No.7, Agriculture, and No.29, Finance and Budgetary Provisions, were to be concluded for all the candidate countries, while the Czech Republic also had to conclude chapters No.9, Transport Policy, and No.30, Institutions. In 1997 at the Amsterdam summit (before the negotiations started), it had been recognised that the Eastern enlargement required the EU to undergo substantial internal reforms. The Amsterdam Treaty nonetheless did not unravel the tricky institutional arrangements and Amsterdam's 'left-overs' remained for the European Council summit in Nice to answer in December 2000. The adopted *Treaty of Nice*, among others, established changes in weighting votes in the EU Council and in the number of seats in the European Parliament after the EU enlargement. While the Czech Republic with its 10.3 million inhabitants received 12 votes in the Council (similar to equally populated Belgium, Greece, Portugal, and Hungary), it was, along with Hungary, awarded only 20 seats in the European Parliament (whereas Belgium, Greece, and Portugal obtained 22 seats). Although the discrepancy of two seats in a 732-member Parliament makes a rather minimal difference, it was a blow to national pride of the Czech Republic (and even more so to Hungary) and made the Czech and Hungarian diplomats unwilling to concede at any price to the Institutions chapter. In the Czech Republic, moreover, this unfortunate EU decision gave euro-realists evident proof of the future 'dictate of power' in the EU that would happen if smaller states agreed with a federalist Europe. On the other hand, the rhetoric of opposition did not influence public discourse very much at this point for a simple reason – the Czech

public either did not understand or did not care about what 'those at the top' were actually doing during the summits. The impact was, therefore, mild and only reinforced the growing scepticism toward EU membership.

On 12-13 December 2002 at the European Council summit in (symbolically) Copenhagen, ten candidate countries officially finished accession negotiations and the European Council decided on the accession of the Czech and Slovak Republics. The final *Treaty of Accession,* whose ceremonial signature took place in Athens on 16 April 2003, was designed as one treaty between all ten new states and fifteen member states. The Accession Treaty contains three main parts – the relatively short proper text of the treaty, the *Act of Accession*, and the *Final Act*. The main body of the 5,000 page long document contains the Accession Act with annexes and protocols. The *Act of Accession, Part I, Article 3* is devoted to the so-called Schengen *acquis* and refers to Annex I, which divides the Schengen provisions into two categories: the category I regulations, which became valid immediately after the Treaty entered into force, and the category II regulations, which will be binding after the Council decides on their obligatory force, i.e. after new member states demonstrate their capability to enforce the regulations. Such complicated provisions ensure that new members will be able to protect the EU's so-called external borders. In the case of the Czech Republic the Schengen *acquis* is far less problematic, since, due to its geographical location, the single external border is Prague international airport; Slovakia is in a more delicate[6] position because of its external borders with Ukraine. In principle, the new member states should accede to the Schengen acquis in full by 2008. A similar temporary exception establishes *Article 4*, which presupposes that the new member states will join the Economic and Monetary Union (EMU) after they meet the Convergence Criteria. Both the Czech and Slovak Republics are so far not in shape economically to fulfil the criteria (particularly because the Czech budget deficit continuously exceeds the required 3% limit), and the earliest date possible for their integration into the eurozone is expected to be around the year 2010. *Part II: Adjustments to the Treaties* introduces the institutional modifications settled at the Copenhagen summit. The EU tacitly acknowledged its mistake and accorded the Czech Republic and Hungary with an additional two seats in the EP. *Part IV: Temporary Provisions* refers to temporary derogations from the Accession Treaty (i.e. transition periods and permanent exceptions) and to Annexes and Protocols of the Act that provides their details. The most challenging issues dealt with during the Copenhagen summit were the transition periods (demanded both by the candidate states and the EU) and the question of what to do with the financial contributions from the Common Agricultural Policy and structural funds. The agricultural matters were more disturbing for Slovakia than for the Czech Republic, given the higher percentage of the populace employed in the agricultural sector (Slovakia - 6.6%, the Czech Republic - 4.9%), the higher share of agriculture on GDP (Slovakia – 4.5%, the Czech Republic – 3.9%), and more serious environmental implications, e.g. biodiversity affected due to abandonment of land (European Environmental Agency 2004). Notwithstanding the minor differences between both states, the overall CAP reform and financial package should not have a diverse effect on either country.

The transition periods enjoyed much more attention in Czech and Slovak media and public discourse. The main concern troubling both societies was the 'buying out of our family silver' or the acquisition of agricultural land and forests and real estates by foreigners. The fears that Sudeten Germans, expelled after the WWII, would flood border regions or that Magyar families would immediately buy weekend houses in the Slovak countryside were, indeed, groundless (even though foreign-based companies had been allowed to buy Czech and Slovak property for years if they were registered in the respective country), but nonetheless were intense concerns. The EU eventually agreed to a seven-year transition period (i.e. purchase prohibition) for land and forests and five-year period for real estate in exchange for a seven-year transition period that restricts the free movement of labour for newcomers, which was no less popular and, presumably, no less unreasonable request from the European public. Nevertheless, the EU members allowed negotiating on a bilateral basis; now Czech and Slovak workers can be employed in the United Kingdom, Ireland, Netherlands, Sweden, and Denmark. The temporary limitation of the free movement of persons was demanded particularly by two neighbouring countries – Germany and Austria, which were expected to bear the largest migration costs (annual estimate was 300,000 migrants, of which 200,000

were going to Germany) (Hall, Quaisse 2001, Schimmelfennig, Sedelmeier 2002).[7] A similar concern pertaining to haulage created a transportation transition period of five years. In both the Czech and Slovak Republics, the public applauded the preservation of the lower value-added tax to cigarettes and tobacco products; and Slovaks were happy, since their team negotiated exemption until 2008, while the Czech one until 2007. Equally applauded was the permanent exception to distil special national fruit liquors, which are considered parts of national identity (slivovice in Slovakia and jablečná pálenka i.e. calvados in the Czech Republic). The remaining transition periods were rather of an expert nature (e.g. waste management or harmonisation of hygienic standards) and therefore, did not evoke major public concern. In comparison, the Czech Republic negotiated a smaller number of transition periods (though the difference is minor), which can mean either that Czech diplomats were less skilful negotiators, or, more likely, that the Czech Republic was simply able to conform to the EU standards a bit more easily.

Conclusion

Since the integration of new members is subject to the assent procedure, the European Parliament cast the required majority of votes on the enlargement on April 9th, 2003. Another precondition was the ratification of the Treaty of Accession by April 30th 2004. Before it could happen, all the candidate countries (except Cyprus) chose to hold membership referenda. Owing to the improved communication among V4 group members,[8] V4 countries approved a 'domino effect' order of referenda, so that the first to vote were those with the greatest support for EU membership. If we look at the Eurobarometer results from Spring 2003 and Autumn 2004, the situation was worrying. Both the Czech Republic and Slovakia showed declining support for their membership, though Slovak support was considerably higher (or at least closer to 50%) than the Czech support (see figure 1).

How come the Czech Republic, the country that has always been reckoned to be the leading candidate state, is less in favour than other countries? Why is Slovakia, which managed to do well enough to get out of its political curse, not as eager as it was before? The Slovak case is easier to explain: even though Slovakia was fighting for its membership since 1998, any passion lasts shortly and, with time, cools down. Moreover, HZDS and its leader V. Meciar did not discredit itself, but further operated on the Slovak political scene, saying that 'the national interest of the Slovak Republic is to guarantee its sovereignty, territorial integrity, inviolableness of borders, security, and economic prosperity. To do so, we had to achieve a full-fledged membership in the EU and NATO'[9]. How similar those words are to the statements from the Eurorealist Manifesto, co-authored by the former Deputy President of ODS, current MEP, and a 'shadow minister of foreign affairs.'[10] As G. Delsoldato put it: 'Populist national parties basing their political message on the defence of the predominant national identity tend to be critical of the modalities of EU accession though supporting it in principle' (Delsoldato 2002: 283). Today, the position of ODS is that the accession of the Czech Republic to the EU was 'our strategic goal for economic and political reasons,' but any further development toward federalisation 'would lead to the significant reduction, or even elimination, of the state sovereignty… and, therefore, is in contradiction with our national interests, and, being so, is for us unacceptable (Zahradil 2004).'[11] An identical (or even more euro-skeptical) agitation also led the new President of the Czech Republic, V. Klaus who, since his election in 2003, has enjoyed popularity in public polls. It is no wonder that in such an atmosphere and state of the public discourse, only 77.3% of votes were in favour of the membership, which is relatively little in contrast to 92.46% positive votes in Slovakia.[12]

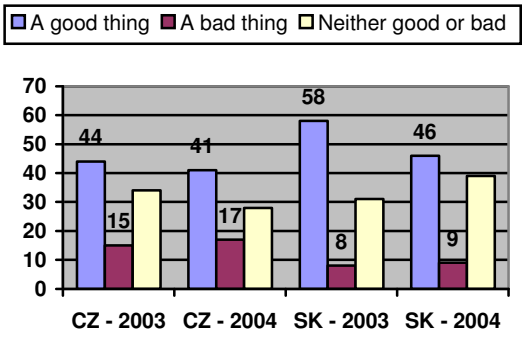
The experience of both republics is telling: even if the economic integration is successful and the European legislation is more or less implemented, what in the end matters is a political readiness to enter the EU and the motivation of the public to become its member. First of all, the understanding that the political criterion is not only a plain phrase but a firm precondition for EU membership might be a warning to the current candidates as well. Secondly, although it is important how many chapters are concluded, what kind of transition periods negotiated, and how much money countries get and pay, the self-evidence of the accession can change overnight if public discourse is led by leaders who, rather than realistically explaining the pros

and cons of the membership, are playing on the nationalist and populist note. In any case, the Treaty of Accession entered into force on 1 May 2004 and the Czech and Slovak Republics joined the European Union, which shows that, despite all the obstacles and difficulties, the 'inevitable' can eventually materialise.

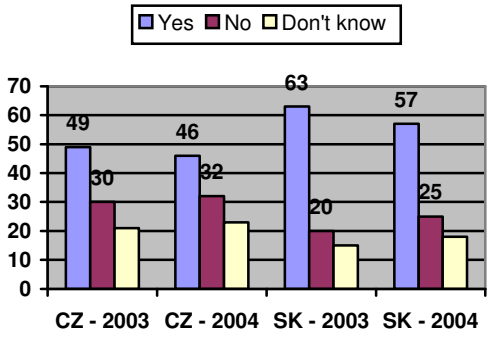
Annex

Figure 1: Eurobarometer Results, Spring 2003 and Autumn 2004

Generally speaking, do you think that your country's EU membership is…?



Taking everything into consideration, will your country get advantages from EU membership?



Notes

[1] In 1994 HZDS received almost 35%, in 1998 27%, and in 2002 19.5% of votes.

[2] For example, in the inaugural speech in 1995 V. Meciar declared: 'In the sphere of international policy the government of the Slovak Republic will unambiguously keep the continuity of its orientation. We want to carry on in the hitherto existing policy of integrating Slovakia into European and Trans-Atlantic political, security, and economic structures.'

[3] A press spokesman for HZDS even reacted by saying: 'Concerning the European Parliament resolution to Slovakia, HZDS reminds you of a recent story, when the leaders of Nazi Germany first sent countries demarches, and then occupied them with tanks.' Not surprisingly, HZDS representatives distanced themselves from the spokesman's remarks, calling them his own personal opinions and not the official HZDS party standpoint.

[4] One from the Czech peculiarities was 'The Pact on the Creation of the Stable Political Environment,' or the 'opposition agreement,' between the minority social democratic government and V. Klaus' opposition 'civic' party (besides these, there were three other smaller parties in the parliament). Based on the agreement, the minority cabinet was tolerated by the ODS in exchange for several concessions (e.g. proposed changes of the electoral rule) and offices. Basically, the agreement was targeted against smaller parties and was a hidden major coalition with a vague distribution of responsibilities between government and opposition.

[5] The document can be found at the Civic Democratic Party (ODS) web page, at http://www.ods.cz/knihovna/dokument.php?ID=11 as of December 15, 2004

[6] The Slovak-Ukraine border is also considered one of the main points for the trafficking of goods and people into the EU. See 'Slovak police fight losing battle on eastern front,' *Financial Times*, December 9th, 2004, p.4.

[7] So far it seems that even these estimates were exaggerated. Moreover, as in the case of the Czech Republic, the mutual quotas for employment that already now exist are far from their fulfillment.

[8] Communication improved due to the governmental change in the Czech Republic in 1998 and a common Czech-Hungarian strategy since 2000.

[9] See official web page of the HZDS, www.hzds.sk.

[10] The similarity between HZDS and ODS is obvious also in other points: both parties are the strongest political parties, both are currently in the opposition, V.Meciar and V.Klaus also share a similar political past and other characteristics (nevertheless, the new ODS leadership attempts to distance itself from V.Klaus, not only because the presidential function in the Czech Republic is considered 'impartial').
[11] J. Zahradil further stresses that ODS is against multi-speed Europe and the Constitutional Treaty.
[12] The referendum in Slovakia took place on May 16-17th, 2003, whereas in the Czech Republic on June 15-16th, 2003 (V4 group: Hungary, Slovakia, Poland, Czech Republic). The turnout in Slovakia was 52.15% (i.e. only 2.15% above the required 50% level), in the Czech Republic 55.21% (50% participation not binding).

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Knocking On The EU's Door: The Political Economy of EU-Ukraine Relations

Marco Montanari

1. Introduction

The events related to the 2004 Ukraine's presidential election (the so-called "Orange Revolution") brought this country, and especially its prospects of becoming a fully-fledged democracy, to the international community's attention. In such a context, the issue of integration with the European Union (EU) is becoming more and more relevant. So far, the relations between the EU and Ukraine have been regulated by a Partnership and Cooperation Agreement, entered into force in 1998. It provides for cooperation in a wide range of areas, including political dialogue, trade, investment, economic and legislative cooperation, and cultural and scientific cooperation.

Following the 2004 Eastern enlargement, the EU launched the European Neighbourhood Policy (ENP), which offers 'the prospect of a stake in the EU Internal Market' (European Commission 2004: 13) to all countries located near the borders of the EU which have not been granted the prospect of future membership.[1] In the long term, the final goal of the ENP might be that of reaching with these countries a level of integration similar to the present European Economic Area (EEA).

Applying the ENP to Ukraine raises some interesting political economy issues. What are the main interests at stake, on both the EU and the Ukrainian sides, and the main challenges in this integration process? Can the ENP be a credible alternative to full EU membership? This paper seeks to answer these questions by using a liberal intergovernmentalist approach (Moravcsik 1993, 1998), emphasising, first of all, domestic economic interests and, secondly, geopolitical motives as the main determinants of countries' preferences in international negotiations. More specifically, we discuss potential benefits and costs for both EU member states and Ukraine associated to three different scenarios, characterised by an increasing degree of integration: free trade area (FTA), fully developed ENP and EU membership.

Two main conclusions can be drawn from this analysis. First, potential benefits from integration would be asymmetrically distributed, being more significant for Ukraine than for the EU; moreover, the main obstacles to integration would not be economic, but political. Second, the ENP lacks attractiveness in the long term because it would impose obligations analogous to those of EU membership on Ukraine, but without the corresponding benefits; thus the integration process is likely either to produce a more modest outcome, limited to the creation of an FTA, or to lead to EU accession.

The paper is structured as follows. Section 2 briefly describes the main features of the ENP with reference to Ukraine. Section 3 presents a liberal intergovernmentalist framework for the analysis of EU-Ukraine integration. Section 4 applies such theoretical framework to the three different scenarios of integration mentioned above. Section 5 concludes.

2. The nature of EU-Ukraine relations in the light of the ENP

The relations between the EU and Ukraine have been regulated so far through the contractual framework provided by the Partnership and Cooperation Agreement, which was concluded in 1994 and entered into force in March 1998. The most relevant provisions concern the economic sphere. The parties accord to one another Most Favoured Nation treatment and limit the possibility of imposing restrictions on imports and exports, while specific articles govern conditions for establishment and operation of companies, approximation of legislation, intellectual property rights and trade defence instruments.

Even if EU imports of manufactured goods from Ukraine are to a large extent liberalised, special agreements still govern trade in some sensitive products, namely steel and textiles. Trade in certain steel products is currently regulated by a quota system to be replaced by a new agreement, the negotiations of which were completed on 31 March 2005. Reciprocal liberalisation of trade in textile products started from 1 January 2001. A new bilateral agreement, abolishing import and export licensing requirements for all textiles, was signed on 9 March 2005 (European Commission 2005d). With regard to agricultural trade, Ukraine does not benefit from any EU preferential scheme and in some instances still faces relatively high tariff barriers.

Following the 2004 Eastern enlargement, the EU began to develop the ENP as a means to enhance relations with those countries that are located near its borders, but do not currently have the prospect of membership. Through it, the EU is going to offer a more intensive political dialogue and greater access to its programmes and policies (European Commission 2004).

In more detail, in the political field the ENP should lead to intensified relations, including cross border co-operation and shared responsibility in conflict prevention and conflict resolution. The most significant elements of the ENP, however, focus on the economic field. They include:

a) enhanced trade integration; in the case of Ukraine, that imply the possible establishment of an FTA;
b) the prospect of participating in the EU Internal Market and in selected EU programmes in the areas of research and education;
c) increased financial and technical assistance;
d) improved interconnection with the EU in sectors like energy, telecommunication and transport.

To implement the ENP, the method proposed by the European Commission is to define, together with partner countries, a set of priorities, whose fulfilment would bring them closer to the EU. These priorities are to be incorporated in jointly agreed Action Plans, defining a number of key areas for specific short- and medium-term action. After the presentation of a Strategy Paper by the European Commission in May 2004, the Action Plan for Ukraine, covering a three-year period, was jointly adopted at a special EU-Ukraine Co-operation Council on 21 February 2005. Moreover, on the same day, the EU General Affairs and External Relations Council agreed ten specific measures for closer co-operation in order to foster the process of democratisation and economic reform following the 2004 Orange Revolution. They cover, inter alia, issues such as foreign and security policy, visa facilitation, Ukraine's accession to the World Trade Organization (a key condition to be satisfied before possible negotiations for an FTA may start) and financial assistance (European Commission 2005c).

The 2004 ENP Strategy Paper envisages that, when Action Plan priorities are met, the following step could consist in the negotiation with each partner country of a bilateral European Neighbourhood Agreement, which, in Ukraine's case, would replace the present Partnership and Co-operation Agreement. Progress made in the implementation of the Action Plans should therefore enable the EU and its partners to agree on longer term goals for further development of relations in the years ahead.

The long-term implications of the ENP are therefore still characterised by quite a large degree of vagueness and uncertainty. It is worth noting that the early 2003 Commission proposals explicitly suggested that the ENP would promote the "four freedoms" (concerning movement of persons, goods, services and capital) on which the Single Market is based, in return for approximation of partner countries' legislation with that of the EU (European Commission 2003). The final outcome would be a degree of economic integration comparable to the present EEA. By contrast, the 2004 Strategy Paper makes no direct reference to that and only focuses on the medium-term Action Plans instead (Moshes and Haukkala 2004). Because of this shift of emphasis, Vahl (2005) argues that 'it is clear that the extent of economic integration through the ENP has been scaled down and will fall far short of the EEA' (p. 9).

Whilst this appears true if the perspective is restricted to the time span covered by the Action Plans, however the chance of negotiating new European Neighbourhood Agreements may still open the door to deeper integration in the long run, including a progressive establishment of the "four freedoms". In other words, the ENP looks like an open-ended process. Its ambiguity will dissipate only when the EU makes clear what 'the prospect of a stake in the EU Internal Market' ultimately means.

3. Liberal intergovernmentalism and EU-Ukraine relations: a conceptual framework

In this section a theoretical framework is provided which allows for the analysis of the prospects of Ukraine's economic and political integration with the EU. To do so, this paper draws upon liberal intergovernmentalism, a theory developed by Andrew Moravcsik (1993, 1998), which seeks to explain the major turning points in European integration history. Very concisely, it proposes a three-level analysis of the European integration process focusing on the formation of national preferences, the outcome of intergovernmental bargaining and the subsequent choice of international institutions.

A liberal intergovernmentalist approach is also suitable for the analysis of EU agreements with third countries, because both association agreements (according to Art. 300 and Art. 310 of the EC Treaty) and accession to the EU (under Art. 49 of the EU Treaty) require unanimity among member states and therefore may fit into the category of interstate bargaining. With regard to the former, theoretical frameworks drawing on liberal intergovernmentalism have been recently used to analyse, for instance, the 2000 Cotonou Agreement with the African, Caribbean and Pacific countries (Forwood 2001) and the Euro-Mediterranean Association Agreements with the Southern Mediterranean countries (Montanari 2007). As regards the latter, Moravcsik and Vachudova (2003) and, partially, Schimmelfennig (2001) employ liberal intergovernmentalism to account for the EU Eastern enlargement process.

The first two levels of liberal intergovernmental analysis are those relevant for the model of EU-Ukraine relations, as set out in this paper: how domestic groups' interests translate into state preferences and how the outcome of international negotiations is shaped according to the relative bargaining power of the players involved. Negotiations leading to international agreements take place therefore at two levels: within countries, involving domestic groups with different interests, and among states. At the national level, domestic groups pursue their interests by lobbying the government to adopt a position favourable to them, then, at the international level, the aim of national governments is to maximize their ability to defend domestic interests. Since most EU activities belong to the economic sphere, domestic interests are principally economic, but also geopolitical concerns may play a significant role. Before proceeding further, we have to define better what we mean by 'international level' when the EU negotiates with a third country. It includes two distinct phases, taking place sequentially: first, bargaining among EU member states in order to find a common position vis-à-vis the partner country, then, negotiations with that country to conclude a bilateral agreement.

However, governments are not always so strictly constrained by domestic actors. There are at least two kinds of situations where they can find more room for manoeuvre. The first is when

the future effects of a specific policy are uncertain. 'Uncertainty about the effects of co-operation arises where policies are stated vaguely, left to future negotiation, mediated by complex market processes, or applied in an unpredictable way across a population. Uncertain policies engender less opposition than those that are immediate, precise and targeted' (Moravcsik 1993: 490). The second arises when an issue is perceived as not very salient from a political economy viewpoint. 'When net expected costs are insignificant, ambiguous, balanced or uncertain, governments enjoy a greater autonomy from particularistic domestic groups that oppose co-operation' (Moravcsik 1993: 490).

When moving from the domestic to the international level, the theory has to explain how intergovernmental bargaining are shaped. Here the fundamental concept is "asymmetrical interdependence", firstly introduced by Keohane and Nye (1977): the states which are going to gain the most from international co-operation are more willing to compromise. Therefore, countries expecting to get large benefits have the most intense preferences for agreement and are disposed to make concessions in order to reach it, because it would still make them better-off than the status quo. By contrast, countries for which agreement is less important are more likely to see their priorities get through, because they can credibly threaten not to ratify any agreement far from their preferences.

Nevertheless, countries with intense preferences for agreement can sometimes influence the outcome of the negotiations in a subtle way. In his analysis of the EU Eastern enlargement process, Schimmelfennig (2001) proposes the concept of 'rhetorical action', a set of strategies, played by both the candidate countries and some EU members, consisting in the manipulation of European identity and the accession criteria or in complaints about alleged inequality of treatment between candidate countries. Such concept would provide a better explanation than "standard" liberal intergovernmentalism for the EU's decision to move from association agreements to the offer of membership to the Central and Eastern European countries (CEECs).

Since it involves EU norms and values, rhetorical action may seem to imply a radical deviation from liberal intergovernmentalist assumptions towards a social constructivist perspective. However, as pointed out by Moravcsik and Vachudova (2003), rhetorical action was effective during the enlargement process because economic and geopolitical benefits were present, economic costs were modest (or, at least, sunk) and the overall impact of enlargement on the EU was very limited. Moreover, references to norms and values were used strategically in a rationalist framework. Hence rhetorical action can be better viewed as an extension of liberal intergovernmentalism for the analysis of EU negotiations with third countries than as a departure from it (see Schimmelfennig 2004 for an exhaustive discussion on this point).

There is also another feature of international bargaining which applies specifically to the EU when it negotiates bilateral agreements (Bofinger 1995, Sedelmeier and Wallace 2000). In such a situation, the EU has a strong bargaining power because, before negotiating with a third partner, it needs to find a position acceptable to all its members; subsequently, any change in that position during the negotiations has to win support from each of them again. It is thus difficult that a radical shift in the EU's stance may take place during the negotiations, since it would be very probably resisted by some member states (Forwood 2001, Montanari 2005).[2]

Finally, the likely effects of a specific agreement have to be evaluated. In the case of EU-Ukraine relations, as well as in the other processes involving EU neighbouring countries, the basic political economy question is whether the degree of integration chosen provides enough incentive to trigger economic and political reform in the partner countries. In this context, a bilateral agreement can be defined as efficient if, in the medium to long term, it may represent an effective external anchor for Ukraine's government to credibly commit itself to reformist policies, aimed at establishing a functioning market economy and a fully-fledged democracy, and to overcome internal opposition to them. This concept will act as a guide in terms of comparing and assessing the different scenarios of integration.

The liberal intergovernmentalist framework built in this section can be summarised in a few propositions which will constitute the starting point of our analysis in the remaining part of the paper:

- the process leading to an international agreement can be modelled as a two-level game: first, domestic interest groups compete to shape national preferences, then national governments engage in international bargaining where they try to satisfy domestic pressures;
- at the domestic level, national preferences are shaped by economic and geopolitical interests. However, governments enjoy more freedom when the future effects of a specific policy are uncertain or when an issue is not politically or economically sensitive;
- at the international level, (encompassing, in the case of the EU, two dimensions: bargaining among member states and negotiations with Ukraine) the relative bargaining power of governments depends on the importance attributed to agreement: the actors expecting to benefit the most from co-operation are more willing to make concessions (asymmetrical interdependence), but may strategically use EU norms and values to influence the final outcome of the negotiations (rhetorical action). Moreover, the requirement of unanimity among member states strengthens the EU's bargaining power;
- a EU-Ukraine bilateral agreement is efficient if it may effectively spur the Ukrainian government to pursue political and economic reform in the medium to long term.

4. Three possible scenarios of integration

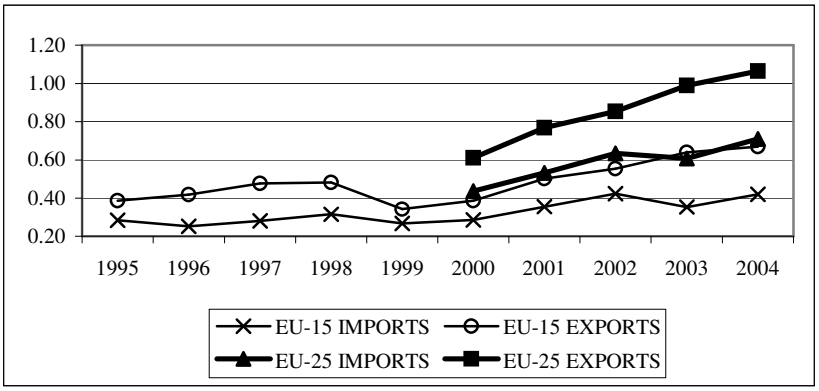
In this section three different scenarios for the evolution of EU-Ukraine relations are outlined and compared: Free Trade Area (FTA), fully developed European Neighbourhood Policy (ENP) and EU membership. The aim of this paper is not to predict what will happen in the next few years or in the long run, but rather to evaluate the potential political and economic benefits and costs of each scenario, analysing the main interests at stake for both EU member states and Ukraine.

4.1 Free Trade Area (FTA)

This may be defined as a minimalist scenario, because it implies a much lower degree of integration than the other two. An FTA would entail a complete liberalisation of trade in both manufactured and agricultural goods, which would require the abolition of special provisions for sensitive industrial sectors (steel and textiles) and of the protectionist regime governing agricultural products. To understand the issues at stake, we need to examine the present EU-Ukraine trade relations in detail. According to Eurostat figures, over the last decade EU-15 trade with Ukraine grew quite steadily from roughly €2 billion for both imports and exports to €7 billion for exports and €4.5 billion for imports; figures are about 50 per cent higher for the EU-25. In both cases, the EU trade surplus has been widening significantly.

Absolute values, however, do not reveal much about the relevance of Ukraine as a trading partner of the EU, which can be better assessed by examining the evolution of the share of total EU external trade made with that country. Figure 1 shows that it has only increased modestly since the mid-1990s; at present, barely 0.4 per cent of EU-15 imports and 0.7 per cent of its exports come from or go to Ukraine. In this case too, figures for the EU-25 are roughly 50 per cent higher.

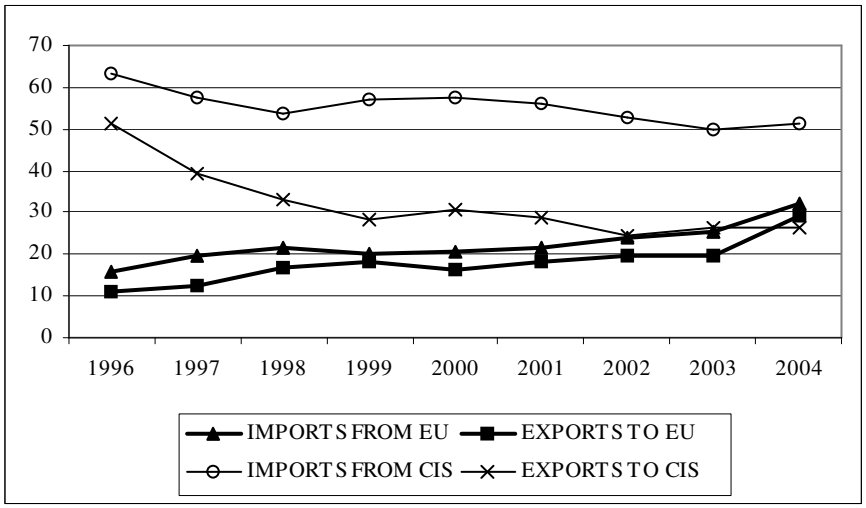
Figure 1: EU trade with Ukraine as a percentage of Total EU external trade



Source: Author's calculations based on Eurostat data

While one can thus conclude that Ukraine accounts for an extremely small share of EU external trade, Figure 2 shows that, by contrast, the EU has become a very relevant trading partner for Ukraine. In the mid-1990s, less than 15 per cent of both Ukraine's imports and exports originated from or went to the EU, whereas, after the 2004 enlargement, these shares have reached 30 per cent. The EU has now become the most important market for Ukraine's exports, surpassing the Community of Independent States (CIS), whose share has steadily declined in the last few years and which is still Ukraine's main supplier (providing about 50 per cent of its imports), chiefly because of energy supplies from Russia.

*Figure 2: Ukraine's trade with the EU and the CIS as a percentage of Ukraine's external trade**



*data from 1996 to 2003 refer to the EU-15; data for 2004 are for the EU-25
Source: State Statistics Committee of Ukraine

This is a clear example of asymmetrical interdependence: Ukraine may obtain much larger benefits than the EU from the establishment of an FTA. After analysing aggregated flows, it is necessary to disaggregate trade, first by sectors then by countries, with a view to identifying possible more specific interests at stake.

EU exports to Ukraine are concentrated in more capital intensive and technologically advanced products (especially machinery), where the EU enjoys large surpluses (Table 1). Also

in sensitive products, such as textiles and clothing, the EU trade balance is positive. The main imports, on the contrary, are represented by energy, a sector registering quite a large deficit, and agricultural products, where, however, the EU deficit is much smaller.

Table 1: EU trade with Ukraine by main sectors in 2004 (€ million)

	EU Imports	EU Exports	Balance
Machinery	341	3139	+2798
Chemicals	489	1565	+1075
Transport equipment	247	1265	+1018
Textiles and clothing	492	764	+272
Agricultural products	855	680	-175
Energy	1001	102	-898

Source: Eurostat

Some interesting conclusions can be reached by further disaggregating trade flows and examining the pattern of Ukraine's comparative advantage in trade with the EU. It has been shown that, not very surprisingly, Ukraine's comparative advantages in exports are concentrated in just a few sectors: raw materials, agricultural products, iron and steel and some transport equipment (locomotives); among them, only cereals constitute more than 10 per cent of total EU imports in that category (Montanari 2006). Therefore, full liberalisation of imports from Ukraine, also in sectors deemed sensitive (agricultural products, textiles and steel) could be very beneficial to it, because it could better exploit its pattern of comparative advantage, without being a major threat for specific sectors of the EU economy.

Among EU member states, Italy is the main importer from Ukraine (23 per cent of total EU imports), followed by Germany and Poland, whilst Germany is the major exporter (it makes 28 per cent of total EU exports to Ukraine), followed by Poland and Italy (Table 2). Both economic dimension and geographical proximity clearly determine the positions in Table 2. Germany, Italy and Poland are large countries located quite close to Ukraine (Poland is also the member state sharing the longest border with it). Smaller countries like Hungary and the Czech Republic exploit their proximity to Ukraine and precede larger but remote countries, such as the United Kingdom (UK) or Spain.

Table 2: EU trade with Ukraine by main partner countries (2004)

EU IMPORTS		**EU EXPORTS**	
Country	*Share of EU imports from Ukraine*	*Country*	*Share of EU exports to Ukraine*
Italy	23.38%	**Germany**	28.49%
Germany	12.57%	**Poland**	15.87%
Poland	11.78%	**Italy**	10.54%
Hungary	7.55%	**France**	5.58%
Czech Republic	6.09%	**Netherlands**	5.20%
Spain	5.32%	**Hungary**	4.79%
Slovakia	4.50%	**Austria**	3.67%
Austria	4.24%	**Czech Republic**	3.58%
France	4.03%	**Belgium**	3.49%
Netherlands	3.50%	**UK**	3.03%

Source: author's calculations based on Eurostat data

Potential benefits, even if quite limited, from trade liberalisation seem thus to accrue mainly to the CEECs, Italy and Germany. The relevance of trade flows and geographical proximity thus determine the intensity of EU countries' interest in the creation of an FTA. Possible costs could arise if some EU members' exports had to face a strong risk of competition from Ukraine. In that case, national producers would be against liberalisation and would try to induce their governments to resist it. However, the previous analysis suggests that, at present, no serious threat from trade integration with Ukraine exists for any EU country's economy.

To summarise this section's findings, EU-Ukraine trade relations are marked by a strongly asymmetrical interdependence: Ukraine's economy could get large benefits from the creation of an FTA, whereas benefits for the EU would be small and concentrated in a few countries (the CEECs, Italy and Germany). Potential costs for the EU, in terms of more competitive pressures for specific sectors or countries, would not be significant. Hence, according to this paper's liberal intergovernmentalist model, trade liberalisation is an issue of low political salience for the EU: it should not face a strong opposition from any member state and might represent a realistic medium-term objective.[3]

4.2 European Neighbourhood Policy (ENP)

While an FTA may be a medium-term goal, the second scenario we outline is to be considered as a long-term prospect. It can be briefly defined as "FTA plus the other three freedoms of movement (services, capital and persons)" and corresponds to a full exploitation of the opportunities provided by the ENP. It would entail a degree of participation in the Single Market (and therefore of economic integration) comparable to the present EEA.[4]

The benefits from liberalisation of trade in services are widely recognised: greater competition can lead to efficiency gains in both the services sector itself and the other sectors of the economy relying on services as an input. Moreover, when liberalisation involves areas with different levels of economic development, technology transfer from the most advanced countries to the least advanced ones (for instance, via foreign direct investment) can be a significant source of additional growth for the latter (Mattoo et al. 2001). Services liberalisation necessarily require a process of regulatory harmonisation. The rationale for it is to overcome the effects of non-tariff barriers to trade such as standards and regulations imposed for environmental, health, safety or consumer protection reasons, which have become more and more relevant in determining actual market access (Brenton and Manchin 2003).

The very close link between trade in services and foreign direct investment (FDI) raises the issue of free movement of capital. Liberalisation in this field could bring large efficiency gains to Ukraine's economy, which is highly dependent on the EU as a source of FDI. Indeed data from Eurostat and the State Statistics Committee of Ukraine indicate a very strong asymmetrical interdependence: in 2003, 56 per cent of Ukraine's inward FDI stock came from the EU-25, representing, however, only a tiny share (0.05 per cent) of EU-25 total stock of outward FDI.

In order to actually reap the potential benefits from freedom of movement of services and capital, Ukraine would have to make considerable effort in implementing politically sensitive reforms. Regulatory harmonisation in the context of the ENP would simply mean that Ukraine should adopt EU standards. Capital liberalisation would be productive only if accompanied by sound economic policies, at both the macroeconomic and the microeconomic level, including fiscal and monetary discipline and a proper regulatory environment (European Commission 2005a).

A detailed analysis of the problems currently faced by Ukraine's economic system is far beyond the scope of this paper. We just mention that, contrary to what has happened to the CEECs, the process towards the creation of a functioning market economy has so far been very slow and largely unsuccessful: the political economy of transition in Ukraine has been marked by plenty of opportunities for rent-seeking, promptly exploited by the so-called

'oligarchs', a small number of people who gained and still retain the control of most of the manufacturing and services sectors (Pynzenyk 2000, Sundakov 2000, Sellar and Pickles 2002, Åslund 2005, Kuzio 2005). Taming oligarchs' power is therefore the most challenging task for a reform-minded government eager to achieve a high degree of integration with the EU.

According to the theoretical framework as set out in this paper, the long-term nature of the ENP prospects represents an example of uncertainty about the future effects of specific policies. Given the economic disparities and the differences in regulatory environment between the EU and Ukraine, liberalisation of trade in services and of capital movement could only be achieved very gradually. This might reduce the incentives for radical economic and political reform in Ukraine. Lobbying groups in sectors sheltered from competition (such as services) may use their influence on populist politicians with a view to slowing down the reform process (Shumylo 2006).

While the previous issues should not be of particular concern for EU public opinion, the free movement of people is certainly very sensitive. The distribution of immigrants from Ukraine in the EU is reported in Table 3.[5] The largest number of Ukrainian citizens reside in Germany (116,000), where, however, they only represent 1.6 per cent of total foreign population. In the Czech Republic, Poland and Slovakia (three countries located near Ukraine), the Ukrainians constitute quite a large share of immigrants (from 25 per cent to 16 per cent of total).

Table 3: Ukrainian citizens resident in selected EU member States (2002)

	Ukrainian citizens (thousands)	**Share of total foreign population**
Czech Republic	59.1	25.5%
Poland	9.9	20.1%
Slovakia	4.7	15.9%
Portugal	62.0	15.0%
Hungary	9.9	8.5%
Lithuania	1.6	7.7%
Greece	13.6	1.8%
Germany	116.0	1.6%
Netherlands	2.2	0.3%

Source: OECD (2005)

Some opposition to free movement of Ukrainian nationals may thus be expected to come especially from neighbouring countries, even if, among EU member states, they would be those reaping the largest benefits from economic integration with Ukraine. Their position mirrors the situation faced by Austria and Germany with regard to the 2004 enlargement (Boeri and Brucker 2002). The EU could exploit its superior bargaining power and impose restrictions in the field of labour movement, with a view to reassuring public opinion in those Member States most affected by Ukrainian immigration. The temporary restrictions to freedom of movement for CEEC nationals, even after their countries' accession to the EU, imposed by most "old" member states may constitute a precedent for similar or more stringent measures applicable to Ukraine.

On the whole the long-term nature of the ENP prospects might help overcome opposition within the EU with regard to the free movement of people. This is another example of uncertainty about the future effects of specific policies. At the same time, as in the case of liberalisation of trade in services and of capital movement, the incentives for economic and political reform in Ukraine would be reduced.

4.3 EU accession

Ukraine has not been granted the prospect of EU membership so far; therefore any scenario contemplating EU accession is not only long-term, but also very hypothetical. EU membership implies a higher degree of economic integration than the previous scenarios and introduces new significant elements of political integration. It is defined in this paper in a stylised way as "ENP plus Common Agricultural Policy (CAP) and structural policies plus participation in EU institutions".

In the economic field, the EU budget should be modified to include CAP payments and Structural Funds attributed to Ukraine. The historical precedent of the 2004 enlargement suggests two reflections. Firstly, some opposition could come from two groups of countries: net contributors to the budget (such as Germany and the Netherlands), which should pay the largest share of the cost of Ukraine's accession, and the present poorest member states (the CEECs) fearing to lose part of the Structural Funds. Secondly, the actual cost of enlargement to Ukraine could be accommodated without any disruptive impact on the budget. To support the latter claim, one can make a simple illustrative calculation, whose methodology is described in detail in the Annex. The maximum net cost of a hypothetical enlargement to Ukraine in 2005 could reach €2.46 billion, corresponding to only 0.025 per cent of EU-25 GDP. Moreover, the EU could easily exploit its superior bargaining power and the asymmetrical interdependence in its relations with Ukraine in order to impose transition periods or temporary restrictions that Ukraine would be almost obliged to accept without modifications.
In the political field, Ukraine's participation in the EU institutions would exert some impact especially on the Council of Ministers and the European Parliament. With 48 million people, this country would account for roughly 10 per cent of the EU population and would get a number of votes and seats similar to that of France, Italy and the UK, becoming a significant player in EU decision-making processes. The main political issue raised by Ukraine's accession would concern however the completion of its process of stabilisation and democratisation: according to the Copenhagen Criteria, Ukraine should guarantee 'democracy, the rule of law, human rights and respect for and protection of minorities' (European Council 1993) to be considered for EU membership. The successful creation of a fully-fledged democracy would clearly bring large geopolitical benefits to the EU, especially to Ukraine's neighbouring countries. This was already evident during the 2004 Orange Revolution, when Poland and Lithuania acted as "drivers" in spurring the EU to support it, whilst France and Germany were more reluctant to intervene because they feared to worsen their relations with Russia (Emerson et al. 2005, Nemyria 2005).

Nevertheless, Ukraine has not been recognised as a potential candidate for membership yet. After the 2004 Eastern enlargement and the rejection of the Constitutional Treaty in France and the Netherlands in 2005, the EU seems to be very wary of new enlargement rounds (other than the scheduled accession of Bulgaria and Romania). The outcome of the accession negotiations launched in October 2005 with Turkey (another large and poor country at the borders of Europe), which has been granted the prospect of EU membership, is still open-ended and might fall short of accession (European Commission 2005e). Moreover, the concept of 'absorption capacity' of the EU was recently stressed by the European Council, even if it has not become (at least, not yet) a new formal criterion for accession (European Council 2006).

Here there is wide room for rhetorical action to be played by both Ukraine and those member states, like Poland and the other CEECs, expecting to obtain the largest geopolitical payoff from Ukraine's accession. Indeed, all the conditions stressed by Moravcsik and Vachudova (2003) for successful rhetorical action would be in place in the case of EU's enlargement to Ukraine: geopolitical benefits would be present, economic costs would be low and the overall impact of enlargement on the EU would be very limited.

Strategies such as emphasising Ukraine's European identity and underlining its satisfactory performance with regard to the accession criteria may help to strengthen the bargaining power of the actors in favour of opening the EU's door to that country. As regards Ukraine's

European identity, the Ukrainian government has already resorted to rhetorical action. For instance, in 2005 Oleg Rybachuk, minister for European integration, declared: 'We will never agree to this neighbourhood status as indefinite. It goes against our strategy, against our priorities and against public opinion. [...] We believe that it is the sacred right of every European nation to submit that application and Ukraine is not an exception, this is our natural right' (European Voice 2005).

A good performance by Ukraine with regard to the accession criteria may clearly enhance its prospect of membership. If Ukraine fulfils the requirements for EU membership, but some member states still manifest the will to block any enlargement involving a large and poor country, rhetorical action may play an important role, in particular by demanding the respect of the principle of equal treatment between Ukraine and the CEECs. In such a case a rejection of Ukraine's application could appear as an unfair decision.

To evaluate the present performance of Ukraine with regard to the respect of economic and political Copenhagen criteria, we choose two frequently used indicators: the *Index of Economic Freedom* by the Heritage Foundation (Heritage Foundation 2006) and the *Freedom in the World Index* by the Freedom House (Freedom House 2005). The former ranks countries' economies on a scale from 1 (completely free) to 5 (completely repressed). In 2005, Ukraine scored 3.24 and was still classified as 'mostly unfree' economy. According to the latter, the score attributed to a country's political system may range between 1 (completely free) and 7 (completely repressed). Ukraine's score in 2004 was 4 for 'Political Rights' and 3 for 'Civil Liberties' and the country was judged only 'partly free'.[6]

Ukraine clearly has still a long way to go to meet the conditions required for EU membership. However, it has also to be noticed that, because of asymmetrical interdependence, Ukraine would be willing to accept a number of compromises (such as temporary restrictions or transition periods) in order to reach the fundamental goal of EU membership.

4.4 A comparison

A comparison of the three scenarios permits to examine their efficiency, as defined in Section 3. An FTA is a medium-term objective which does not need deep reforms in Ukraine to be achieved; hence it cannot be considered as efficient. On the contrary, a fully developed ENP does require a long-term process of thorough economic and political reform, but, unfortunately, does not provide Ukraine with enough incentive to realize it. Indeed, Ukraine would have to adopt the *acquis communautaire* concerning the Single Market without reaping the benefits of EU membership, such as the CAP, the Structural Funds and participation in the EU decision-making process. In their absence, it would be unlikely that the Ukrainian government might build a broad consensus in public opinion for difficult reforms facing strong opposition from the powerful domestic groups controlling most of the economy. Therefore, only the prospect of EU membership can act as an effective external anchor for radical political and economic reform.

It follows that EU membership is the only efficient scenario: the ENP cannot be a credible alternative to it for Ukraine in the long run. Actually the EEA, the model of economic integration to which a fully developed ENP would tend, aims to provide a strong link to the EU for some Western European countries which do not want to join it (at present, Norway, Iceland and Liechtenstein), but is not intended as a substitute for membership for countries that, by contrast, wish to enter the EU. Hence a fully developed ENP is a very unlikely scenario; as a consequence, the long-term outcome of the integration process will probably be either more modest (remaining essentially limited to the creation of an FTA) or more ambitious, leading therefore to EU accession.

5. Conclusions

This article has proposed a liberal intergovernmentalist framework for the analysis of Ukraine's prospects of integration with the EU with a view to evaluating the main benefits and costs associated to three possible scenarios: FTA, fully developed ENP and EU accession. Its main findings can be briefly summarised as follows. First, gains from integration would be asymmetrically distributed and would mostly accrue to Ukraine, while the main obstacles would come from political rather than economic reasons. Second, the ENP does not represent a credible long-term alternative to EU membership for Ukraine; thus the likely outcome of the integration process should consist either in the mere creation of a free trade area or in EU accession.

Finally, a relevant issue not discussed in this article concerns the possible influence of relations with Russia on Ukraine's integration with the EU. However, the trade-off between integration with the EU and integration with Russia may well turn out to be more apparent than real. Ukraine's rapprochement with the EU does not exclude the maintenance of close economic ties with Russia as long as integration between the EU and Russia proceeds too. In this latter field, a significant step forward was achieved in May 2005 with the agreement on a road map aiming to build Common Spaces in four areas: economy; freedom, security and justice; external security; research education and culture (European Commission 2005b). Moreover, Russia's cooperation might also be beneficial to EU-Ukraine relations themselves and even help Ukraine to avoid "knocking on the EU's door" indefinitely.

Annex. The cost of Ukraine's membership

In estimating the cost of Ukraine's membership for the EU budget, we apply a simple methodology similar to that used by Gros (2005) in the case of Turkey. The approach consists in calculating the net benefits from the EU budget that Ukraine would receive under current rules if today it were a EU member. At first sight, this might seem somewhat unrealistic, but it avoids the problem of making necessarily arbitrary assumptions about Ukraine's possible accession date, the evolution of EU budgetary rules, and future economic growth rates of both the EU and Ukraine. Taking into account that the goal of this exercise is merely to indicate the possible order of magnitude of the cost of Ukraine's membership, simplicity and transparency may be preferred to more sophisticated methods.

The two fundamental items of the EU budget are the CAP and the Structural Funds. The calculations for agriculture are potentially quite complex, since we should consider the output structure of agriculture in Ukraine. However, we can avoid that by using an indirect approach, based on the ratio between CAP support and agricultural production. At present, the CAP absorbs 0.5 per cent of EU-25 GDP and the value added produced by agriculture is about 2.5 per cent of EU-25 GDP. Therefore we may assume that European farmers get at most 20 per cent of their value added from the CAP. To simplify the calculations further, suppose that Ukraine is treated exactly like one of the old EU-15 members and is not subject to the temporary restrictions applied to the new members. Finally, agriculture produces 14 per cent of Ukraine's GDP and the Ukrainian economy accounts for 0.45 per cent of EU-25 GDP. Consequently, the maximum amount of CAP support to Ukraine would be 0.013 per cent (=20%*14%*0.45%) of EU-25 GDP.

As regards the Structural Funds, the calculation is straightforward. Under existing rules, the amount of Structural Funds that a country may receive is capped at 4 per cent of its national GDP and, as before, the Ukrainian economy accounts for 0.45 per cent of EU-25 GDP. Therefore, Ukraine would get 0.018 per cent (=4%*0.45%) of EU-25 GDP at most.

Since the EU budget approximately equals 1.2 per cent of EU-25 GDP, this implies that Ukraine's contributions to it would amount to about 1.2 per cent of its GDP, which, as above, corresponds to 0.45 per cent of that of the EU-25. Therefore Ukraine's contributions to the EU budget would represent 0.0054 per cent (=1.2%*0.45%) of EU-25 GDP. After subtracting

contributions from total receipts, Ukraine's maximum total net receipts from the EU budget would then reach 0.025 per cent of EU-25 GDP. The main findings of these calculations are summarised in Table A.1. Since EU-25 total GDP presently amounts to €10,270 billion, the annual net cost of Ukraine's membership would be €2.46 billion.

Table A.1: The cost of Ukraine's membership of the EU (in % of EU-25 GDP)

CAP	0.0126%
Structural Funds	0.0179%
Total Receipts	0.0305%
Total Contributions	-0.0054%
TOTAL NET RECEIPTS	**0.0251%**

Source: author's calculations

Notes

[1] The geographical coverage of the ENP includes some former Soviet republics (Ukraine, Armenia, Azerbaijan, Belarus, Georgia and Moldova) and countries in the Mediterranean region (Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Palestinian Authority, Syria and Tunisia).
[2] This remark follows from the logic of two-level games, firstly proposed by Putnam (1988). Using his terminology, the requirement of unanimity among its member states greatly restricts the EU's range of acceptable outcomes (its "win-set") when it negotiates with a third country, implying that the final agreement will tend to be quite close to the EU's position.
[3] However, as mentioned in Section 2, the necessary precondition for the opening of negotiations for an FTA is Ukraine's accession to the World Trade Organization.
[4] Here we abstract from the institutional provisions governing the EEA. For more details on this subject, see Vahl (2005).
[5] Data were not available for all EU member states.
[6] Data on political freedom in Ukraine for 2005 are not available yet.

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European Corporate Governance: Harmonisation Through Knowledge Management?

Gabriele G. S. Suder & J. Michael Payte

1. Introduction

The diversity of corporate governance systems internationally has been profoundly analysed in regard to international convergence (Rubach and Sebora, 1998), the conceptualising of national differences (O'Sullivan 2000), the research about two dichotomous models of Anglo-American and European models, and by classifying the systemics of corporate governance along the activity or rigidity of labour, financial markets and ownership in particular. European models have fostered academic attention about national variations also through the studies of Cernat (2004), Dore (2000), Gerlach (2000), and Martin (1999) for Eastern Europe.

In this article, we acknowledge the importance of these works by using and complementing the conceptual framework with a convergence model that aims to use knowledge management (KM) concepts for the convergence of corporate governance on a European management scale. We examine both the academic and the institutional attempts to conceptualise a convergence in advanced capitalist economies. For instance, the OECD Ad-Hoc Task Force on Corporate Governance developed a set of non-binding principles, elaborated in conjunction with member states, other international organizations and corporations. The principles were set to build upon past and recent experience, and to lay a basis that could assist parties in developing rigorous, possibly converging standards for publicly traded companies. However, these principles were not to substitute private sector 'best practice' principles; rather, the initiative attempts to enhance synergy between macroeconomic and structural guidelines (i.e. the overall business environment and fixed governmental settings). At the same time, the European KM Forum is debating a common European framework reflecting an interdisciplinary consensus towards convergence issues (EKMF 2001: 8). The similarity and possible cohesion between the two debates is striking in the clustering of objectives obtainable as results, and the usefulness of the KM approach to convergence concepts on European corporate governance level, in regards to usability. Key characteristics of the KM approach are simplicity, recognition, convenience, availability, evolution, quality of network, focus on ergonomics, transparency and dissemination of results, and a knowledge based non-technological solution method for convergence. If we compare the European Union to a KM organized corporation, then we can attempt to benefit from KM determinants: Explicit knowledge offers great "potential for value creation because of its replicability potential" (Grant in Despres and Chauvel 2000: 33). We argue that national corporate governance models contain this explicit knowledge and therefore a high potential for convergence along the above-mentioned key characteristics taken from KM, that allow us to develop a European convergence model and to research the methodology of value integration.

Over the past two decades or so, multinational corporations (MNCs) that have emerged as major forces in the global economy have been the origin of important changes in the corporate governance principles at national and international level (see the works of Fukao 1995). In particular, this is due, not only to the derivatives crisis including Barings, Metallgesellschaft, Procter & Gamble and Sumitomo, but also the Asian financial crisis of 1997;

the end of the bubble economy with the crises of Cendant, Enron, WorldCom, Parmalat; director compensation scandals like that at the New York Stock Exchange, Tyco, GE, ABB, Vivendi, Mannesmann, and the consequent 2002 American Sarbanes- Oxley Act, which led to the establishing of new national regulatory principles such as The Public Company Accounting Oversight Board (PCAOB) in the US, as well as at NYSE and NASDAQ (Holmstrom and Kaplan 2003; Baums and Scott 2003). The European Union (EU) is subject to an evolution of national corporate governance principles that have given rise to heated debate about cross-national diversity and possible standards on an EU level. Will there in fact be twenty-seven different and independent supervisory boards set up? The benefit of convergence will be discussed.

Corporate governance frameworks are elaborated from legal, regulatory and institutional environments of a large economic context in which the MNC works. They are also based on business ethics and the responsible business image that the corporation advances in the long term (OECD 1999). In this paper, a selective comparative study sheds light on the business environment that is at the origin of European corporate governance models, and their separation between ownership and control, the legal sets behind corporate law and corporate finance, a comparison of the role of the board of directors, and executive compensation. From this comparative approach, we conclude whether the trans-nationality of knowledge management in MNCs is effectively a driving force that has the potential for the convergence of the models existent in the European market, given that the EU creates a harmonized, common set of policies and procedures in numerous fields that crucially determine the *modus operanti* of corporations. The European Commission's 'Modernizing Company Law and Enhancing Corporate Governance in the European Union' plan, the European Corporate Governance Forum, and the continuous, - if for some, still hesitant - dialogue, are signs that future harmonization can be envisaged on a pan-European regulatory level. As this paper is being written in the mid 2000s, a form of harmonization and convergence is emerging between the EU and the US Sarbanes Oxley Act as Frits Bolkestein, EU Commissioner for the Single Market and William McDonough, Chairman of the US Public Company Accounting Oversight Board (PCAOB) have begun to work on a "constructive, co-operative way forward" that will permit joint co-operation on enforcement (*Financial Times* 2004: 9). This would have been unthinkable not so long ago.

The analysis is organized as follows: The first section presents a definition of corporate governance and related international framework information. We make reference to the lessons that can be learned in research from the recent corporate governance scandals in Europe. We also expand on the current theoretical literature of internationalization and harmonization. This is followed by a second section with a brief review of empirical work on European corporate governance models that allow us to classify the prevailing models and to elaborate, by way of analogy, an integrating model. The third section defines the variables necessary for convergence on EU level and an EU model development. This section then studies the theoretical impact of trans-national knowledge management; the discussion is held at a theoretical level. We offer a proposition for a model that uses KM theory in order to advance the understanding of the challenges that convergence embed for management and organizations. The last section offers some concluding remarks that underpin our cross-disciplinary approach that is strongly inspired by actor–centered institutionalism (Scharpf 1997) in that we believe in the strong mutual impact of the relationship between institutions and corporations.

Through systemised modelling of corporate governance approaches, we analyze the theoretical setting available and challenge the agency-theory regarding the theory's premise that there are just two stakeholders – managers and shareholders. The common knowledge of corporate governance models was created separately through tacit and explicit actors and divergent foundations in the past. However, dynamic interaction over time affects the orientation of the CG model that evolves along the co-evolution of the corporate environment (McKelvey 1999) and inside the organisation (Spender 1996) through what can be labelled a community of practice (Wenger 1998) that deploys codes of best practice with a replicability potential. A model and methodology for a European convergence harmonization

are developed that are based on Spender and Grant's theorem that an organization's primary source of value creation is its efficient usability of knowledge.

This article investigates, hence, the link that can be established between corporate governance convergence and KM methodology, and its impact on corporate competitive advantage: Does convergence of models on a European level potentially inhibit or foster corporate reactivity as referred to by Scharpf? Does the harmonized corporate governance model (CGM) have the potential to allow knowledge management the ability to create, transfer and integrate value through the dissemination of best practice and community of practice- inspired implementation?

2. Corporate Governance Theory and Internationalisation

The study of internationalisation focuses on of corporate governance analysis, mainly on agency–theory and its impact on convergence towards an Anglo-Saxon system. We challenge this theory and develop a proposition for a European scale model that is not exclusive to this area in its potential implication, but founded in the particular diversity of the European management and organisations that provide the ideal playing field for the forces of regional harmonization along the actor-centred institutionalism known from sociology. We believe in value creation through diversity, and challenge the label of 'fragmentation' that implies negativity. As such, this article does not attempt to discuss either the impact of sociology or to examine institutional configurations that are discussed in the research of Aguilera and Jackson (2003) and others, but rather to propose a facilitating model for convergence.

The substantial direct investment in foreign countries and the deeper and wider integration of the EU, imply an active management of offshore assets and not just holding them as a passive financial portfolio. The Single Market compels European management integration of operations located in different countries, in a competitive game that embraces multiple markets and multiple strategic options. Internationalisation generally comes with currency fluctuation and exchange risk, and economic performance measured in multiple currencies. This risk is superfluous in the Euro-zone countries but persists with all other European countries. This defines the company determination of governance structures and mechanisms that serve and control organizational functioning. The MNC that follow the example of the first European colonial trading companies in the 16th and 17th centuries (Muchlinsky 1995) are explained in their existence by the theory, established by Hymer (1970a; 1970b). They exploit comparative advantages by going abroad, at the same time internationally integrating operations. Recent theory states that in the case of transactional market failure, the corporation must internalize markets to retain monopolistic advantages across borders (Dunning 1988). Rugman and Verbeke (2004) demonstrate that the economically integrated region is, in this context, the main market for MNCs, stating that "The regional concentration of sales has important implications for various strands of mainstream IB [International Business] research, as well as for the broader managerial debate on the design of optimal strategies and governance structures for MNEs", i.e. corporations that produce and/or distribute products/services abroad (Rugman and Verbeke 2004: 3). The costs of international operation and of Europeanisation must be offset by these advantages, and the extension of Coase's microeconomic theory (the firm as a boundary with internalised exchanges) to the larger business environment, leads us to argue that in the integrated market, corporations also re-allocate governance, by adopting international or trans-national strategies: Levitt (1983) is probably one of the strongest advocates of the standardised approach to international business operations, that have been adjusted by modern IB research recognising that, MNCs answer to and exploit the diversity in national structures; while Prahalat, C.K.; Doz, Y. L. (1987) and others explore the issues of local responsiveness, and develop the internalising model of foreign expansion (Buckley and Casson 1976; Rugman 1981). Depending on the strategy adopted by the corporation, it benefits from differing economic, social and regulatory business environments.

Organisational complexity in the particularly diverse European market calls for the study of the governance mechanisms of corporate governance (for important literature reviews, see Pettigrew 1992; Huse 2000). We need to go further than the analysis of the control of the executive and the protection of the shareholder. If companies need to manage complex demands across barriers of distance, time, language and cultures, they also need to reply to the opportunity or threat that harmonisation on European level may pose. This paper, therefore, explores the relationship between a selection of harmonisation and convergence issues with regard to reporting and corporate governance in the EU, thus challenging the agency–theory's narrow premise that there are just two participants – managers and shareholders (Dalton, Daily, Elstrand and Johnson 1998; Shleifer and Vishney 1997; Dalton, Daily, Certo and Roengoitya 2003) and their attempt to bring each other's interests in line (Walsh and Seward 1990). We maintain that there are more than just two sets of participants. These include, the non-management employees, the customers of the corporation (which is the reason for the corporation's continued existence) and the overall environment in which the corporation operates. We also include the community at large in which the corporation operates. This is particularly significant what with management pursuing a course of continued existence and improved performance, such as better and more competitive products, improved financial performance, production or product enhancements that propel the corporations forward rather than "strip mining" the corporations' assets and goodwill. We support the thesis that corporate governance traditionally focuses on the control of the executive by the board and the stockholders, "but also the contractual covenants and insolvency powers of debt holders, the commitments entered into with employees and customers and suppliers, the regulatory issues by governmental agencies, and the statues enacted by parliamentary bodies" (Baums and Scott 2003: 5). This comprises the broader macroeconomic context including competitive conditions in the many markets in which an MNC operates. For instance, the International Organization of Securities Commission, in 2000, recommended accounting standards to be used by multinational issuers for financial statements for cross-border offerings and listings. The European Commission proposed a regulation in February 2001 to require listed companies to use international accounting standards by 2005 in consolidated statements. This move is a strong sign of the coordination that was enhanced over the past five years, including a supervisory system "to guarantee representation of the full European interest" (EFRAG proposal (www.iasplus.com)). We argue that the European Union will realise a convergence of corporate governance along the lines known by the setting of international accounting standards, embedded in the particular diversity and along the developments that KM convergence will open up.

A further school of corporate governance theory, the resource dependence theory, emphasises the role of the executive in the enhancing of organisational functioning, its position in the competitive environment and strategy (Johnson *et. al*. 1996; Dalton, Daily, Johnson and Ellstrand 1999). Contributions to the modes of functioning and reporting are herein dependent on the access of resources that can be furnished by directors of the company, mainly from the outside. This theory attempts to complement the agency-theory, just as the stewardship theory (Davis, Schoorman and Donaldson 1997,) does, by reinforcing the attention given to the mutual interests between executives and shareholders, according to the theory that executives will generally strive to improve their long-term image by improving financial performance indicators, which profits shareholders' return (Baysinger and Hoskisson 1990). Their potential conflict of interest as studies by Jensen and Werner (1988), Daily and Johnson (1997), mainly help to explain the succession process (Shen and Canella 2002), while further studies permit conceptualisation of class hegemony, the legalistic theory, and signalling theory and compensation criteria. Agency-theory is, however, the dominant framework used for the analysis of corporate governance models, as developed by Berle and Mean in 1932. As the theory makes assumptions that were challenged by an important body of theory, we turn to the analysis of research of the corporate environment that can explain a multitheoretical view as defended by Lynall, Golden and Hillman (2003). Our approach is to shed light on corporate governance models in Europe. We categorize systems on the basis of criteria that have become recently available from the current governance scandals, and that call for a study of the possible harmonisation, on EU level, of either corporate governance models, or guidelines concerning best practice.

3. Systemic Future of Corporate Governance in Europe

Institutional and corporate organisations gain their legitimacy and image from sources of performance that potentially homogenise the process of reporting; this interaction was largely researched by DiMaggion and Powell (1983). It can be complemented by the fundamental research concerning the role of KM that states that a high stock and diversity of knowledge supports a high performance potential for the multinational economy. In both disciplines, it is the internationalisation, the sophistication of the environment, and bottlenecks in legitimacy and effectiveness that drive a convergence of knowledge, in order to (1) develop economics of ideas (Despres and Chauvel 2000, pp. 9-15), (2) cognitive science to understand how people function herein, and (3) best practices satisfying unique demands to 'customize' legitimacy and control it.

The systemic failure of public trust in the corporate sector has been led by a combination of collusion, conspiracy, connivance, incompetence and at the very least a culture of 'benign neglect' by the very groups responsible for the checks and balances in the business community. In the 1990's we find the seeds of this crisis being sown by the US Securities and Exchange Commission aided and abetted, by changes in the US tax code and the US Internal Revenue Service. This began with the alteration of the whole system of remuneration and financial rewards for corporate executives that were supposedly being "reformed" through the adoption of the new mantra that executive performance must be more closely tied and directly reflects the performance of the corporation. New comprehensive disclosure rules were mandated by the SEC in the Executive Compensations Disclosure Rules of 1992. While these rules and disclosures were certainly a good thing, the reforms did not end there because not only did these new rules require comprehensive disclosure about executive pay, but this event was then abetted by changes in the tax laws of the US whereby a cap on the deductibility of executive payments not directly related to performance was instituted (Daily and Dalton, Canella 2003). This prompted the introduction and explosion of executive stock option plans, which then directly led managements to the extremes of manipulation of the short term, quarter-to-quarter financial reports. For example, the false balance sheets and resulting income statements of Parmalat subsidiaries in the most recent wave of European scandals were carefully adjusted to make sense of the group's overall financial position. The black hole in Parmalat's balance sheet has now been estimated to be in excess of $13 billon. On 29 December 2005, Parmalat's shares were suspended indefinitely on the Milan Stock Exchange. Parmalat used the Cayman Islands, the leading off-shore tax haven, to raise more than US$1 billion; "Milan prosecutors asked judges to indict 29 individuals and three companies on charges related to the alleged fraud" (Wall Street Journal 2004). In this case, Bank of America, Deloitte & Touche and Grant Thornton are among the firms which are involved in the disappearance of €10 billion from Parmalat's books. America's Securities and Exchange Commission accused Parmalat of misleading bond investors in the biggest financial fraud case in the history of Italy. Financial fraud cases show that with greater globalisation of the world's capital market, the inadequacies of both the American and European regulators, such as the SEC and the various national regulators in Europe, are revealed. The current phenomenon began with the derivatives crisis including Barings, Metallgesellschaft, Procter & Gamble, and Sumitomo (Halpern 2000), but also the Asian financial crisis of 1997, the end of the bubble economy with the crises of Cendant, Enron, WorldCom, director compensation scandals like that at the New York Stock Exchange, Tyco, GE, ABB, Vivendi, Mannesmann, which led to the subsequent 2002 US 'Sarbanes-Oxley Act', the establishing of new national regulatory principles such as 'The Public Company Accounting Oversight Board' (PCAOB), as well as greater oversight at the NYSE and NASDAQ (see Baums and Scott 2003). Enron's collapse seemed to herald a wave of corporate malfeasance that took in US Corporate Governance such as World Com, Tyco, Adelphia and many others. While the issues of failure remain an important set of research, in the context of this article, we focus on the wave of knowledge. The knowledge that was heralded makes it clear to us that the current body of analysis need to be complemented, not only in regard to work about the possible setting of

harmonised guidance, but also about the management and transfer of corporate governance knowledge on a European scale.

The Parmalat case, followed by Ahold, Adecco, and now Shell, is not isolated in the European business landscape, but at the same time, the problem cannot be generalized. Despite the existence of a single market for goods, services and capital, Europe projects a very diverse picture in the functioning of corporate governance mechanisms (Aguilera and Jackson 2003; Berglöf 2000; O'Sullivan 2000; Weil, Gotschal, Manges 2002). These differences are due to variations in shareholding structures and different social and economic traditions. With the single market measures gradually achieving their effect and the market playing a bigger role in corporate control, a gradual convergence in corporate governance standards is projected.

Improvements in corporate governance practices (best practices) could increase Europe's competitiveness and enhance the attractiveness of its equity markets. Ethical responsibility and stronger internal controls are defences against future Parmalat style scandals. A successful convergence through knowledge management and transfer on European scale has the potential to increase the economics of ideas and enhance corporate legitimacy. This suggests that a convergence model has to be developed that satisfies KM criteria, and that is based on the diversity found in the theoretical and practical settings.

The previous discussion highlights essential requirements faced by the convergence and transfer of corporate governance knowledge. It follows that we can categorise the empirical and conceptual works on European corporate governance models as presented in the literature review. Corporate governance has been the reserve of the national law systems of each member state (Van der Elst 2002; EIRO 2002). This is the foundation of a variety of systems that can very broadly be classified as the Anglo-Saxon, Nordic and the German systems (La Porta *et. al.* 1998). Tables 1 to 3 present a categorising of European states by 'legal traditions', 'corporate law' and 'corporate finance' that is indicative, but not exhaustive. These categorisations allow us to understand not only the diversity, but also the possible convergence potential that particular corporate governance models in Europe may represent.

Table 1: Indicative Categorising of European states by Legal Traditions

Legal Tradition			
Common Law	*Civil Law*		
	French	**Scandinavian**	**German**
Ireland	Belgium/Luxemburg	Denmark	Austria
UK	France	Finland	Germany
	Greece	Sweden	Netherlands
	Italy		
	Portugal		
	Spain		

Adapted from Emmons and Schmid (2000)

Cont. over

Table 2: Indicative Categorising of European states by Corporate Law

Corporate Law		
Shareholder versus Stakeholder focus		
Company Based	*Enterprise/Stakeholder based*	
Shareholder	Trade Unions / Collective Bargaining	Co-determination
Ireland UK	France Greece Italy Portugal Spain	Austria Belgium Denmark Finland Germany Luxemburg Netherlands Sweden

Adapted from Berglöf (2000); EIRO (2002)

Table 3: Indicative Categorising of European states by Corporate Finance

Corporate Finance		
Outsider	Insider	
	Bank/State	**Bank/Family**
UK Ireland Finland	France Greece Germany Portugal Spain	Belgium Denmark Sweden Italy Netherlands

Adapted from Berglöf (2000); EIRO (2002); Walter (2002)

Table 4: European Best Practice Codes (selected)

	UK	**France**	**Germany**	**Italy**
Board independence	1/3 non-executive directors (NED's) majority independent	Majority independent	Unspecified number of independents	Adequate number independent
Separate Chairman/CEO	Split recommended	Do either	Required by law for larger companies	No
Audit committee composition	At least 3 NEDs, at least 2 of them independent	2/3 independent	Minimal guidance	All NED's
Executive pay disclosure	Yes	Yes	Encouraged	No

The Economist (2004a: 51)

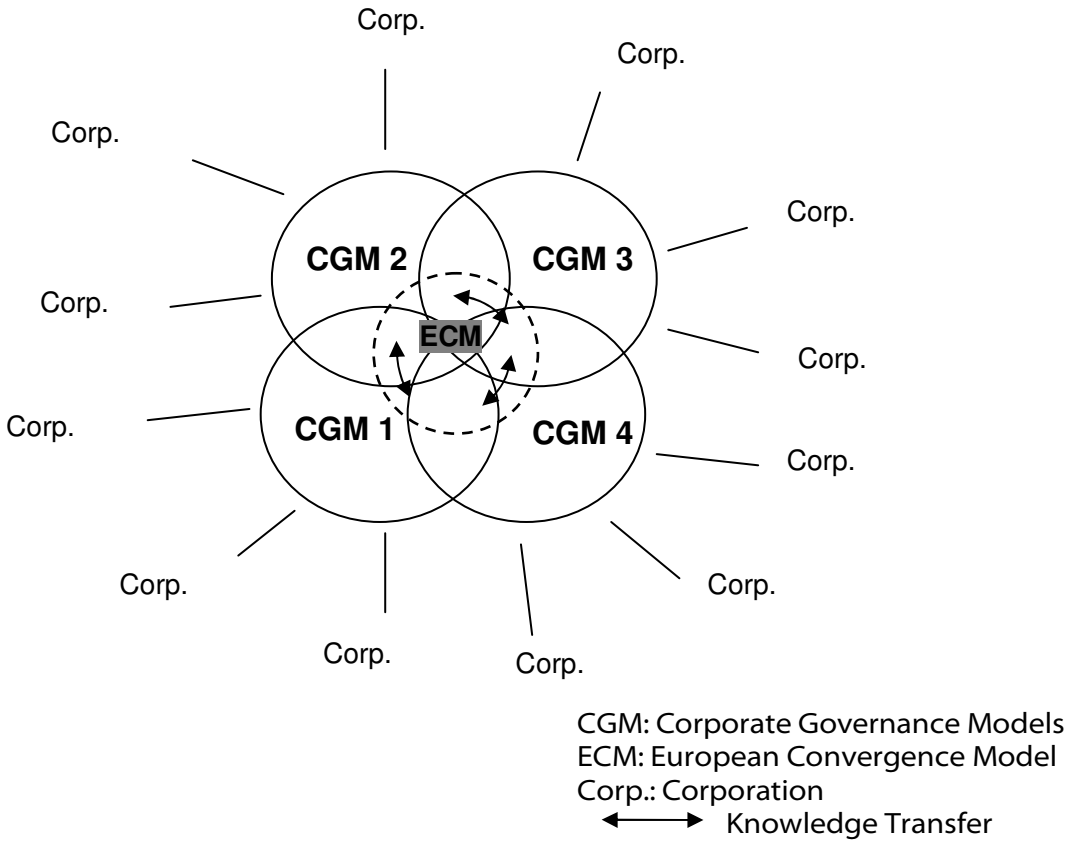
We have found that in Legal Tradition, it is useful to distinguish between Common Law and Civil Law foundations of governance models; in the latter category three dominant streams of thought emerge and are classified as French, Scandinavian and German. Legal traditions and systems, according to Weil (2002), La Porta *et al*. (1998), determine the rights and obligations that rule the government principles in regard to investors, and therefore the shape of corporate finance, reporting, and best practices as categorised in Table 4.

In Corporate Law, we found tendencies relating to a 'Shareholder' versus 'Stakeholder' focus, depending on the model. It is of particular interest to note that in the category Trade Unions / Collective Bargaining or Co-determination, we find that the above mentioned Scandinavian and German stream are considerably coherent. Then the distinction in Corporate Finance and reporting mechanisms that found a focus on either Outsider or Insider mechanisms, presents, for example, Germany and Finland in different categories than the countries that appeared to subscribe to a similar governance model in the two prior tables. Consequently, there is the potential for the introduction of a common denominator.

4. Managing Convergence and Knowledge Transfer: Discussion and Assessment

The diversity of models defines the variables necessary to converge on an EU level if harmonisation is to be achieved, and an EU model developed. Three key capabilities of knowledge management in MNEs are sensing, responding, and implementing. On an organisational level, these translate into knowledge recognition (explicit and tacit), knowledge value creation and convergence, and knowledge integration. It has been argued that for mature MNEs, the development of valuable skills can occur at any location of operation, at home or in foreign subsidiaries (Berkinshaw and Hood 1998; Gupta and Govindarajan 2000, Anderson, Forsgren and Holm 2002). It can be noted that given the diversity of European models, and the categories that can be established thereof, a European MNE can exploit location advantages in corporate governance issues that are potentially harmonised by the EU. The harmonisation of corporate governance models along the knowledge-based theory allows for the tackling of uncertainty solutions if types of knowledge relate to the types of uncertainty in corporate governance.

Diagram 1: Convergence Modelling for European Corporate Governance



In Diagram 1, a Convergence Modelling for European Corporate Governance is conceptualised. The number of CGMs (CGM1, CGM 2…) is arbitrary and depends on the categorising that is applied, by legal system, financial system, and so on, as represented above in Tables 1 to 4. This means that we are not restricting the number of national models in the European market to four; but the figure is useful in illustration of the simplicity and comprehensiveness of the model only.

To each national model, a quantity of corporations or their subsidiaries subscribe. If a European convergence is to be based on knowledge transfer and integration, then this ECM will allow the dissemination of what is most recognised, useable, available, simple and flexible in each of the currently distinguished models. Corporations can then subscribe to the model (Diagram 1); this would serve the corporations and institutions in the Europeanised business reality. This assumption facilitates the implementation of continuous reporting, controlling and monitoring of multi-structured corporations.

It was found that the collapse of public trust in the corporate sector meant that, potentially, the compliant and moribund members of the Boards of Directors were unable to challenge charismatic chief executives in the mature European economy. The collusion of the corporation's commercial and investment bankers created hidden and ticking time-bombs in special purpose vehicles (SPVs) both on-shore and off-shore which were susceptible to exploding when the pressure for financial disclosure exceeded the maximum sustainable level.

Securities analysts following the companies, (by reason of change in their mandate, by the managements of the commercial and investment banks, from reasonably independent and accurate analysts and reporters of a corporation's outlook) changed into agents of new business for the corporate finance departments of the investments banks; taking their specialized knowledge with them. Credit agencies and their analysts were virtually hamstrung in their ability to analyse corporate financial statements and reports. The corporate governance scandals also showed that there is a traditionally benign shareholder culture dominated by institutional managers that have only recently begun to find an activist voice. This needs an organisational stimulus to transfer knowledge and integrate it into control structures.

Integration and implementation are based on coordination that needs to focus on the arrangement of what is the most feasible to use in the European corporate environment, through the knowledge transfer that takes place in the ECM, Diagram 1. Whether the knowledge is explicit or tacit, corporations and public policy actors face a complex process, in which separate models are specialised and retain specialist knowledge, comparable to Grant's intra-company model (Grant 1996). The complexity is then the dependent variable of order creation along the concepts studies by Lewin (Lewin 1993).

While published financial statements are today virtually opaque and impenetrable to even the most sophisticated financial experts, as well as to the last line of defence, the credit rating agencies and their analysts, an efficient European model can be based on the dissemination of what is most recognised, useable, available, simple and flexible in each current model that can be distinguished. The corporations that subscribe to these models are identified in Diagram 1. From the analysis of these models arises a common knowledge of corporate governance that was created separately in the past, and that will be a dynamic for interaction between public policy and the corporate sector over time. This dynamic and interaction affects the orientation of the convergence model that evolves along the co-evolution of the corporate environment (McKelvey 1999) and inside the organisation (Spender 1996) through what can be labelled a community of practice (Wenger 1998) that deploys codes of best practice.

Looking ahead, the clean-up of corporate governance scandals has begun. The issue of strengthening the resolve and authority of the members of the Boards of Directors is at first sight mandating the expansion and greater authority of "non-executive" members of the

Boards of Directors. "It has been shown that a well-organised and determined group of non-executive members of a Board of Directors can in fact be a powerful force to improve corporate governance by reining in over-mighty chief executives" (*The Economist* 2004b). The traditional approach to appointing members to Boards of Directors has been for the chief executive to hand-pick the strongest supports from inside a firm and then fill in with their "golfing" pals for the remainder of the positions. Improvements in accounting and auditing have now received a "kick-start" both in Europe and the US, first through the "knee-jerk reaction" legislation known as Sarbanes-Oxley passed by the US Congress in 2002 to strengthen and repair weaknesses in corporate-governance, auditing and accountability. These changes, as well as the Parmalat, Ahold, Adecco and Shell scandals in Europe have given the necessary boost required for European action. Now a key question here is the co-ordination/harmonisation between the US and Europe as well as across the incumbent pre-200415 member countries and the issue of how to include the newest 12 members that are undoubtedly technologically and methodologically behind current practices. The US has established the Public Company Accounting Oversight Board (PCAOB), the UK may not be far behind and there will surely be more to come. Warnings are already being posted by such organisations, such as the UK's Institute of Chartered Accountants, about how overreaction to recent scandals could lead to huge increases in red tape and higher costs.

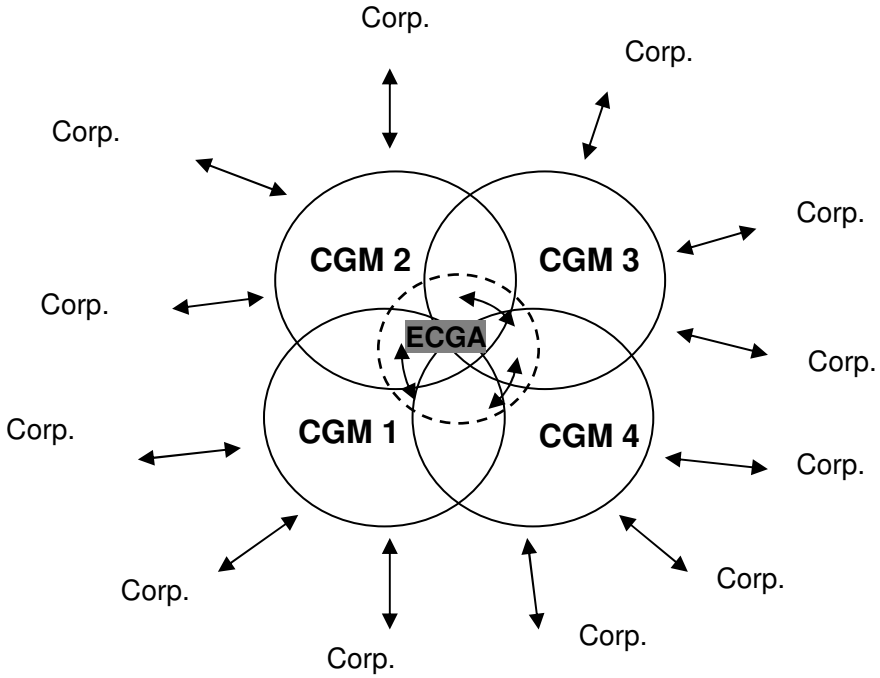
A key concern is whether the cures being proposed as well as the admitted need of co-ordination/harmonisation will create a straight jacketed environment so structured that creativity and inventiveness of the modern corporation will be stifled. Are we unleashing a new and counterproductive chain of events that will also operate under "The Theory of Unintended Consequences" causing the pendulum to swing massively so far the other way that it will create a period of stagnation just when the world economy needs the maximum of creativity to stimulate growth? What is the right balance that will "keep the game straight and honest" but not saddle it with so much red tape that we are inadvertently starving the engines of growth and progress. Are we going to create so much regulatory co-operation and harmonisation as to create a new and un-thought of form of systemic risk in the corporate world? How are we going to institute "best practices" reaching both sides of the Atlantic as well across the current 27 EU members? How do we maintain creativity and diversity without sinking to the lowest common denominator or the blandness of averaging across all these dynamic cultures? After all, the basic premise of the creation of the EU is the stimulation of the free flow of goods, people and capital and to create greater economic stability and growth and a better life for its citizens.

Clearly, we must have improvements in the technical knowledge and authority of the oversight committees on the Boards of Directors; clearly, we must have some means of rebalancing the theoretical checks and balances of our economic systems.

"Opening the Doors of the Boardroom" the clarion call "to end the 'magic circle' of white middle-aged men" otherwise known as the 'old boy network' of cronyism that has dominated boardrooms across the Anglo-American-European corporate environment. This is the essence from a report commissioned by the UK's Department of Trade and Industry as reported by Stephen Bubb in *The Times* (26 April, 2004: 27). A key element of the report cites an increasing amount of creativity, effectiveness, enhanced corporate decision making and greater oversight through the opening up of corporate governance to a much greater range of different backgrounds and experiences. This replaces the traditional, exclusive corporate friendship and personal contact style of recruitment. The first steps in establishing this concept was the UK government's establishment of an appointments process though their Public Appointments Unit; this concept could now be greatly expanded into the commercial sector. Something of this nature could easily be replicated across the European corporate landscape, not only opening up corporate governance to wider segments of each individual member state, but the opening up of availabilities and appointments across the EU for greater cross cultural board interface and membership. This is a key model that can be used to enhance corporate governance through effective cultural harmonisation, knowledge transfer and knowledge management and fits very well into the model represented in Diagram 1 with this set of cross-cultural board members fitting into the Corporate

Governance Models and communicating ideas and concepts through the Knowledge Transfer of the European Convergence Model. This is illustrated in Diagram 2 below.

Diagram 2: Convergence Modelling for European Corporate Governance



EU1, 2, 3, 4: EU Member States
ECGA: European Corporate Governance Appointments
Corp.: Corporation
⟷ Knowledge Transfer: A request for Non-Executive Directors from Corps. To ECGA, response and recommendations in return

This raises the bar of intellectual capacity at the corporate board level by opening the doors across all these dynamic cultures to a broader spectrum of highly talented, competent and committed individuals rather than risking the alternative of "sinking to the lowest common denominator or the blandness of averaging", as referenced above. This gives the independence of board members the authority of oversight that can recalibrate the system of checks and balances designed to protect the international market system by introducing enhanced technical knowledge, innovation and creativity at a time of great need to thrust industry forward. Establishing a cross industry mechanism such as this model, operated and staffed by a broad range of participants from the European corporate community to assist in sourcing, vetting and matching individuals, interests and skills with corporate governing boards would be a giant stride forward without creating another Brussels based governmental bureaucracy surely to spew out reams and reams of rules, regulations, guidelines and directives. This would be a cross- European industry based initiative with the understanding of the needs and requirements of corporations in mind and it would be a strong signal to government officials, regulatory authorities, investors, analysts, employees, customers and their communities, that industry was in fact serious about enhanced corporate governance and restoring public confidence in the corporate community.

5. Conclusion

From the start, we supported the thesis that corporate governance focuses traditionally on the control of the executive by the board and the stockholders, "but also the contractual covenants and insolvency powers of debt holders, the commitments entered into with

employees and customers and suppliers, the regulations issues by governmental agencies, and the statues enacted by parliamentary bodies" (Baums and Scott 2003: 5). The research and conceptualising that was used for this article have allowed us to establish an important link between the study of corporate governance solutions and the lessons that can be learned from KM for a harmonisation of models that report and control corporations that strive for efficiency in the international Europeanised environment.

It has been noted that three simplifying assumptions have blocked progress with the trans-national processes: (1) that subsidiaries are symmetrical ("the United Nations syndrome"); (2) that HQ-subsidiary relationship is based on pattern of dependence / independence; and (3) that corporate management exercises control uniformly. The recent cases of corporate scandals and the increasingly important body of research in the field argue that we evolve from symmetry to differentiation in the European strategy model. If this is so, then each unit has its own distinct role to play in corporate governance and it subscribes to a divergent corporate governance model. Public policy, taken as a response to the Europeanisation of the economic and corporate realities, needs to respond to a harmonisation of standards or guidelines. If corporations and their subsidiaries and affiliates move from dependence or independence to inter-dependence, this is probably most likely through inter-unit integration mechanisms in business sectors. If however Europeanisation leads from uni-dimensional control to differentiated control, then it is important to make better use of the social control mechanism. The transfer of specialised knowledge from each CGM into the CM necessitates the integration of available, usable, simple, and dynamic knowledge.

In this article, we have elaborated (a) a possible ECM, and (b) discussed the usability of KM to the harmonisation of such value in the European framework in which we followed an actor–centred institutionalism (Scharpf 1997). We believe in the strong mutual impact of the relationship between institutions and corporations. Yet, our concerns are raised as to how these changes in corporate governance will impact corporate productivity, as well as corporate competitive advantage given asymmetrical adoption and implementation programs and time tables. Also, will a convergence of models on a pan-European basis level the field and will this convergence inhibit or foster corporate reactivity and momentum. At this time, it is still too early to analyse or project where the balance lies between enhanced corporate governance accompanied with accurate reporting versus some overly ambitious regulation that may prove to load business with burdensome cost, constraining rules and regulations that could create a straightjacket smothering creativity, innovation and other improvements. These issues will remain on the research agenda for a long time. In a market driven system such as the one in which European mature corporations operate, the freedom to fail must not be eliminated in our zeal to ensure a clearly transparent system of governance and reporting.

Notes

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BOOK REVIEW

Maurizio Ferrera (2005). *The Boundaries of Welfare: European Integration and the New Spatial Politics of Social Protection*. Oxford: Oxford University Press

Elke Viebrock
University of Edinburgh

This book takes as its starting point the tension between national systems of social solidarity and European integration. Ferrera's key argument is that the political legitimacy of nation states rests on closure – i.e. they represent a cohesive community, whose members feel that they are reciprocally linked by common ties against social risks within clearly demarcated boundaries – whereas the building of a European community and identity is based on opening and by this weakens the national boundaries which demarcated the territorial range of social protection. European integration is thus redefining these boundaries between insiders and outsiders of social sharing systems and by this challenging the foundation of Europe's national societies and political systems as welfare states.

Illustrating what he calls the "new spatial politics of welfare" (p. 6) is a main objective of this book. He sets out to answer to what extent and in what ways the process of European integration has redrawn the boundaries of national welfare states and what the effects of this development are. The concept of boundaries is key to his argumentation as they are a prerequisite for tying together individuals, groups, and territorial units and for strengthening their readiness to exert solidarity. From a geographical perspective of boundaries he outlines that EU members states become increasingly sandwiched between processes of supranationalisation on the one hand and regionalisation on the other hand. The concept of boundaries can, however, also be understood as a membership space of social interaction in which insiders share common traits or are subject to common sets of norms and rules. In this sense the welfare state has always been a bundle of membership spaces with different tiers of social provision, each with its own codified boundaries of inclusion and exclusion. European integration is now challenging both types of boundaries, quite obviously the territorial bases, but also the internal membership spaces.

Ferrera asks important questions regarding a possible destabilisation and restructuring of national systems of solidarity through European integration. As he correctly notes, the causal chain of boundary reconfiguration (or 'destructuring') only develops incrementally and a historical approach is thus indispensable. The six chapters of the book reflect his analytical framework and the historical perspective. After an introductory part, in which the main arguments and the key findings are briefly presented, chapter one outlines the theoretical groundwork on boundaries and gives a framework for the exploration of spatial politics. He draws in particular on Stein Rokkan's theoretical work on the role of cleavage structures with regard to nation-building and adopts explicitly a historical perspective. Accordingly, welfare state formation is depicted as a long-term process of structuring in the social sphere. In the second chapter he gives a historical background of the emergence and development of European welfare states until the Second World War and describes this welfare state formation mainly as a process of boundary-building or closure. He describes in this first empirical chapter how closure dilemmas were solved and redistributive collectivities bounded in different national contexts. Clear boundaries were mainly drawn through compulsory insurance between those who are obliged to enter the protection systems and thus gain entitlements and those who are not eligible to join the insurance schemes. Chapter three then concentrates on the following thirty "golden" years of the welfare state until the

mid-1970s. Despite the general economic prosperity and expanding welfare state budgets, this was when the first challenges from within national welfare states took place in the form of growing demands for more generous and differentiated welfare systems, leading e.g. to the institutionalisation of supplementary pension systems. This was also the time of the foundation of the European Communities and thus first external challenges to national welfare state boundaries in the form of regulations for migrant workers came about.

Chapter four focuses on the period after the first oil shock and thus on the time when breaches into the internal and external boundaries of solidarity became more visible. It illustrates how EC laws on social protection as well as free movement and competition regulations significantly contested national social sovereignty. Member states could, e.g., no longer restrict welfare state provision to their own citizens, but had to admit other EU-nationals automatically. With examples from pensions, health care, and social assistance the reconfiguration of welfare state boundaries by the European Union are demonstrated. In contrast, Chapter five deals with challenges to the nation state from below, namely with the impact of regionalisation on central welfare states. This revival of subnational units has, in turn, partly been promoted by European integration and did not only lead to within-state regionalisation but also to the building of transnational regions. Just as they have been pivotal for the building of loyalty within the early European nation-states, social policies have been central for winning loyalties in a process of what Ferrera calls 'competitive region-building'. The effects of this revival of older centre-periphery cleavages are exemplified in areas as diverse as health care, active labour market policies or social services. The final Chapter six summarises the main elements of his diagnosed spatial reconfiguration of social protection and examines its potential 'destructuring' effects. The book concludes with a discussion of how solidarity within the EU might be strengthened through improved citizenship rights and increased democratic accountability.

This is an excellent book. Its main strength is the clear analytical framework and historical approach. Ferrera gives a profound historical overview of the development of European welfare states and describes systematically with many empirical examples, how the institutionalisation of the European Union redefined the boundaries of its members' welfare states. Throughout the empirical part, illustrative case studies are briefly described in concise information boxes. Moreover, useful empirical data are presented in tables, and various figures provide good visualisations of the main theoretical arguments. Finally, European Court of Justice cases are referred to in order to underline his empirical diagnosis.

This book should be read by everyone who is interested in the often problematic consequences of European integration for national systems of social sharing and protection.

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Thomas Pfister
Queen's University Belfast

Much has been said about the fate of the Western European welfare state. Contributing to this vast debate Maurizio Ferrera's *The Boundaries of Welfare* clearly shows that we might be far from 'solving' many of the related key political and intellectual puzzles but that a broad range of perspectives is not adding complexity but enriching our understanding of these complex processes.

His particular analytical strategy is to focus on boundaries. Closely connected with the concept of boundary is the concept of space, which is used in a broad sense as territorial as well as membership spaces demarcated by their boundaries. Against this background, the welfare state displayed the highest level of closure in both senses resulting from long term historical processes of boundary building. The 'locking in' of insiders and preventing outsiders from entering created congruent territorial and membership spaces with citizenship as the key social marker. Moreover, this strict separation enabled entirely new levels of redistribution

on a national scale. According to Ferrera this institutionalisation of national sharing practices is the key to understanding social cohesion and legitimacy of the nation state. Hence, while focusing on the mechanism of "internal bonding through external bounding" (p. 4), the main theme of his book is whether and how the opening pressures arising from European integration affect the national welfare states of Western Europe.

The strong interest in the concept of boundaries originates in the author's admiration of Stein Rokkan, whose account is labelled by Ferrera as 'bounded structuring'. In short, this means simultaneous processes of external demarcation and internal differentiation or 'system building'. Over the history of state-building in Europe, two types of structures turned out to be most prominent: 'centre-periphery structures' linking power centres with their subordinate areas and 'cleavage structures' or those fundamental socio-economic or cultural differences that "systematically divide national communities" (p. 18). Each form is expressed in a particular configuration of institutions and organisations, which often became 'crystallized' after specific historical turning points. 'Structuring', then, denotes the stabilisation and institutionalisation of patterns of interaction, organisations, norms or social alliances. The creation and consolidation of boundaries is a key element of all structuring processes. They can be physical or symbolic, they separate territories and citizens but they also divide social groups within a society.

With regards to the concrete mechanisms of structuring, Rokkan utilises Albert Hirschmann's model of exit, voice and loyalty. Historically, long-term boundary drawing around the nation state eliminated exit options and triggered processes of 'system-building' within it. Apart from a moderate extension of Hirschmann's model to general 'options of vocality' and 'options of locality', Ferrera claims that Rokkan's framework is still convincing and could, in fact, be tested against the new conditions under European integration.

In order to do so, he concentrates on citizenship, which plays a double role as territorial marking device linking persons to states and as social marker, providing persons with rights, obligations, social roles and identities. The latter also makes it "the privileged currency of politics" (p. 37) ensuring cooperation and trust. In this context, social citizenship receives particular attention as its invention constituted a quantum leap anchoring people's life chances and establishing practices of national sharing or institutionalised solidarity. However, in order to realise social rights in a sustainable system of sharing two requirements had to be met. First, impermeable boundaries were needed to construct the solidarity-community and to prevent its economic collapse, and second, a very specific organisational form: the compulsory social insurance covering all citizens.

Departing from this insight, the empirical core of the book investigates how the large-scale boundary redrawing of European integration affects this spatial architecture of social citizenship. Does it effect in the 'destructuring' of (national) social sharing? Can we also identify 'restructuring' of social sharing at European level? Although the first seeds of destructuring can be traced back to the 'Trente Glorieuses', EU competition law and free movement regulations gained full force over the last two decades. The central study on the impact of EU legislation and case law on the boundaries of national health care systems, social assistance schemes, social protection schemes vis-à-vis third country nationals and the issues of compulsory membership and public monopoly in social insurances produces an appealing and differentiated picture. Ferrera contends that, although the member states may experience massive losses of their boundary setting capacities, this does not imply a linear process of erosion but rather a 'tug of war' in which the member states still have capacities of 'defensive restructuring'. "[A] distinctive new spatial politics has emerged, structured around locality interests and vocality strategies." (p. 165):

With regards to newly emerging structures, the author identifies a strong trend towards new forms of welfare regionalism, which are, directly and indirectly, fuelled by the European Union. His assessment of restructuring at the European level is more cautious. Nevertheless, he contends that an increasingly consolidated European catalogue of social rights in combination with the new governance instruments of the open method of coordination

could indicate an "emerging EU citizenship area" (p. 250) and thereby initiate the "virtuous nesting of the welfare state in the EU institutional framework" (ibid.).

Ferrera is not alone with his strong hope in the OMC yet the empirical basis for these hopes is still weak. Until then, some healthy scepticism might be wise. Notwithstanding this fuzzy prospect of a 'virtuously nested welfare state', the book stands out through its inventive perspective and a rich and multifaceted empirical study.

The focus on space and boundary (re)drawing allows to access highly complex processes of large scale social transformations in a very sophisticated and original way. Especially the strong emphasis on social citizenship as space and as political currency is a major strength. Ferrera convincingly demonstrates its crucial role for the territorial and social integration of the welfare nation state in the 20th century— a role that is often neglected by other, especially liberal, citizenship theories. However, despite his strong interest in social citizenship, the author is not too interested in contributing to the wider citizenship debate. It would have been interesting to tie his concept of citizenship closer to the rich body of normative and critical citizenship theories. On the one hand, this could have broadened the perspective from citizenship rights to 'citizenship in practice' and, thereby, the analysis of centre-periphery and cleavage-structures. On the other hand, such a discussion could have added a valuable normative-critical element to the study.

The empirical chapters provide a skilful and thorough investigation full of original insights. In particular, the discussion about the crucial role of compulsory social insurance and its dissolution is striking. It demonstrates that the seeds for this destructuring were planted by the welfare states themselves and that the market making efforts of the Union just interact with these conditions. Moreover, the author manages to tie these rather technical issues together with the different context of migration. Finally, his convincing argument about a trend towards 'welfare regionalism' makes a strong case to take the EU's multi-level character serious and to expand the focus to the sub-state level. In addition, this point clearly illustrates that we are witnessing processes of boundary re-drawing rather than the mere disappearance of borders. Overall, the empirical investigation of contemporary processes of destructuring and the problems of re-structuring constitute an important contribution to our understanding of negative and positive integration and their unequal relationship.

Two aspects, however, are missing. On the one hand, while Ferrera concentrates on technical and legal aspects, all processes on the normative-discursive level are left out. However, it can be assumed that normative and discursive changes are similarly important for de/restructuring. For example, the European Employment Strategy is characterised by a vast number of new political frames and policy ideas. On the other hand, the issue of agency is slightly neglected. Although the crucial role of all types of agents is clearly demonstrated throughout the case studies, the Rokkan-Hirschmann framework is rather meagre with regards to their constructive and creative potential.

In general, it could be argued that most of the possible criticisms originate from a structuralist bias inherent in the theoretical framework. While the book raises many new and original insights about the nature of the ongoing transformations, its interest in structural configurations and long-term structural change prevents critical reflections on political options, strategies and opportunities in the presence.

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