

©IdPS
Volume 1
Number 0
February 2011
ISSN 2039-8573 online

DISCIPLINARIE INTERCIE POLITICIE BYLUS POSTUDIE

edited
by
UNIVERSITY OF TRENTO
SCHOOL OF INTERNATIONAL STUDIES
UNIVERSITY OF SIENA
CENTRE FOR THE STUDY OF POLITICAL CHANGE



FEBRUARY 2011

INTER DISCIPLINARY POLITICAL STUDIES

editors

Nelli Babayan, University of Trento, Italy
Stefano Braghiroli, University of Siena, Italy



advisory board

Ebru Canan-Sokullu, Bahçesehir University, Turkey
Sabrina Cavatorto, CIRCAP, University of Siena, Italy
Nicolò Conti, Unitelma Sapienza University of Rome, Italy
Maurizio Cotta, CIRCAP, University of Siena, Italy
Vincent della Sala, SIS, University of Trento, Italy
Sergio Fabbrini, School of Government, LUISS University, Italy
Leonardo Morlino, LUISS University, Italy
Richard Youngs, FRIDE Madrid and University of Warwick, UK
Frank Schimmelfennig, ETH Zurich, Switzerland
Helen Schwenken, University of Kassel, Germany
Paul Taggart, University of Sussex, UK



editorial board

Yossef Amr, American University in Cairo, Egypt
Linda Basile, University of Siena, Italy
Marcello Carammia, University of Catania, Italy
Andrea Ciambra, University of Trento, Italy
Senem Ertan, University of Siena, Italy
Pinar Gözen, University of Trento, Italy
Kiryl Haiduk, University of Trento, Italy
Angela Movileanu, University of Siena, Italy
Chiara Toniato, University of Siena, Italy
Liana Smaldore, University of Siena, Italy



designer

Edgar Khachatryan, Marbella Design Academy, Spain



INDEX

3

vincent della sala

After the Crisis: Why Political Science and European Studies
Need to be Concerned

7

mariagiulia giuffre

The European Union readmission policy after Lisbon

20

lorenzo piccoli

The European Union and minority languages:
Evolution, achievements and contradictions in the light of
the Treaty of Lisbon

31

arianna catalano

The political economy of Turkey-EU customs union
after the treaty of Lisbon: A reappraisal

49

direnç kanol

Assessing the legitimacy of the EU

60

judy batt

The EU and the Western Balkans:
Preparing for the long-haul

After the Crisis: Why Political Science and European Studies Need to be Concerned

VINCENT DELLA SALA

*Associate Professor of Political Science and PhD Coordinator at the
School of International Studies, University of Trento*



The launch of new intellectual initiatives is always a moment of great promise, especially in the case of one that aims to showcase the work of graduate students. Scholarship pushes forward not because established scholars explore new boundaries but because the scientific community is constantly infused with new generations of scholars and ideas that force us to look closely at what we thought we understood. The aim of advanced research is not to work closely with established experts, finding new ways to repeat and confirm established arguments. Rather, it should challenge what we know, pushing the scientific community to look for new frontiers of knowledge. This journal is a welcome venue for this venture and adventure.

It comes at a time of great turmoil in politics, at both the domestic and international levels. The current global economic crisis is both a symptom and cause of great transformations in the economic and political order of the last half century. This is especially the case with the European Union. 2010 was supposed to be its breakthrough year. After nearly a decade embroiled in a seemingly endless debate about institutional reform, the EU could look to the Lisbon treaty as the map to guide its way through internal politics and even a central position on the global stage. The first signs of the global financial crisis seemed to confirm Europe's approach to economic governance and placed it in a position to be the model for transnational governance on a global scale. The Copenhagen summit on climate change had the potential to put into relief the EU's global leadership and its normative power. Yet

as a new year begins, not only were the lofty aspirations dashed, but a serious crisis of confidence has sunk into the EU. Even measured political leaders have mused openly about the future of the single currency and of the EU itself.

We have read and heard a great deal about the volatile economic climate of the last three years; there is no reason to try to repeat it here. But in order for us to understand what it means for how we study the EU and more generally contemporary politics, it is worth while to stop briefly to examine what were its major manifestations. While the more enduring effects of the last few years are yet to be determined, there is a lingering sense that nothing will be like it was before. This raises a number of challenges for those who study the EU. A quick glance at the major journals and books in recent years provides scant evidence that the EU would run into the problems that it did in the recent economic crisis. Could this be the equivalent for EU studies of what the sudden end of the Cold War meant for international relations? How did the EU go from being seen on the precipice of assuming a role as a global leader to the current crisis of confidence? More importantly, why did scholarship on the EU not see it coming? Political scientists have enjoyed the discomfort of economics in the wake of the economic crisis, with its certainty about economic models shaken. But we too need to take a closer look at what we took as a certainty.

The global economy, and to lesser extent Europe's, had experienced a period of strong relative growth in the first decade of the new millennium. Low borrow-

ing costs, emerging economic powers (China's admission to the WTO in 2002 was an important milestone) and expanding commercial and financial markets were just a few of the factors that led to optimism that the new economy would be free of turmoil and instability. The development of new financial instruments was supposed to provide ways to reduce uncertainty in markets by pooling different forms of risk. Cheap and available credit helped governments struggling to keep public finances under control (without having to make difficult decisions) just as much as it fuelled housing booms in the United States, Ireland and Spain. All seemed to be moving along smoothly with few signs of trouble on the horizon or reported in the scholarly journals.

It was easy to see the crisis as primarily an American problem when the first signs of trouble emerged in 2007. American consumers had been on a spending binge for most of the decade and its banking system had engaged in activities that could be described, at best, as highly risky. European banks, often seen as too conservative and stodgy, suddenly seemed like solid, safe havens. Indeed, more than one commentator and political leader began to speculate that Europe's moment had come, with the euro possibly becoming the global reserve currency. Yes, the downturn in the American economy might cause some disruption but few, in the early months of 2008, expected that the EU would be shaken to its core within two years.

There are too many steps and phases between the optimism of a few years ago and the aftermath of the sovereign debt crisis to mention here. We can simply say that there were two phases to the crisis. The first was primarily the reaction to the financial crisis in the United States in late 2008 and early 2009. What is striking in this first phase is how the immediate reflex by member states, after nearly twenty years of the single market and a decade of the single currency, was to save national banks and industries. From the unilateral decision by the Irish government to protect all of its depositors to the French government declaring that any aid to automobile manufacturers would be only for plants located in France, the logic of even a coordinated European response was lost in the scramble to protect national interests. But the problems of this first phase were only a hint of what was to come when the crisis entered into its second phase at the end of 2009. The admission by the newly elected Greek government in October 2009 that previous deficit targets had seriously underestimated borrowing requirements set

off a ripple that soon became a wave. What emerged was a consensus that there were serious structural imbalances in the governing of the European economy. This refers not only to the flows of capital within the eurozone but also to the fact that the single currency did not have the political tools to deal with a sovereign debt and fiscal crisis. After a decade of arguing over the weight of votes in the Council or whether a new figure responsible for foreign policy would launch the EU as a global actor, Europeans discovered that the real institutional reform that they needed was to create a means to transfer funds from member states that had saved to those that were spendthrift. More importantly, it was also quite clear that there was little public support for such a move amongst those countries that had their financial houses in order.

There are a number of lessons that we may draw from the last three years that should lead us to think about the way we understand the EU and global governance in general. First, almost from its first signs in 2008, the economic turmoil revealed that economic nationalism remains part of the cognitive map of policy-makers in the member states. Conventional wisdom holds that the last sixty years dedicated to the creation of a European economic space had created levels of economic interdependence that negated the appeal of economic nationalism. This is a tenet that is widely shared amongst policy-makers as well as proponents of neo-functionalism and institutionalism. The argument is based on the premise that integration has brought about a transformation in the formation of interests so that key actors cannot distinguish national economic objectives from those of the EU. The early reaction to the first signs of serious troubles across the Atlantic challenged these assertions. Member states quickly took measures to prop up their own banks and issue guarantees to protect their depositors, even after agreeing that they would not do so at a summit in October 2008. The beggar-thy-neighbour policies continued with various stimulus packages that were introduced and were very much part of the critique of Germany in the second phase of the crisis. This is not to say that protectionism has returned to Europe but that we need to assess to what extent how much "Europeanization" has taken place. Despite twenty years of "convergence" criteria, benchmarking, open method of coordination and the like, the economic crisis laid clear that European economies remain fundamentally different with respect to policy outputs and outcomes. The fear that it would be hard to hold

together a union with so much diversity may become more real than many would hope. Convergence was seen as necessary not only to avoid the fiscal imbalances of the last decade but also to ensure that there would be the necessary political and public support for any corrective measures.

Second, central to the post-war European story has been Germany's transformation from being at the centre of instability in Europe to its role as the anchor of a European polity. This was enshrined in the Maastricht treaty when, in the wake of German reunification, the Federal Republic took the bold step of committing itself to the creation of the single currency, thus abandoning the symbol of Germany's post-war recovery. Tied to this narrative of a European Germany were the central pillars of Germany's economy that supposedly looked to Europe for accessible markets for its goods and services. All this contributed to the conventional wisdom that German and European interests were indistinguishable. Events over the last two years have revealed that perhaps Germany did have a national interest after all, and that it might be distinguishable from what the rest of the EU wanted it to be. Chancellor Angela Merkel was criticized for not showing adequate "leadership" (that is, not accepting the conventional wisdom of a European Germany) and pandering to domestic political pressures. Surveys consistently show that German public opinion is opposed to any form of transfers to peripheral countries facing sovereign debt problems. The German media has picked up on this theme, which has served to tighten the Chancellor's room to manoeuvre. Also constraining Germany's ability to seek out new forms of economic governance is the increasingly vigilant role assumed by its constitutional court, which has sent clear and unequivocal messages that any further transfers of powers to the EU level would require broad consensus within Germany. More immediately, it was considered likely that the Court would strike down any new structure that smacked of a permanent mechanism to bail out member states in the eurozone. Major changes require re-opening the Treaty, and after the battles that eventually led to the Lisbon treaty, Germany is not the only member state that would have preferred not to kick that hornet's nest.

But perhaps the greatest challenge to the notion of a Germany firmly tied to and by the EU is that perhaps its interests are drifting in a different direction in a rapidly changing global economy. The percentage of German trade that is tied to Europe has been de-

clining steadily the last decade. Moreover, its recipe for success in the last decade – wage moderation and structural economic reforms – has proven hard to implement in many parts of the eurozone. It would be difficult to convince German voters that they help bail-out their partners after they have been told by their leaders that wage moderation and welfare state restructuring was the price to be paid for competitiveness in the global economy.

Third, it is early days yet but the all the attention paid to institutional change and the Lisbon treaty has been disproportionate to its impact. Meant to bring citizens closer to the Union and to rationalise decision-making, it provided neither during the crisis. If anything, what was brought into relief was that the EU institutions were largely on the sidelines, including the ECB to a certain extent. More importantly, it also became evident that the sorts of instruments to address the structural imbalances mentioned above would probably require yet more treaty reform. They also will, in all likelihood, make EU decision-making more opaque with even greater distance between citizens and the decisions that affect them. For instance, the introduction of a "European semester", whereby member states present their national budgets to their partners even before their national assemblies is surely going in the opposite direction that was hoped for when the process started in Laeken in 2001.

What does all of this tell us for research in international politics and especially for graduate research? First, it suggests that scholars, like generals, almost always are fighting the last war. Our ways of understanding phenomenon are shaped by what has happened, with the temptation tick with our cognitive frameworks even in the face of different conditions and circumstances.. For instance, a constant refrain that was heard during the last two years is that European integration has always been pushed ahead by "crisis". Even if this were the case (and this is a debatable point), it tells us little as to why this crisis happened the way that it did, at this point in time and because of what factors. In other words, it alerts us to the need to be aware that we need to find a way to balance contingency with structure in our understanding of politics.

Second, the events of the last few years are a useful reminder that we should heed Philippe Schmitter's warning that any theory of European integration also needs to be able to account for disintegration. Our main frameworks for understanding the EU – inter-governmentalism, institutionalism, and even con-

structivism – could not account for the possibility that the EU in 2010 was not the same one that the academic journals had been reporting for the last 15 years. We could accept the argument that recent events are simply more of the same “muddling through” and that this has been the way that the EU has gone ahead throughout its history. This means accepting that the context in which the main actors have to operate has not changed; that the EU’s internal dynamics operate in a vacuum unaffected by broader global developments. This points to the challenge of finding the balance between the domestic and international levels,

between the instruments of comparative politics and international relations.

Finally, the global economic crisis, along with the challenges presented by climate change, energy, food and so on, points to the need for this type of journal to breathe new life into our understanding of the world. It highlights the need to find the balance between established ways of thinking and finding venues for new ideas that push the frontiers of knowledge. Pushing boundaries is always fraught with risk; but I am sure that readers of this journal will conclude, upon reading the work of young scholars, that it is a risk worth taking.

The European Union readmission policy after Lisbon

MARIAGIULIA GIUFFRÈ

PhD Candidate at the School of International Studies
University of Trento, Italy



The author would like to thank prof. Antonino Ali for his comments on the earlier draft of this paper and the Faculty of Law of the Lund University for allowing her to conduct part of her research on EU readmission policy at its premises.

Abstract

This article conducts a brief historical excursus on the evolution of the EU's readmission policy through the analysis of readmission agreements, meant as its main legal instruments. The Lisbon Treaty is herein portrayed as an historical watershed in the recognition of both an express competence of the Union with regard to measures aimed to address the readmission of irregular migrants, and a new role of the Parliament entrusted with the fundamental power to be consulted before a readmission agreement is definitively concluded by the Council. Finally, while a scrutiny of the close relationship between national and supranational readmission strategies reveals the unwillingness of Member States to renounce their national readmission policies, a preliminary assessment of the potential role of the Charter of Fundamental Rights in the field of return of irregular migrants after Lisbon is performed.

Introduction

The issue of the return of irregular migrants has become an underlying component of the EU immigration and asylum policy, which has been progressively defined and consolidated after the entry into force of the Maastricht, Amsterdam and the Lisbon Treaties¹. The need to create a common European Union (EU) return policy has been, then, repeatedly asserted in several European Councils with the aim to emphasise readmission and return as key tools in the battle against illegal migration. This article purports to conduct a brief historical excursus on the evolution of the EU's readmission policy from the outset to the current developments through the analysis of readmission agreements, meant as its main legal instruments. Before scrutinising the premises and implications of

the consolidation of the EU's readmission policy, terminological clarifications are needed. The operational indicative definition proposed in November 2002 by the European Council in its Return Action Programme² considers return as "the process of going back to one's country of origin, transit, or another third country, including preparation and implementation. It may be voluntary or enforced." Readmission concerns, instead, "the act by a state accepting the re-entry of an individual (own national, third country national, or stateless person) who has been found illegally entering to, being present in, or residing in another state" (Annex I). The three actors involved in the repatriation process are the State that requests readmission (requesting State), the State that is requested to readmit (requested State), and the person to be readmitted (either irregular migrant or rejected asylum seeker, meant as an individual who is not in need of international pro-

¹ Treaty of Amsterdam, 2 October 1997, entry into force on 1 May 1999; Treaty of Lisbon, 13 December 2007, entry into force on 1 December 2009.

² Brussels European Council, 25 November 2002

tection). For the purpose of this study, the term illegal is used in relation to a condition and not to a person, while the terms irregular (with no regular/legal status in the host country) and undocumented (without the required papers) migrant are accepted as synonyms and extended to include also persons who illegally cross an international border without valid documents.³

Section I of the article provides a brief historical overview on the EU readmission policy, including the institutional framework, issues of competence, and an outline of the main legal instruments; Section II canvasses the broad subject of readmission agreements—designed to create a set of procedures and obligations between the contracting parties on the return of irregular migrants—by revealing how these treaties have gained notable importance and visibility since the early nineties in shaping the external relations policy of the EU and in stimulating debate on their implications for the human rights of migrants subjected to a return decision.⁴ The primary aim of Section III is to shed light on the developments of the EU's readmission policy triggered by the entry into force of the Lisbon Treaty, which strengthens the power of the European Parliament in the conclusion of such agreements and confer the EU's explicit competence in the field of readmission. An investigation of the tight relationship between national and supranational readmission strategies is also conducted as the EU's asylum and return policies constitute the general framework placed above and beyond the panoply of bilateral accords stipulated at an intergovernmental level by EU Member States and third countries.

It would go too far comprehensively to analyse the complex issue of the impact of readmission agreements on the human rights of returned migrants and asylum seekers. Nevertheless, Section IV purports to perform a preliminary assessment of the potential impact of the Charter of Fundamental Rights (CFR), which, after Lisbon, ranks as the primary Union Law on the readmission practice of the EU.

EU readmission policy before Lisbon: institutional framework and competences

Visa, migration, and asylum are relatively new components of European policy-making. While, indeed, the Treaty of Rome did not contain any provisions on the

harmonisation of these matters, the Maastricht Treaty attributed such issues to the intergovernmental cooperation within the third pillar (Justice and Home Affairs) of the Treaty on EU (TEU).⁵ The Treaty of Amsterdam, which constitutes a series of amendments and additions to the Maastricht Treaty, shifted immigration, asylum, and civil law issues from the third to the first pillar and conferred express power to the European Community (EC)—as set out in Article 63(3) (b) of the EC Treaty (TEC) (Title IV)—to address the issue of “illegal immigration and illegal residence, including repatriation of illegal residents.”⁶ Decisions to conclude readmission agreements—the main instruments used by the EU to facilitate the return of people who have entered or stayed illegally in the EU—have been adopted on the basis of the mentioned article. With the entry into force of the Treaty of Amsterdam in 1999 the European Community (EC) has been empowered to enter in its own name into such agreements, thus letting Member States expel people, with no title to stay, from the territory of the EU.

According to the jurisprudence of the European Court of Justice (ECJ), in those cases in which no explicit external competence is mentioned in the Treaty, competence in external matters, including the power to conclude international agreements, can be derived from explicit internal competence.⁷ Furthermore, when EC law has created powers for the EC within its internal system in order to attain a specific objective, the EC has authority to conclude international agreements if they are necessary for the attainment of that objective, even in the absence of any internal measure.⁸

Regarding the decision-making process, Article 67 TEC provided a shared initiative of the Commission and the Member States, unanimity in the Council, and previous consultation of the European Parliament. However, with the entry into force of the Hague Programme in 2005,⁹ the decision-making rules have been subjected to the initiative of the Commission, qualified majority voting of the Council and co-decision with the European Parliament.¹⁰

5 Only two aspects in visa policy in Article 100c were incorporated in the Treaty of the European Community (TEC). See, (Niemann, 2006: 187)

6 See generally on this issue, (Hailbronner 1998; Monar 1998)

7 This is the so-called principle of parallelism between internal and external powers as set out in the ERTA case, 31 March 1971, para 16.

8 Opinion 1/76 [Re Rhine Navigation Case]

9 The Hague Programme, 4-5 November 2004

10 Council Decision 2004/927/EC, 22 December 2004. See also, (Peers 2005)

3 On the concept of “irregular migrant”, see Guild 2004: 3.

4 See generally, (Coleman 2009: 111-138; Marchegiani 2008; Trauner and Kruse 2008)

In October 1999, the European Council adopted the Tampere Programme to implement the provisions of the Treaty of Amsterdam in the area of asylum and migration.¹¹ Key elements of the Tampere Programme were the creation of a Common European Asylum System (Section II), the fair treatment of third-country nationals (Section III), partnership with countries of origin of migrants on political, human rights and development issues (Section I), and a more efficient management of migration flows, including measures to tackle illegal immigration as part of a common return policy (Section IV). Both the conclusion of readmission agreements and a work of assistance to countries of origin and transit to promote voluntary over forced return also fell within this programmatic framework. The same objectives were, then, stressed in The Hague Programme (2005-2010) which contains a wide range of initiatives to build up a “strong” return and readmission strategy. The measures proposed by the Hague Programme include, for instance, the “Returns Directive”, the creation of a European Return Fund by 2007, the conclusion of Community readmission agreements, the development of common integrated country and region specific return programmes, and the appointment by the Commission of a Special Representative for a common readmission policy (para 1.6.4).¹² This five-years JHA Programme is aimed to define the premises for both efficiently countering illegal immigration and harmonizing and consolidating asylum and migration legislation through a comprehensive approach embracing all stages of the global phenomenon of human movement across borders, with respect to the root causes of migration, entry and admission, integration, and return policies (para 1.2). Such a global approach to migration can be ensured only through a common analysis of migratory trends in all their aspects by means of a strong and coordinated effort between those responsible for the development of asylum and migration policy and those engaged in all other policy fields relevant to these areas (para 1.2).

Likewise, the December 2001 Laeken European Council emphasised return policy as a crucial instrument in the battle against illegal migration and human-trafficking, and viewed the conclusion of EC readmission agreements as a suitable strategy to secure the effective removal of illegal migrants.¹³ Subsequently, the

Commission issued a Green Paper on return policy, which focused on forced and assisted repatriation of persons residing illegally in the European Union.¹⁴ Hardly surprising, a vast range of instruments are part of the EU’s return policy, such as the Council Directives on the mutual recognition of decisions on the expulsion of third country nationals,¹⁵ assistance in the cases of transit for the purposes of removal by air,¹⁶ Council Decisions on the organization of joint flights for removals of third country nationals,¹⁷ on financing expulsion measures,¹⁸ and on the establishment of an information and coordination network for Member States’ migration management services.¹⁹ The return policy also encompasses readmission agreements between the EU and non-EU third countries, which will constitute the main object of study of the following analysis.

Content and purpose of EU readmission agreements

Within the framework of the EU’s return policy, several readmission agreements have been signed between the Union and third countries as means of facilitating the return of persons illegally residing within the borders of one of the Member States. As a result of the April 2002 Green Paper on a Community Return Policy on Illegal Residents, readmission was subsumed into the common return policy. The main objectives of this policy are to fight illegal immigration and expand the number of safe third countries around the EU able to take the burden of migrants expelled and removed from the EU’s Member States. After the Al Qaeda’s attacks in September 2001, even more restrictive control measures have been adopted under Title IV of the Treaty on the European Community (TEC) in a climate in which migrants and asylum seekers are increasingly perceived as a threat to international peace and stability. If, therefore, EU Member States have attempted to elaborate harmonized solutions such as the progressive creation of the Common European Asylum System (CEAS),²⁰ they have also employed new logics

11 Tampere European Council, 15-16 October 1999

12 See also, (Caritas Report 2007)

13 Laeken European Council, 14-15 December 2001

14 Green Paper, 10 April 2002, followed, then, by a detailed Council Action Plan and a parallel Action Plan on external border control.

15 Council Directive 2001/40/EC, 28 May 2001

16 Council Directive 2003/110/EC, 25 November 2003

17 Council Decision 2004/573/EC, 29 April 2004

18 Council Decision 2004/191/EC, 23 February 2004

19 Council Decision 2005/267/EC, 16 March 2005

20 The aim of the CEAS is to establish common asylum procedures and equivalent conditions for persons in need of international protection valid throughout the EU.

of reinforcement of EU frontiers control, criminalization of migrants (Bigo 2004: 61), and acceleration of the procedures for returning foreigners who have an irregular status to their countries of origin or transit.²¹ In general terms, readmission agreements are bilateral or multilateral treaties setting standards and procedures indicating how return of irregular migrants is to be conducted. They generally concern the return of own nationals or third country nationals,²² means of establishing nationality, time limits for requests for readmission, transit arrangements, exchange of personal data, costs of transport, national authorities in charge of cooperating on the removal of immigrants, and a “non affection clause” regulating the relations between the agreement and other international obligations arising from international law, including human rights. The last Section generally lists final provisions clarifying both the territorial scope of the agreement and the confirmation that it does not apply to the territory of Denmark. Nonetheless, a recommendation is made that the third-country and Denmark conclude a bilateral accord on readmission in the same terms as the EU agreement.

Denmark as well as the UK and Ireland are embedded in a flexible system of “ins” and “outs” in respect to asylum, immigration, civil, policing, and criminal matters. The Lisbon Treaty brings asylum and immigration together with all matters on police cooperation and on civil and criminal law into a shared competence, entitled “Area of Freedom, Security and Justice” (AFSJ), which was created with the Amsterdam Treaty and constitutes now the Title V of Part III of the Treaty on the Functioning of the EU (TFEU) (Articles 67-89). The UK and Ireland have opt-outs from the entire AFSJ (Protocol on the position of the UK and Ireland in respect of the AFSJ). Thus, they are not bound by any legal instrument adopted under the EU’s AFSJ, and no judgment of the ECJ interpreting such acts is applicable to them (Article 2).²³ However, in accordance

with Article 3(1) of the Protocol, the UK and Ireland have the possibility to “opt in” and participate in the adoption and application of any proposed measure, within 3 months of the Commission’s publication of a proposal in the AFSJ.²⁴ Unlike the UK and Ireland, Denmark is not entitled to either “opt in” or participate in the adoption of any measure under Title V of Part III of the TFEU (Articles 1 and 2 of the Protocol on the Position of Denmark). Therefore, the UK and Ireland have a wider discretion than Denmark in deciding whether and when opting in or out a readmission agreement concluded by the EU. They are not obliged to act together, and while so far the UK has participated in all treaties on readmission concluded by the EU with third countries—including the most recent one with Pakistan—Ireland has only joined the accord with Hong Kong.

While the Maastricht Treaty did not set out any opt-outs for the UK and Ireland from EU JHA cooperation, the Treaty of Amsterdam attached to the TEU and the TEC three Protocols establishing an opt-out regime for these two countries from the following aspects of the EU Justice and Home Affairs law: the Schengen acquis, border controls measures, and immigration, asylum and civil law legislation (Peers 2009: 3-4).

With regard to the pre-Lisbon procedure leading to the conclusion of a readmission agreement, only the Commission and the Council were involved. Following a recommendation from the Commission, the Council adopted a directive authorising the Commission to negotiate a treaty with a third country (Article 300 TEC). In performing this function, the Commission attempted to take a homogeneous approach by adopting an informal standard draft readmission agreement as a model to be followed in drafting subsequent accords. The latter, along with the Council’s directive, represented the content the Community unilaterally relied upon as the starting point of negotiations. Since the June 2002 Seville European Council, the progress in the field of readmission and return issues has been discontinuous, gathering speed only over the last years. At the time of writing (November 2010), the Commission has received a total of eighteen nego-

21 Between 2005 and 2007, actual removals of unlawfully residing third country nationals within the EU were 756,796. Source: Centre for information, discussion and exchange on the crossing of frontiers and immigration (CIREFI).

22 In the readmission context, the use of term “third country national” refers to a person who does not possess the nationality of any of the contracting parties to a readmission agreement.

23 Pursuant to Article 1 of the Protocol on the Application of certain aspects of Article 26 TFEU, nothing in EU law affects the right of the UK and Ireland to exercise controls over people coming from abroad. See (Peers 2009)

24 For a detailed review on the Lisbon Treaty and the Protocols affecting the UK, Ireland, and Denmark—which would be beyond the scope of this paper—see (Fletcher 2009: 89-95; Chalmers, Davies, and Monti 2010: 491-492)

tiating mandates from the Council,²⁵ but only twelve readmission agreements have become operative (Albania, Bosnia and Herzegovina, FYROM, Hong Kong, Macao, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, and Ukraine).

Repatriation schemes leading to a bilateral accord have been launched with those countries considered as a priority for the EU on the basis of a double standard elaborated by the General Affairs and External Relations (GAER) Council in November 2004.²⁶ The decisive selection criteria are the following: “[first], migration pressure on particular Member States, as well as the EU as a whole; [second], the geographical position of countries, including considerations of regional coherence and neighbourhood” (para 3). These factors have been employed by the Community in selecting States with which negotiating readmission agreements and have been considered by the Council as “the most important criteria for determining, on a case by case basis, with which further countries readmission agreements should be concluded.” (para 3) The common readmission policy is aimed to pursuing different kinds of objectives. First, the fight against unauthorised immigration by facilitating the return of nationals as well as third country nationals illegally residing in the territory of the EU through the issuance, for instance, of travel documents. In this regard, it may be added that readmission agreements for the return of third country nationals are usually based on transit through the territory of the requested States. Second, the establishment of a “buffer zone” of third countries responsible both to readmit immigrants from the EU and to intercept migrants en route to the EU (Coleman 2009: 61). Third, the promotion of readmission agreements between third countries themselves (in-

cluding transit and source countries), thereby broadening the number of States able to receive migrants. Further, the EU encourages third countries’ readmission negotiations through the so-called AENAS Regulation, which enables the Union to fund projects and supply technical and financial support.²⁷

The draft Constitutional Treaty signed in Rome on 29 October 2004 provided the EU with an explicit legal basis for concluding “agreements [...] for the readmission of third country nationals residing without authorisation, to their countries of origin or provenance” (Article III-267(3)).²⁸ Nevertheless, it did not rapidly enter into force because of its rejection by referendum in France and the Netherlands. It means that until December 2009, marking the date of adoption of the Lisbon Treaty, the 1999 Treaty of Amsterdam has offered the legal reference frame for the conclusion of readmission agreements at the EU level. Indeed, with the Treaty of Amsterdam the Community acquired competence to sign such agreements with third countries while issues regarding visa, immigration, asylum, and other policies related to the free movement of persons were transferred from the third to the first pillar (Title IV). Pursuant to Article 63(3)(b) TEC, “the Council [...] shall [...] adopt [...] measures on immigration policy within the area of illegal immigration and illegal residence, including repatriation of illegal residents”. Given the lack of reference to “readmission” in both the Treaty establishing the European Community (TEC) and the Treaty on the EU (TEU), the competence to conclude readmission agreements could be derived from a broad interpretation of the term “repatriation”, which is meant to include also the readmission of migrants to transit countries (Billet 2010: 60).

The issue of the division of competences in the camp of readmission is not without controversy. On the one hand, the Commission has traditionally claimed the exclusive power of the Community to negotiate and conclude these international bilateral treaties. This view is in line with the stance of the Legal Service of the Council, which pinpoints how the existence of inter-state policies of readmission would risk to create potential distortions in an area without internal border controls and with free movement of persons where readmission policies of other EU Member States can be circumvented by secondary movements of illegal

25 In September 2000, the Council adopted a first set of directives for the negotiation of readmission agreements with Morocco, Pakistan, Russia and Sri Lanka; in May 2001 and in June 2002 new directives were adopted for negotiating respectively with Hong Kong and Macao, and with Ukraine. In November 2002 the Council added directives for Albania, Algeria, China, and Turkey, followed by mandates for Bosnia and Herzegovina, Macedonia, Moldova, Montenegro and Serbia. In the JHA Council meeting of 4 and 5 June 2009, the Council adopted two decisions authorising the Commission to open negotiations with the Republic of Cape Verde for the conclusion of agreements on facilitation of issuance of short-stay visas and on readmission. Finally, on 28 November 2008, the Council gave the European Commission the mandate to start the negotiations of the readmission agreement with Georgia. Signed in November 2010, it will enter into force on 1 March 2011 (See, Table 1)

26 Draft Council Conclusions, 2 November 2004

27 AENEAS Regulation, 18 March 2004

28 Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004. See generally, (Monar 2005: 9)

migrants to another EU country.²⁹ Moreover, an often quoted argument is that the conclusion of an EU readmission agreement can have an added value represented by the political and normative weight of the Union in encouraging third countries to accept and fulfil readmission obligations.³⁰ Nonetheless, the JHA meeting of 27 and 28 May 1999 reconfirmed the issue of allotment of competences as an enduring punctum dolens in the path of cooperation between the EU and its Member States since the latter reasserted their unwillingness to renounce national readmission schemes:³¹ competence remained, therefore, shared as moulded in more specific terms in the Lisbon Treaty.

The Lisbon Treaty and the relationship between interstate and EU readmission agreements

The EU's readmission policy constitutes the general framework placed above and beyond the broad cobweb of formal and informal bilateral readmission agreements stipulated by EU Member States with third countries. A close relationship between national and supranational return policies is undisputable and is also corroborated by the fact that Member States continue to pursue their readmission procedures in parallel with the EU's strategy. In this vein, also paragraph 7 of the Preamble of the "Returns Directive" underlines "the need for Community and bilateral readmission agreements with third countries to facilitate the return process."

Readmission has, therefore, turned out to be an underlying component of EU immigration and asylum policy, which has been progressively defined and consolidated after the entry into force of both the Amsterdam and the Lisbon Treaties. Also the "Stockholm Programme – an open and secure Europe serving and protecting the citizens", adopted in December 2009, portrays readmission agreements as a building block in EU migration management.

In the context of a common immigration policy, "the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the area of illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation" (Article 79(2)(c)). The Lisbon Treaty has also modified

the legal basis for the conclusion of international agreements in the field of readmission. Article 79(3), indeed, expressly gives authority to the EU to stipulate agreements with third States for the readmission of third-country nationals who do not or who no longer fulfil the conditions for entry, presence, or residence in one of the Member States. If the substance of this Article is not new, having the EC already brokered treaties on this subject with eleven countries worldwide (Migration Watch UK 2008), the Lisbon Treaty represents, however, a turning-point in the recognition of an explicit competence of the Union with regard to measures designed to addressing the readmission of irregular migrants. A cross-reading of Articles 207 and 218 of the Treaty on the Functioning of the EU (TFEU) spells out the procedures to be followed for adopting an agreement with a third country: as a first step, the Council gives a mandate to the Commission to negotiate the treaty. Next, after negotiations are conducted by the Commission on the basis of the guidelines received from the Council—which appoints a special committee for assisting the Commission in this task—a compromise is reached and the Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement. Finally, the Commission will sign the agreement in the name of the EU as the Lisbon Treaty has eventually endowed the Union with legal personality (Article 47 TEU). It is also worth observing that EU readmission agreements do not require separate ratification by Member States' governments or parliaments.

While, in pursuance of Article 300(3) TEC, the European Parliament was only consulted and its role was limited to delivering a non-binding opinion after both parties had already signed the agreement, the Lisbon Treaty provides that the Council, on a proposal by the negotiator, shall adopt the decision concluding the accord only after obtaining the consent of the European Parliament (Article 218(6)(a) TFEU). This new empowerment undoubtedly is one of the most important innovations of the Treaty and the fact that under Article 218(10), "the European Parliament shall be immediately and fully informed at all stages of the procedure" implies the capacity of this body, when dealing with readmission agreements, to gather information and data during the negotiation process with regard to the structure and content of the accords as well as their implications for the rights of migrants and asylum seekers.

The issue of division of competences has sparked a

29 Council Doc 665/99, 10 March 1999; see, (Migration News Sheet 1999: 1)

30 Proposal for a Comprehensive Plan to combat illegal immigration, 14 June 2002, para 76. See also, COM(2001) 672 final, 25

31 Council Presidency Conclusion, 27-28 May 1999

heated debate over the years, and Member States have openly contested an alleged exclusive competence of the EU. However, what counts is that the Lisbon Treaty does not bestow upon the Union the exclusive power to negotiate readmission agreements since Article 4(2)(j) of the TFEU incorporates “Freedom, Security and Justice”—which clearly encompasses also readmission—in the field of shared competence. The relationship between the EU and Member States, however, continues to be grounded on the principle of “sincere cooperation” enshrined in Article 4(3) of the TEU, which reads as follows:

pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Therefore, as supported also by customary practice, competence would remain shared with Member States, which are, thus, able to continue to conclude such arrangements on a bilateral basis. Although the European Commission is responsible for the negotiation of readmission agreements, the overall phase of implementation, including the decision to return an irregular migrant, the issuance of a request of readmission and the enforcement of a removal order rests entirely with the Member States.³²

Previous State-negotiated bilateral agreements are still in force and used, but, by virtue of the ‘safeguard clause’, EU readmission agreements take precedence over State-negotiated ones in case of incompatibilities. When, then, a third country is concurrently bound by obligations deriving from readmission agreements concluded with both the EU and single Member States at a bilateral level, the conflict could be solved by referring to the third contracting State. Indeed, the third country by accepting the ‘safeguard clause’ can be deemed as implicitly renouncing to apply provisions in conflict with the agreement signed with the

EU. Saying that, the treaty concluded at a bilateral level continues, however, to be in force (Marchegiani 2008: 332).

It is often mistakenly assumed that the role of Member States is totally dismissed once the Commission and the Council independently decide to negotiate and conclude an EU readmission agreement, thereby overlooking the fact that the mandate of the Commission only consists in “brokering the agreement” (Casarino 2010: 18). Indeed, as Karel Kovanda lucidly put it in 2006

EC readmission policies and agreements fall under the external dimension. They set out reciprocal obligations binding the Community on the one hand and the partner country on the other hand. But once an agreement is negotiated, the Community responsibility is over. Its day-to-day implementation, the actual decision about sending a person back and the actual operation it involves—all this is entirely within the competence of our Member States.³³

The JHA Council of May 1999 sustained that a Member State must always notify the Council of its intention to negotiate a bilateral readmission arrangement, and can carry on with the process only if the Community has not already stipulated a treaty with the concerned third State or “has not concluded a mandate for negotiating such an agreement.” Exceptions are represented by the case in which Member States require more detailed arrangements to compensate a Community agreement or a negotiating mandate containing only general statements. However, “Member States may no longer conclude agreements if these might be detrimental to existing Community agreements” (JHA Council 1999). To put it differently, they “shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence” (Article 2(2) of the TFEU). Should a State contravene this obligation, an infringement procedure could be brought by the Commission to the ECJ under Article 258 of the TFEU. To date, no Member State has stipulated a readmission agreement with a third country with which the EU has already concluded a treaty. Nevertheless, Spain signed readmission arrangements with Morocco and Algeria even if the Commission

³² Letter dated 23 March 2009 from the European Commission, DG Justice, Freedom and Security to the President of Migreurope

³³ See, <http://www.eurasyllum.org/Portal/April2006.htm>

had already concluded a mandate for negotiating agreements with these countries.³⁴ If such a practice may be considered at variance with the principle of cooperation in good faith,³⁵ it is also true that the Commission, up to now, has never referred the matter to the ECJ under the Treaty infringement procedure. Member States have also a duty to notify the Commission, the Council, and the Parliament their negotiations as well as the current status of implementation of their arrangements (either formal or informal). At the same time, EU readmission agreements contain monitoring mechanisms that could be strengthened to guarantee a constant updating on the implementation process in each Member State. As a general rule, the agreements concluded at the EU level sets up a Joint Readmission Committee (JRC) comprising representatives of the European Commission as well as experts from the Member States and representatives of the partner third countries that should be involved in the analysis of the implementation and interpretation of the accords. Overseeing how readmission agreements are translated at the domestic level also entails the duty to gauge whether governments effectively comply with their international and European human rights obligations with regard to people returned to countries of origin or transit on the basis of readmission agreements. These EU instruments only provide for the inclusion of a so-called “non affection clause”, which generically refers to the commitment of governments to make the treaty consistent with international obligations arising from international law. Advocates of readmission agreements do not question whether these arrangements are consistent with human rights since they do not provide a legal basis for rejection. In their view, human rights considerations should arise only when taking the return decision, not when enforcing such a decision with the help of a readmission agreement (Coleman 2009). Nevertheless, concerns have been expressed by NGOs, International Organisations, and scholarship with regard to the existence of a causality link between the application of these accords and the likelihood of human rights violations for returned irregular migrants and asylum seekers (Council of Europe 2010: 2). Such an approach

34 While the mandates for the EC agreements with Algeria and Morocco were given in 2002 and 2000, respectively, the agreement between Spain and Algeria entered into force on 18 February 2004 whereas that one with Morocco was signed on 6 March 2007.

35 See, e.g, *Commission v. Luxembourg Case*, 2 June 2005, para 60.

is consonant with the idea that readmission agreements are part of the whole process of return of irregular migrants that, in each single phase, must be consistent with human rights. A thorough investigation of the compatibility of readmission agreements with refugee and human rights law would be beyond the frontiers of this article since the argument of the dearth of human rights safeguards in the text of the accords is open to counter arguments that cannot be deeply revisited and articulated within the boundaries of this contribution. Nonetheless, in the next section, an attempt is made to expound the potential role of the CFR in the field of readmission as, with the entry into force of the Lisbon Treaty, it has become part of the core EU legislation.

The Charter of Fundamental Rights: a preliminary assessment after Lisbon

The Charter of Fundamental Rights (CFR) is a “regional supranational instrument” reinforcing the protection of migrants and asylum seekers in international and European law (Gil Bazo 2008: 33). It sets out a whole range of civil, juridical, economic, and social rights and has become legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. Since the meaning of the rights enshrined in this Convention depends on how the ECJ interprets them in particular cases, it is difficult to assess a priori the impact this instrument could have on returned asylum seekers and irregular migrants. Nevertheless, it is important to realise that the incorporation of the CFR in the Treaty of Lisbon expands the power of the ECJ to interpret whether both the EU institutions and Member States follow human rights standards in making and implementing EU law, respectively (Migration Watch UK 2008).³⁶ Indeed, while the Charter is certainly applied to EU institutions, it is also relevant for Member States implementing EU law. Additionally, the Lisbon Treaty also extends the ECJ’s jurisdiction over asylum and im-

36 It also worth observing that the Protocol on the Application of the CFR to Poland and to the United Kingdom states in Article 1 that “[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom, except in so far as Poland or the United Kingdom has provided for such rights in its national law’. See, (Barnard 2008)

migration policy,³⁷ provides for the gradual introduction of an integrated management system for external borders (Article 77(1)(c) TFEU), and empowers the EU to develop common policies for asylum and immigration (Article 78(2) TFEU). With regard to the legal effect of the Charter, it ranks now as primary Union Law and compliance with it has become a requirement for the validity and legality of the EU's secondary legislation in the field of migration and asylum. Moreover, as established in Article 51 of the Charter, its scope of application is limited to the areas in which Member States are implementing Union Law and it "does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties."³⁸ Yet, although the TEU, as amended by the Lisbon Treaty, sets out that the Charter will have "the same legal value as the treaties", it does not constitute, properly speaking, a treaty as a matter of international law since it is not an agreement between States. Indeed, in accordance with the Article 1(a) of the Vienna Convention on the Law of Treaties, "a treaty is an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." On the contrary, the CFR has been neither signed nor ratified by the Member States, and its provisions have not been included in the Lisbon Treaty.³⁹ The Charter will have, therefore, the same legal value as the treaties as a matter of Union law but its relation with other international human rights instruments is not governed by the Vienna Convention (Gil Bazo 2008: 35).

Pursuant to Article 52(4) of the Charter,

insofar as this Charter contains rights, which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision

37 ECJ's jurisdiction in immigration, asylum and civil law applies equally to all Member States, including the UK and Ireland, but only in so far as they have opted into the legislation. See, (Peers 2009: 12)

38 Art 6(1) TEU as amended by the Lisbon Treaty also states that the Charter "does not extend in any way the competences of the Union as defined in the Treaties"

39 The CFR was signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission on behalf of their institutions at the European Council meeting in Nice on 7 December 2000.

shall not prevent Union law from providing more extensive protection.

According to the "Explanations" relating to the CFR,

the reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

It emerges, therefore, that Charter provisions should be interpreted and applied in accordance with the ECHR principles as determined by the jurisprudence of the Courts of Strasbourg and Luxembourg.

Other international human rights tools can be considered as sources of inspiration for Charter provisions. According to Article 53,

nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The reading of the Article 53 indicates how the Charter tends to expand rather than restrict human rights protection in the Union by recognising also the relevance of international agreements to which Member States are party for interpreting and enhancing human rights principles as enshrined in the Charter itself.

From this brief analysis of the CFR, conclusions may be drawn which are of relevance for showing how human rights obligations fall upon the EU and its Member States when both drafting and enforcing readmission agreements with non-EU third countries, which are not necessarily bound by the same international and European human rights instruments and do not always offer legal safeguards comparable to those granted by States within the EU milieu.

Concluding Observations

This paper conducted a brief historical excursus on the evolution of the EU readmission policy through the analysis of readmission agreements, meant as its main legal instruments. Over the last years, there has been a change in the perception of the relations of the EU Member States with third countries, which have become, indeed, the beneficiaries of compensatory measures offered by the EU to enhance their cooperation in fighting illegal immigration. If on the one hand, this cooperative framework shows that provisions adopted by Brussels can no longer be shaped only by domestic security concerns, on the other, the EU's return policy and EU readmission agreements continue to be viewed by most third countries' governments as responding predominantly to the interests and securitarian policies of the EU Member States.

Retracing the main stages of the readmission policy, the Maastricht Treaty attributed immigration, asylum, and civil law issues to the intergovernmental cooperation pillar while the Amsterdam Treaty shifted such matters from the third to the first pillar and conferred express power to the EC to address the issue of "illegal immigration and illegal residence, including repatriation of illegal residents" (63(3)(b) TEC). However, given the lack of reference to "readmission" in both the TEC and TEU, the competence to conclude readmission agreements could only be derived from a broad interpretation of the term "repatriation". Conversely, the Lisbon Treaty modifies the legal basis for the conclusion of international agreements germane to readmission and expressly grants authority to the EU to conclude agreements with third States for the readmission of third-country nationals who do not or who no longer fulfil the conditions for entry, presence, or residence in the territory of one of the Member States (Article 79(3) TFEU). In this vein, the Lisbon Treaty represents an historical turning point in the recognition of both a specific competence of the EU with regard to measures addressing the readmission of irregular migrants, and the new role of the Parliament entrusted with the underlying power to be consulted before a readmission agreement is definitively concluded by the Council.

Although an EU-negotiated treaty can have an added value represented by the political and normative weight of the Union in encouraging third countries to accept and fulfil readmission obligations,⁴⁰ Mem-

ber States have often expressed their unwillingness to renounce their national readmission policies: competence, therefore, has always remained shared, both before and after Lisbon.

Finally, a brief examination of the potential role of the CFR in the field of readmission has been carried out showing how the incorporation of this instrument in the Treaty of Lisbon expands the power of the ECJ to interpret whether both the EU institutions and Member States follow human rights standards in making and implementing EU law, respectively. As also recommended by the Parliamentary Assembly of the Council of Europe, the EU should ensure that readmission agreements and return policies are consistent with relevant human rights standards, including the CFR, which, with the entry into force of the Lisbon Treaty, has become part of the core EU legislation. Taking readmission agreements as a key component of the "return toolbox", further studies should, however, be designed to investigate what impact they have on the policies of the Member States of the EU as well as on the rights of migrants and refugees returned by means of these accords to either their countries of origin or transit.

As already stated, the predominant doctrine deems standard readmission agreements are executive instruments, which serve to enforce a national decision of expulsion or removal and do not provide a legal basis for rejection. It is, indeed, in the initial phase of formulation of an expulsion decision that human rights-related considerations should be made by governments. Nonetheless, human rights concerns should be taken into account in all the phases of the return process, from the issuance of the expulsion decision to the enforcement of such an order. No claim is made here to explore in depth the complex relationship between readmission agreements and human rights, still an open issue in the doctrine.

However, as a matter of public international law, it is particularly important to interpret the value of references to human rights and democracy in the preamble of any readmission agreement in order to gauge whether they are either mere assumptions on which the accord is predicated or real objectives of the treaty. A recurrent objection moved to the possible incorporation of stringent human rights clauses in the text of readmission agreements is grounded on the fact that EU Member States are already bound by human rights principles deriving from international customary and treaty law as well as from European law. Therefore,

40 Proposal for a Comprehensive Plan to combat illegal immigration and trafficking of human being in the EU, 14 June 2002, para 76.

adding in the text of such accords (those concluded by either single Member States or the EU) further legal safeguards concerning refugees and asylum seekers would amount to a superfluous reiteration. These issues remain moving targets for analysis, as the political debate within the EU is still in a formative phase, and as such they cannot be explored in full here. Nonetheless, it is of utmost importance to clarify that EU Member States and non-EU third countries are not necessarily bound by the same international and European human rights instruments, in particular with regard to the *acquis communautaire* (in primis the Charter of Fundamental Rights and the European Convention on Human Rights). As practice shows, third countries do not always offer the same legal safeguards granted by EU Member States, and the jurisdictional reach of supranational judges will be limited in case of violations of fundamental rights committed by readmitting countries. Thus, if inclusion of precise safeguards for refugees could be a replication for EU Member States, it might constitute, instead, a fundamental benchmark for third countries. Further, legally binding human rights clauses would create more onerous obligations than those deriving from general international law. In this case, the inclusion in the text of bilateral treaties linked to readmission of specific obligations referring to the protec-

tion of human rights and refugee rights would be doubly beneficial: if on the one hand, it would increase legal certainty for both governments involved, it would also be in line with Article 60(1) of the Vienna Convention on the Law of Treaties which provides that a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

In conclusion, it may be observed how both the EU and Member States have developed different readmission strategies with third countries of origin or transit of migrants, often within the framework of restrictive and securitarian policies, which confirm how the debate on agreements linked to readmission and their implications for the rights of asylum seekers is, essentially, a political debate involving national security and identity concerns. Therefore, the real danger, in the era of the "war on terror", is that States start to unduly emphasise uncertain and flexible national security interests to the detriment of the protection of migrants' fundamental rights. The opportunity to conduct intensive research upon such an issue can be lucidly explained through the words of Louis Henkin: 'how [a State] behaves even in its own territory, [is] no longer [...] its own business: it has become a matter of international concern, of international politics, and of international law' (Henkin 1999: 4).

1. List of EU readmission agreements⁴¹

Third country	Mandate	Date of signature	Entry into force
Albania	November 2002	14 April 2005	1 May 2006
Algeria	November 2002		
Bosnia and Herzegovina	November 2006	18 September 2007	1 January 2008
Cape Verde	June 2009		
China	November 2002		
Georgia	September 2008	22 November 2010	1 March 2011
FYROM	November 2006	18 September 2007	1 January 2008
Hong Kong	April 2001	27 November 2002	1 March 2004
Macao	April 2001	13 October 2003	1 June 2004
Moldova	December 2006	10 October 2007	1 January 2008
Montenegro	November 2006	18 September 2007	1 January 2008
Morocco	September 2000		
Pakistan	September 2000	26 October 2009	1 December 2010
Russia	September 2000	25 May 2006	1 June 2007
Serbia	November 2006	18 September 2007	1 January 2008
Sri Lanka	September 2000	4 June 2004	1 May 2005
Turkey	November 2002		
Ukraine	June 2002	18 June 2007	1 January 2008

⁴¹ This table, updated to January 2010, is drawn from the following website: <http://www.mirem.eu/datasets/agreements/index/european-union> More recent updates are mine.

BIBLIOGRAPHY

- Barnard, C. (1995). 'The "Opt-Out" for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?* Wien: Springer.
- Bigo, D. (2004). 'Criminalization of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion', in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives*. Martinus Nijhoff Publishers
- Billet, C. (2010). 'EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration. An Assessment after Ten Years of Practice' *European Journal of Migration and Law*, 12, pp 45-79
- Caritas Report on EU Return Policy: Past, Present and Future of the European Union's Common Return Policy, 26 April 2007, available at <http://www.erso-project.eu/about-erso/eu-return-policy>
- Cassarino, J.P. (2010). *Readmission Policy in the European Union*. Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Civil Liberties, Justice and Home Affairs, Brussels, European Parliament.
- Chalmers, D, Davies, G, and G. Monti. (2010). *European Union Law: Cases and Materials*. Cambridge: Cambridge University Press
- Coleman, N., (2009). *European Readmission Policy: Third Country Interests and Refugee Rights*. Martinus Nijhoff
- Fletcher, M. (2009). 'Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom's "Ins" and "Outs"' *European Constitutional Law Review*, 5
- Gil-Bazo, M. (2008). 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' *27 Refugee Survey Quarterly*, 3
- Guild, E. (2004). 'Who is an Irregular Migrant?', in Bogusz, B., Cholewinski R., Cygan, A., and E. Szyszczak (eds), *Irregular Migration and Human Rights*. The Hague: Kluwer
- Hailbronner, K. (1998). 'European Immigration and Asylum Law under the Amsterdam Treaty' *Common Market Law Review*
- Henkin L. (1999). Lecture: The Robert L. Levine Distinguished Lecture Series, 'That "S" Word: Sovereignty and Globalization, and Human Rights, Et Cetera', *Fordham Law Review*, 68(1)
- Kovanda, K. Special Representative for Readmission Policies at DG Relex, during an interview made by Euroasylum, available at <http://www.euroasylum.org/Portal/April2006.htm>
- Marchegiani M., 'Competenze Comunitarie e Prerogative degli Stati in Materia di Immigrazione Irregolare, con Particolare Riferimento alla Questione delle Politiche di Riammissione' in Benvenuti, P. (ed), *Flussi migratori e Fruizione dei Diritti Fondamentali*. Il Sirente
- Migration Watch UK. (2008). *The Lisbon European Union Reform Treaty Impact on Asylum and Immigration Policy*, available at <http://www.migration-watchuk.org/Briefingpaper/document/82>
- Monar, J (1998). 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' *European Law Review*
- Monar, J. (2005). 'Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the "Area of Freedom, Security and Justice?"' *European Constitutional Law Review*, 1
- Niemann, A. (2006). *Explaining Decisions in the European Union*. Cambridge University Press
- Peers, S. (2005). 'Transforming Decision-making on EC Immigration and Asylum Law' *European Law Review*, 30
- Peers, S. (26 June 2009). 'UK and Irish Opt-outs from EU Justice and Home Affairs (JHA) Law', available at <http://www.statewatch.org/news/2009/jun/uk-ireland-analysis-no-4-lisbon-opt-outs.pdf>
- Trauner, F. and Kruse, I. (23 April 2008). 'EC Visa Facilitation and Readmission Agreements: Implementing a New EU Security Approach in the Neighbourhood' CEPS Working Document No. 290

European Union documents

- AENEAS Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum, OJ L 80, 18 March 2004
- Brussels European Council of 25 November 2002, Doc. 14673/02, available at <http://register.consilium.europa.eu/pdf/en/02/st14/14673en2.pdf>
- Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial im-

- balances resulting from the application of Directive 2001/40/EC, OJ L 060, 27 February 2004
- Council Decision 2004/573/EC of 29 April 2004 on the organization of joint flights for removals from the territory of two or more member states, of third country nationals who are subject of individual removal orders, OJ L 261
- Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty OJ L 396 , 31 December 2004
- Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2 June 2001
- Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purposes of removal by air, OJ L 321, 6 December 2003
- Council of Europe: Parliamentary Assembly, Readmission Agreements: a Mechanism for Returning Irregular Migrants, 16 March 2010, Doc. 12168, available at: <http://www.unhcr.org/refworld/docid/4bdadc1c3.html>
- Council of the EU, 7 October 2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/116918.pdf
- Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country, OJ C 274 of 19/09/1996
- Draft Council Conclusions on the priorities for the successful development of a common readmission policy, (Doc. 13578/04) (2 November 2004) available at <http://www.consilium.europa.eu/uedocs/NewsWord/en/gena/82621.doc>
- Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/17
- Green Paper on a Community Return Policy on Illegal Residents COM(2002) 175 final, presented by the Commission on 10 April 2002.
- JHA Council meeting of 27-28 May 1999, Conclusion on "Readmission Agreements – consequences of the entry into force of the Amsterdam Treaty", available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/08654.en9.htm
- Laeken European Council of 14 and 15 December 2001, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/68827.pdf
- Letter dated 23 March 2009 from the European Commission, DG Justice, Freedom and Security to the President of Migreurope.
- Presidency Conclusions, Tampere European Council of 15 and 16 October 1999, available at http://www.europarl.europa.eu/summits/tam_en.htm#c
- Proposal for a Comprehensive Plan to combat illegal immigration and trafficking of human being in the EU, OJ C 142, 14 June 2002
- Seville European Council of 21-22 June 2002, Doc. 13463/02, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/ec/72638.pdf
- The Hague Programme for strengthening freedom, security and justice, adopted by the Brussels European Council of 4 and 5 November 2004, Doc. 14292/1/04, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/14292-r1.en04.pdf>
- The Stockholm Programme – An open and secure Europe serving and protecting the citizens, adopted by the Brussels European Council of 2 December 2009, Doc. 17024/09, available at <http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf>
- The Treaty of Rome, establishing the European Economic Community (EEC), signed in Rome on 25 March 1957, and entered into force on 1 January 1958
- The Treaty on European Union, signed in Maastricht on 7 February 1992, entered into force on 1 November 1993
- Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004, OJ C 310.

Case-law

- Case 22/70 Commission v Council [1971] ECR 263 (E.R.T.A.– European Road Transport Agreement).
- Case C-266/03, Commission v. Luxembourg [2005]
- Opinion 1/76 (Re Rhine Navigation Agreement) [1977] ECR 741 (Rhine Navigation).

The European Union and minority languages: Evolution, achievements and contradictions in the light of the Treaty of Lisbon

LORENZO PICCOLI

Graduate student at the School of International Studies of Trento. He also studied at Trinity College, Dublin, and at the University of Victoria, Canada



I am grateful to Luisa Antonioli, Marco Brunazzo and Jens Woelk, who have given me many useful insights on the topic. I also thank Catherine Riley and the two anonymous referees who reviewed earlier drafts of this paper. However, any error of fact or judgment is exclusively my own.

Abstract

The issue of minorities has long been perceived as an obstacle to European integration. This paper seeks to unravel the complex nature of minority language (ML) policy in the European Union (EU), arguing that a long way has been travelled since 1981. From that moment onwards, the European Parliament (EP) began dealing with minority issues starting from the functional area of minority languages (MLs). This has led to two outcomes: on the one hand, with the Treaty of Lisbon (ToL) the EU has finally adopted a more embracing notion of minority rights, recognizing linguistic diversity and the protection of the persons belonging to minorities as part of its fundamental values; on the other hand, the European Commission is increasingly active in supporting the promotion of ML through financial programmes. This is evidence that ML policy at the European level, complementary to those of the single Member States, is very fragmented and barely structured, but still effective in so far as it legally protects and financially supports ML.

Introduction

Some authors suggest that in 2007 the EU did not yet have an efficient minority language (ML) policy (Van Bossuyt, 2007; Urrutia and Lasagabaster, 2007). In this article I argue instead that, even though minority languages (MLs) have long been perceived as an obstacle to European integration, they are now protected by the treaties and in some ways even promoted by the Commission. Therefore, my argument is that the EU has experienced a gradual awareness of MLs, firstly, and then also of a broader notion of the protection of minorities' in general. This main contention is therefore discussed by analyzing over time the activity of the main EU institutions. Of course, such policy is still far from being unquestionable; but, however fragmented and to a great extent merely complementary to that of member States, it does protect and promote ML in many ways.

By means of qualitative analysis, I focus on the single

case-study of the EU and its institutions. The research question revolves around ML policy in the EU: historical development and the state of the art. Accordingly, this paper describes how such policy has been constructed, discussing a set of hypotheses: the first is that the EP played a crucial role in starting and addressing this policy. The second is that, MLs constituted a functional area for the development of a more embracing notion of minority rights. As a matter of fact, with the Treaty of Lisbon the EU has finally recognized linguistic diversity and the protection of the persons belonging to minorities as part of the EU's fundamental values. The third hypothesis is that the European Commission is increasingly active in supporting the promotion of MLs through financial programmes – particularly those targeting to education and regional development – thus becoming the most important European actor with regard to MLs. Discussing these three hypotheses, rather than providing a cost-effectiveness

analysis of ML policy, I aim to describe its progressive development over the last thirty years, as well as its present features.

There are different approaches to tackling ML issues. I discuss minority claims starting from the literature on regionalism in Europe (Keating, 1998; Loughlin, 1996; Fitjard, 2010). Accordingly, I consider ML policy as part of the broader protection of minority rights. For this purpose, I particularly rely on the work of Ó Riagáin (2002), Palermo and Woelk (2005), Toggenburg (2000, 2005, 2006, 2008), and Elias (2009). Overall, this paper has an essentially descriptive purpose, mainly based on secondary sources such as scholarly texts, papers and legal documents which are all analyzed through a legalistic approach. Moreover, the research design is limited to a specific time span, that is to say from 1980 up to the Treaty of Lisbon (2009), when the major improvements in this area of policy were made.

Accordingly, I try to highlight the separation between the level of political protection provided and the degree of financial promotion available. After a brief overview of the European framework for minorities and MLs, where I seek to introduce the main arguments, as well as the concept of ML itself, I discuss the development of the idea that MLs must be protected starting from 1981, when the EP decided to promote linguistic and cultural rights for minorities rather than rights for ethnic minorities *per se* (see: Ó Riagáin, 2002). In this section, I put the activity of the EP under scrutiny. In particular, I maintain that it was the Parliament that, actually, had the merit of raising awareness of the issue of MLs in Europe. Its approach, however, has been characterized by a narrower focus on the pursuit of ML rights rather than broader minority rights. Nonetheless, EP activity, although not binding, has been crucial in the political protection of regional languages. The pioneering work of the EP was subsequently endorsed - somewhat timidly- by the European Court of Justice (ECJ), even if it mainly focused on ML rights within the context of the free movement of workers. These initial efforts, however, were almost totally lacking in any binding value. A first step in that direction was the path that led to the 2004 enlargement, when minority rights were included as a precondition for EU accession. As a consequence, the European Council was actively involved in minority protection issues. Furthermore, the principle of conditionality inaugurated a shift towards a more embracing policy - that is to say from ML protection to the protection of minorities in general. This move was fi-

nally legally entrenched in the Treaty of Lisbon (ToL), which included the recognition of minorities into the EU primary law. Before 2009, no single reference to the existence of minorities were ever made in the EU primary legislation.

Finally, the third part focuses on the financial promotion fostered by the European Commission. Although it has no direct legal competence on minority issues and language protection, the Commission makes a difference in the promotion of ML, financing studies and programmes in the critical domain of education from which MLs largely benefit. In this sense, the European ML policy forms part of a “polycentric diffusion which characterizes an increasingly large share of public tasks and functions” (Palermo and Woelk, 2005: 6–7).

1. Minority languages: a functional area for minorities

That of minorities is a fundamental political issue of our times. Even though the EU has tried to engage in debates on the protection and the promotion of minorities, this area remains largely within the remit of the single Member States. However, there is one field within the broader area of minorities where the EU has been able to step in and to develop its own policy, complementary to that of member states: that of MLs.

1.1 The EU and minority protection

In the recent years, protection of minorities has become one of the most sensitive scholarly discussions, with particular regard to the EU. One way of looking at it is that of regionalism, as the revival of regions as a counterbalance to the homogenous centralization of politics and identity brought about by nation states (Loughlin, 1996; Keating, 1998; Fitjar, 2010). Indeed, European states are far less homogenous than it is often thought: Europe is a continent built on diversity, where differences go beyond the national borders and involve internal differences. a wide range of regions and groups. Culturally, regions can be defined as “territories marked by the presence of human societies sharing histories and cultural/linguistic features that are different from that of the dominant culture of the nation-state in which they find themselves” (Loughlin, 1996: 147). Such societies, or groups, are often referred to as minorities. As such, they need special arrangements to be protected from the centralizing pressures coming from the state. According to the literature on regionalism, the EU constitutes a source of potential opportunities for the mobilization of ethnic and re-

gional minorities (Loughlin, 1996; Keating, 1998). Indeed, "Looking at the present situation in Europe, the law of minorities is constituted by large variety of instruments of protection, different sources and inter-related levels as well as determined by a great number of different actors" (Palermo and Woelk, 2005: 6). However, in reality minority protection is relatively neglected by the EU. As a matter of fact, the EU has traditionally relied on the work of international and regional organizations, such as the Council of Europe, the United Nations and its associated agencies in these matters. The direct involvement of the EU is very limited; in fact, today there is no charter specifically related to minorities in the EU legal framework, nor a defined understanding of who can be considered a member of a minority. According to De Witte, "the emerging EU minority protection system rests largely on principles that are implicit rather than explicit" (2004: 107).

In spite of lack of legal recognition, repeated references to the value of diversity, however broad and vague ("highly ambivalent", to use Toggenburg's words, 2005: 735), have raised awareness of the protection of national minorities. At the same time, there is strong resistance from Member States against the development of an effective minority policy at the European level. A symptomatic example is that of Copenhagen 1993, when the protection of national minorities was included among the criteria for accession: this particular criterion, unlike the others, did not acquire legally binding value in EU primary law until the ToL. Accordingly, Toggenburg describes the EU approach towards minorities as a merely "growing legal reality without adding any self standing policy instruments or clarifications in order to put these legal principles into daily practice" (2006: 10).

Nevertheless, this article discusses one specific (or functional) field within minority protection where the EU has been seriously engaged, working over time towards the creation of an efficient policy: this is the case of ML policy.

1.2 The importance of MLs in Europe

The shared definition of MLs is that of languages "spoken as a mother tongue by a small number of speakers relative to the population of a region or a country as a whole which has a different language as its national language" (Llomas et al. 2007: 222). In the European context, MLs are defined by the Council of Europe's Charter on Regional and Minority Languages of 1992 as "languages traditionally used within a given terri-

tory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population; and different from the official language(s) of that State" (art. 1). This definition excludes dialects of the official language(s), and the languages used by recent immigrants from other states. As a matter of fact, it only applies to languages traditionally used by the nationals of the State Parties: these languages may be specific to a region such as Catalan, Basque, Breton, Welsh, Sardinian, or they may be languages spoken by a minority in one state but which are official languages in another EU country, such as Hungarian in Slovakia, German in southern Denmark (see: European Commission, Booklet, *Many Tongues, One Family: Languages in the European Union*, 2004).

The concept of MLs is particularly sensitive, since "debates over regional languages are never just debates over language" (Kymlicka and Patten 2003: 5). The fact itself that the official EU terminology interchangeably uses a wide variety of synonyms for MLs, such as "lesser used language", "lesser taught language", "less widespread language", "regional languages", "threatened languages", is a sign of the sensitivity of the debate revolving around such a concept. In fact, Europe is a place where a variety of MLs have developed over time as a result of the revolutions of nineteenth century, treaties and migrations: linguistic identity is a key factor in the European context (see also: Toso, 2004). Today, from Breton to Sámi, Yiddish, Romansch and Welsh, there are more than sixty ML in the EU. Moreover, it is estimated that almost 55 million of Europe's 500 million citizens speak a ML other than the majority language of the state in which they live (data from Mercator European Research Centre, 2010; see also: European Commission, *Many Tongues, One Family: Languages in the European Union*, 2004; EU Commissioner for Education, Culture and Multilingualism, website, 2006; and Toso, 2004). MLs are spoken in all EU countries; and in some cases, they count even more speakers than some EU national languages. For example, Catalan counts approximately 6 million speakers, whereas Finnish and Danish have 5 million each (*Network for Multilingualism and Diversity in Europe*, 2006). All in all, ML represent an extremely significant issue in the European context.

Consequently, ML policy is aimed at the preservation and the promotion of cultural and linguistic plurality with particular regard to ML groups. In fact, it is one specific field of language policy, which is defined as "a systematic, rational, theory-based effort at the societal

level to modify the linguistic environment with a view to increasing aggregate welfare" (Grin and Kuzmany, 2000: 7). Accordingly, the purpose of the EU's ML policy is to guarantee to all the European citizens that "they could speak and act together at European level and thus achieve results, which individually would have remained beyond their capabilities" (Ó Riagáin, 2002: 7). This concern was very much present also in the foundations of the European Community: not by chance, as noted by Elias, the drafters of the Treaty of Rome "were acutely aware of the need to preserve some semblance of linguistic parity, and therefore political parity, when they conferred equal status on all national languages of the EU member states (with the exception of Irish and Luxembourgian) as working languages" (2009: 269).

Despite such fundamental preoccupations with linguistic identity, European institutions did not directly address concerns about ML rights until the beginning of the 1980s. Indeed, at the very beginning of the common market, MLs were perceived as an obstacle to the free movement of goods and people. It was only with the initial efforts of the European Parliament, in the 1980s, followed by the other institutions, that a ML policy was made possible. In fact, "a unified European approach to minority language rights has only emerged recently, during the last twenty years" (Elias, 2009: 269).

2. The struggle for recognition: political protection for minority languages

I begin this section of the paper discussing my first hypothesis: the EP as the institution which has contributed the most to raising awareness on the issue of ML at the European level. Its pioneering work between 1981 and 1994 shaped the debate and led the EU towards an embryonic ML policy. It also established a *path dependency*, so that MLs came to be considered a functional area for the broader protection of minorities as such. To put it in Ó Riagáin's words, "the support for lesser used languages, emanating from the institutions of the European Community during the 80s and the first half of the 90s, raised, not only the morale of those working to conserve and promote lesser used languages, but also their hopes and expectations" (2002: 7). This narrative was embraced also by the ECJ, which timidly endorsed the development of a ML policy. However, while the work of the EP consisted of soft-law resolutions, the European Council had an opportunity to develop hard-law instruments, binding

acceding members to "respect for and protection of minorities", as established at the Copenhagen meeting of 1993 (Copenhagen Council Conclusions). These criteria were applied in general through the principle of conditionality during the process for enlargement of 2004. Building on these developments, the ToL finally included the respect of minorities among the fundamental values on which the EU is founded, thus translating this issue into the primary law of the EU. Accordingly, not only does the ToL contribute to the development of ML protection, but it also embraces a more inclusive approach to minority rights, as the result of a functional approach which started from the specific area of ML. This is the second hypothesis I discuss in the concluding part of this section.

2.1 The pioneering work of the Parliament

So far, the EP has adopted four major resolutions on the ML of the EU (which, until 1992, was still the EC): those of Arfé (1981 and 1983), Kuijpers (1987) and Killilea (1994). Within the EP, a significant role in dealing with the issue of ML has been played by two collective actors. The first is the Intergroup for Minority Languages (IML), which is one of the longest standing Intergroups committees within the EP since it was officially recognized in 1983. The second actor is the Committee on Culture and Education (CULT), which is responsible, among other things, for "the protection and promotion of cultural and linguistic diversity" (CULT's website, 2010). All the resolutions concerning MLs were, in fact, inspired by reports and recommendations either by the IML or by the CCT. However, it is worth remembering that resolutions are soft law sources: they are not legally binding.

The EP first addressed the topic of MLs at the beginning of the 1980s, issuing two resolutions based on two reports tabled by the Italian MEP Gaetano Arfé. The 1981 "Resolution on a Community Charter of regional languages and cultures and on a charter of rights of ethnic minorities" first urged the right to use MLs in dealings with official bodies and Courts; it also proposed to promote teaching in MLs and to ensure MLs access to local media. This resolution is fundamental, since it shaped the EU's minority policy for the following 20 years. As noted by Ó Riagáin (2002: 4-5), during the preparation of the motion for the resolution a fundamental debate took place, revolving around the best approach for addressing the needs of MLs. It put a trade-off between rights for ethnic minorities per se or solely linguistic and cultural approach. In the

end, this debate pitched those in favour of the rights of ethnic minorities per se against those prepared to adopt a solely linguistic and cultural approach. From that moment on, the EU pursued ML rights rather than broader minority rights. Such an approach was, in fact, followed by the Arfè “Resolution on measures in favor of minority languages and cultures” of 1983, which led to the opening of a budgetary line for MLs, and the 1987 “Resolution on the languages and cultures of regional and ethnic minorities”. These three resolutions, while broad in their terms and lacking binding force, set the stage for the innovations contained in the Treaty reform of 1992, which in fact recognized for the very first time European “cultural and linguistic diversity” (art. 126 TEU). The Killilea resolution of 1994 acknowledged this progress and urged EU Member States to take the ML issue more seriously, calling for a ratification of the European Charter of Minority Languages.

Meanwhile, in 1993, the European Council held in Copenhagen established that “respect for and protection of minorities” was one of the compulsory criteria for accession (Copenhagen Council Conclusions). Such a criterion became fundamental ten years later, when the European Council used it for the actual implementation of the protection of minorities, as explained in section 2.3.

2.2 The timid endorsement of the European Court of Justice

According to Elias (2009: 297-298), the ECJ is part of the development of a ML policy in so far it shifted advancing from toleration-oriented language rights (rights that are protections individuals have against government interference with their private language choices) to promotion-oriented language rights (rights that individuals have to the use of a particular language in public institutions — in the courts, the legislature, public schools, the delivery of public services, etc). Such a distinction, proposed by Kloss (1971, pp. 259–262), suggests that the ECJ embraced over time a perspective which contributed to giving strength to the resolutions of the EP and to creating the basis for subsequent developments.

As stressed by Palermo, “The phenomenon of massive intervention of the ECJ in shaping the concrete contents of European law is well known, being part of the overall expansive tendency of the role of courts in modern societies (judicial creativity, or judicial activism). This is even more evident when examining the

tendency of the ECJ to include fields within the scope of the Treaty that were originally excluded from it: a phenomenon that can be called ‘judicial spill-over’” (2006: 22). However, until the ToL there was no legally binding reference to minorities in the EU framework: therefore, the ECJ never had the chance to deal with minorities. The lack of Community competence in this field prevented the ECJ to rule on substantial issues related to minority protection. The only exception was, in fact, the matter of linguistic rights (Van Bossuyt, 2006: 4): in contrast to the rights of minorities in general, “the ECJ has left its marks on the language rights of minorities within the European Union. It should, however, be noted that these judgments have been pronounced in the framework of the free movement of persons and the freedom to provide services” (Van Bossuyt, 2006: 9 – 10).

This was evident already in *Mutsch* (1985), when the ECJ had to rule for the first time on the use of languages before national courts. After that, the ECJ ruled again on issues concerning MLs in three other key cases: *Groener* (1989), *Bickel & Franz* (1998) and *Angonese* (2000).¹ However important for the protection of linguistic rights, these rulings never clarified the concept of MLs, not least because the ECJ focused on the importance of the protection of linguistic rights in the context of the free movement of workers rather than on the protection of ML as such. Accordingly, Palermo stresses that “if member states want to effectively protect their special legislation on linguistic/cultural diversity, and therefore to affirm their internal pluralism, they must provide the EU with at least some competence in this regard. By doing so, they will enable the ECJ to take into consideration and to balance not only economic freedoms, but also the protection of diversity as an European value” (2006: 25). This arguments makes the developments brought about by the ToL particularly relevant, as it will be discussed in section 2.4.

2.3 Enlargement as an opportunity for the European Council

The enlargement of 2004 meant a shift in the narrative of ML protection in the EU. It implied some major innovations, starting from the fact that the main institutional actor involved in ML protection became

¹ I do not intend to go into the details of each single ruling here. For those interested, both Van Bossuyt (2006) and Elias (2009) provide more accurate reflections on all these decisions of the ECJ.

the European Council, through its exercise of the principle of conditionality vis-a-vis new Members. More precisely, cooperation with acceding countries implied the “respect for and protection of minorities” as established at the Copenhagen meeting of the European Council (Copenhagen Council Conclusions). More specifically, acceding countries from Western Balkan states were bound by some provisions which stressed the “[r]ight to establish and maintain [...] [a] dequate opportunities for [...] minorities to use their own language before courts and public authorities” (Luxembourg Council Conclusions, 1997: annex III, quoted in Toggenburg, 2008: 6). In some cases, “promoting language training [...] in particular for resident persons belonging to minorities” was considered a binding element (see: Lithuanian agreement art. 78, quoted in Toggenburg, 2008: 6). This created a double-standard: while the European Council was able to bind acceding members, the EU had limited authority in cultural matters towards those which are already Member States. In fact, while Lithuania was obliged to protect its Russian speaking minority to gain access to the EU, no enforceable instruments were used to bind France, Italy or Belgium to respect their ML communities. However, even though these provisions did not apply to Member States, they made clear that minority rights are a binding precondition for the eligibility for the Council assistance.

Consequently, the instruments used in this phase of European integration were no longer soft resolutions, but hard law obligations for acceding countries. Furthermore, this development also reflected a shift in the European perspective over MLs. According to Toggenburg (2008), the EU’s emphasis shifted from a cultural perspective to a broader perspective including the issue of the political participation of minorities. This development anticipated the innovations of the ToL, which finally embraced a broader concept of minorities, going beyond the (undeniably hegemonic) narrow focus on ML groups. In this sense, the 2004 enlargement was a means to further develop the EU’s minority policy and anticipate some of the developments which would have later been recognized by the ToL.

2.4 The Treaty of Lisbon: achieving a more encompassing policy

Of course, the EP continued to play a role shifting its focus from MLs to minorities in a more inclusive light. After a 2003 resolution “with recommendations to the Commission on European regional and lesser-used

languages — the languages of minorities in the EU — in the context of enlargement and cultural diversity” based on the report tabled by Italian MEP Michl Ebner, in 2005 the EP put forward a resolution “on the protection of minorities and anti-discrimination policies in an enlarged Europe”. Together with a 2006 resolution, sponsored by the Latvian MEP Tatjana Zdanoka, on “non-discrimination and equal opportunities for all – a framework strategy”, these developments did not, for the very first time, directly target MLs, as they took into account ethnic minorities, as well as new minorities such as the Roma.

The ToL builds on these developments, strengthening the EU legal framework for minorities in general and, more specifically, for ML. Consequently, its most important feature is the legal recognition of minorities: the ToL refers to the “respect for the rights of persons belonging to minorities” (art. 2 TEU). Therefore, the ToL not only recognizes the existence of persons belonging to minorities, but it goes further, establishing respect for them as one of the values on which the EU is founded. A more specific provision for the protection of MLs is to be found, instead, in the Charter of Fundamental Rights, which is annexed to the ToL and thus legally binding under the framework of the EU primary law. The Charter “prohibits any discrimination on any ground such as [...] language [...] membership of a national minority” (art 21.1). Such a provision reflects article 3 TEU (formerly art. 126), which contains a legal duty to respect the European “rich cultural and linguistic diversity”. All in all, the ToL is an important step forward, since it brings in a number of provisions which were not officially recognized before.

As stated by Toggenburg, “this might not be all too astonishing and most probably does not add much to the general principle law of equality under current EU law” (2008: 13). Certainly, it does not add much to the field of ML policy. In fact, it disappoints for its weakness, lacking both an indication on self-standing policy instruments and clarity that would help putting principles into practice. For instance, the Charter of Fundamental Rights insists on the non discrimination for linguistic diversity, but it does not specify what kind of linguistic diversity should be respected. However, it would be misleading to dismiss the ToL as a failure. While MLs have long been perceived as a threat vis-a-vis the European project of integration (see, for instance, Toso, 2006: 51) and an obstacle to the achievement of the internal market, the ToL finally affirms that the EU is based on values such as the

“rights of persons belonging to minorities” (art. 2 TEU) and on its “rich linguistic and cultural diversity” (art. 3.3 TEU).

The main strength of the ToL is, in fact, symbolic: the recognition of the value of minorities within the EU legal framework reflects a very strong pro-minority message. To put it in Shuibhne’s words, “If asked ‘Have recent times produced key European Union (EU) developments for the status of minority languages?’ an observer’s instinctive answer would most probably be abrupt, quite simple, ‘No’. On reflection, however, more has been going on than might at first be presumed, but with somewhat mixed results” (2008: 123). Toggenburg himself admits that, despite being weak, the ToL represents “a major shift”, since the term “national minority” itself enters into EU’s primary law (2008: 13). Moreover, this development is likely to give strength to organizations and actors lobbying for a stronger ML policy. Accordingly, the symbolic force of the ToL could create the basis for further developments.

This fundamental development coincides with a significant stretching of the concept of minorities. The ToL officially recognizes minorities as not merely linked to language. Rather, it introduces a much broader understanding, which is not directly linked to any particular marker, such as language, territory of ethnic belonging. This might constitute a weaknesses in that it is generic; at the same time, all the minority groups (and not only linguistic groups) are potentially capable of being affected. This constitutes a shift from the initial narrow focus on MLs adopted by the EP, when in 1981 it began dealing with minorities. Such an approach has been followed for a long time due to a path dependency: MLs were naturally considered the way to deal with minorities in general. Functionally, MLs have proved to be an effective starting point towards a more embracing notion of minorities: the EU now recognizes in its primary law the fundamental values of minorities as such, without a specific connection with language or any other specific marker of identity.

3. The means for promotion: financial means for minority languages

The Commission is the most important actor in the financial promotion of ML, particularly in the critical domain of education. As a matter of fact, from 2004 the European Commissioner for Education and Culture portfolio included an explicit reference to languages, thus becoming European Commissioner for

Education, Training, Culture and Multilingualism; the name was changed in 2007 (European Commissioner for Multilingualism), and again in 2010, finally becoming Commissioner for Education, Culture, Multilingualism and Youth. European Commissioners have often always shown a clear willingness to mainstream ML policy into the work of the EU; in 2002, Viviane Reding, then Commissioner for Education and Culture, stressed that “the European Union should build on the structures, networks, projects, initiatives, know-how and good will generated by the year to develop a coherent long-term strategy for linguistic diversity and language learning” (The future of regional and minority languages in the European Union, conference, Helsinki, 11 October 2002).

However, the Commission can function only in the fields where it has competence in the scope of the Treaties; and, in fact, it does not have direct legal competence in the field of the protection of language minorities. Therefore, the Commission can influence ML only indirectly, through functional intervention based on a variety of sources: the chapter on ‘Culture’ in the Maastricht Treaty; the Copenhagen membership criteria; the anti-discrimination Article 13 of the Amsterdam Treaty; and, finally, the programmes for regional development or cross-border cooperation. In this way, even if not explicitly invested of such competence in the Treaties, the Commission actively promotes MLs in the field of education, through study programmes and specific researches.

3.1 Education: minority languages in schools and universities

An area where the Commission is particularly active is that of training and transnational exchanges. The aim is to promote MLs in the official school curricula through CDs and the internet, alongside projects that raise awareness on MLs. For instance, Comenius, a Commission programme which provides language courses and intercultural education for teachers and other staff, gives priority to those school teachers requesting training in a ML.

Less directly – but not necessarily less effectively – the Commission promotes MLs through mobility, transnational partnerships, youth exchanges, town twinning projects, and the European Voluntary Service. Such programmes can be used for supporting ML communities culturally, socially or economically. Erasmus, for instance, can involve training for MLs, such as Celtic, Catalan or Flemish. Those students going to a country

where MLs are spoken are eligible for an intensive language course before the study period. Moreover, Erasmus raises awareness on ML communities through cultural exchanges of young students. A similar task is carried out by the Study Visit Programme, the European Bureau for Lesser Used Languages (EBLUL)'s programme for the promotion of ML. All in all, these programs are vehicles for facilitating and fostering networking and information exchange.

3.2 Scientific research: investigating minority languages

A second field of activity for the Commission is that of financing a dense network of agencies and institutions aimed at studying ML communities in Europe. Such initiatives were proposed by the 1983 Arfé resolution, which called upon the Commission "to continue and intensify its efforts in this area, particularly in relation to establishing pilot projects and studies" (Resolution on measures in favor of minority languages and cultures).

First of these is the EBLUL, that was set up to promote linguistic diversity and languages. It was founded in 1982 and, though independent, it largely relies on funds from the European Commission (together with the Council of Europe and regional institutions). Among its activities are scientific publications, a newsletter (Contact-Bulletin) and promoting the contacts between ML communities and the European institutions. The second institution founded was the Mercator Centre, which was set up in 1988 following the call in the 1987 Resolution on the languages and cultures of regional and ethnic minorities for the Commission "to give the necessary attention to linguistic minorities in the Community's information publications". Mercator is an information and documentation network which aims at improving the exchange and circulation of information on MLs and cultures, providing the general public as well as people with special interests with up to date and reliable information on the situation of the linguistic communities. Together with EBLUL, it seeks to encourage cooperation and networking between institutions and organizations, universities, local, regional and national authorities. Finally, since 1992 the EU has supported a series of studies on MLs, collectively known as Euromosaic. A series of subsequent researches were published in 1995 and then in 2004 and 2009, with the purpose "to find out about the different regional and minority languages in existence and to establish their potential for pro-

duction and reproduction, and the difficulties they encounter in doing so" (Euromosaic Study's website). Through these strategic studies the Commission promotes debate, innovation, and the exchange of good practice.

3.3 Regional programmes: investing in culture and customs

A third field of activity for the Commission, already mentioned in the 1987 Resolution on the languages and cultures of regional and ethnic minorities is that of financing the indigenous potential of MLs through structural funds, such as the European Regional Development Fund (ERDF) and the European Social Fund (ESF).

The ERDF supports economically underdeveloped regions; as many ML communities live in such regions, it indirectly protects their diversity. For instance, Interreg III, a programme for promoting cooperation between regions as part of the ERDF, "holds definite potential for ML communities who find themselves in adjoining regions but in different jurisdictions" (Ó Riagáin, 2002: 11). The obvious examples are the Basques and Catalans in Spain; but also the small Greek community in Puglia has availed of the programme in a manner that strengthens its identity and culture.

The other structural fund, ESF, is set up to reduce differences in prosperity and living standards across EU Member States and regions, thus promoting economic and social cohesion. Much of the fund is used to train workers; as the cultural sector has considerable potential in terms of economic development, ML communities can avail of ESF funding to develop their economies in ways that are of benefit to their languages and their attendant cultures (Ó Riagáin, 2002: 11-12). An examples is the case of Sámi language and culture, whose promotion is financed by the EU according to the framework of the European Social Fund, objective 1 (see also: Second Periodical Review of the ECRML: Finland, 2003).

Conclusions

In this article I have discussed past and present developments of the EU's approach towards MLs, arguing that some European institutions have been more active than others in pushing forward the issue of minority protection (hypothesis 1 and 3). The historical analysis shows that the EP played a pioneering role in the 1980s, raising awareness and setting the agenda for successive developments. Subsequently, the Eu-

European Council exercised an important role when, in 2004, it imposed the principle of conditionality towards acceding countries, with a particular focus on the respect of minorities. While the involvement of the ECJ remained timid – the Court never clarified the concept of MLs, narrowly focusing on the protection of linguistic rights in the context of the free movement of workers – the European Commission has progressively become the most important European institution in this field, financing study programmes and scientific studies.

Moreover, MLs have been significantly developed in the Treaties (hypothesis 2). Accordingly, the ToL represents a fundamental evolution, since it officially recognizes the importance of minorities (art. 2 TEU) and it adds the European “rich linguistic and cultural diversity” (art. 3.3 TEU) among its fundamental values. Such a broad understanding of minorities results from the progressive development of the area which monopolized the issue of European minority protection

from 1981 to the beginning of the 2000s: namely that of MLs. In this sense, ML policy has been functional to the achievement of a more embracing concept of minority protection in the EU’s legal framework. Minorities, in the EU primary law, are not associated with any marker such as language, religion, or ethnic belonging. Such a development marks a shift from the previous common attitude towards minorities, long perceived as an obstacle to European integration.

Accordingly, the European ML policy involves legal recognition in the treaties, courses of action from the main institutions, and funding priorities for the Commission. MLs are now not only politically protected by the Treaties and endorsed by the EP, the European Council and – less assertively – by the ECJ; but they are also financially promoted by the European Commission. Under this light, the EU has developed over time a more efficient ML policy, which itself has put the basis for the construction of a broader minority protection at the European level.

BIBLIOGRAPHY

- De Witte, B. (2004), ‘The constitutional resources for an EU minority protection policy’, in Gabriel Toggenburg (ed.), *Minority protection and the enlarged European Union: The way forward*, LGI Books, 107-124.
- Elias, S. B. (2010), ‘Regional Minorities, Immigrants and Migrants: The Reframing of Minority Language Rights in Europe’, *Berkeley Journal of International Law*, 28/1, 261 – 312.
- Fitjar, R. D. (2010), *The Rise of Regionalism. Causes of regional mobilization in Western Europe*, Routledge.
- Grin, F. and B. Kuzmany (2000), ‘Evaluating Policy Measures for Minority Language in Europe: Towards effective, cost-effective and democratic implementation’, *European Centre for Minority Issues*, http://www.coe.int/t/dg4/education/minlang/publications/ECMIReport6_en.pdf (last access: November 2010).
- Keating M. (1998), *The New Regionalism in Western Europe. Territorial Restructuring and Political Change*, Edward Elgar.
- Kloss, H. (1971), ‘Language rights of immigrant groups’, *International Migration Review* 5/ 2, 250–268.
- Kymlicka, W. and Patten A. (2003), ‘Language Rights and Political Theory’, *Annual Review of Applied Linguistics*, 23, 3 – 21.
- Llamas, C., Mullany L., Stockwell P. (2007), *The Routledge Companion to Sociolinguistic*, Routledge.
- Loughlin, J. (1996), ‘“Europe of the Regions” and the Federalization of Europe’, in *Federalism and the European Union*, 26/4, 141 – 162.
- Ò Riagáin, D. (2002), ‘The lesser used languages of Europe & their participation in the programmes of the European Union’, *Europa Diversa: Expert Meeting*, http://www.europadiversa.org/eng/pdf/donall_oriagain_eng.doc (last access: November 2010).
- Palermo, F. and J. Woelk (2005), ‘From Minority Protection to a Law of Diversity? Reflections on the evolution of minority rights’ *European Yearbook of Minority Issues*, 3, 5-13.
- Palermo, F. (2006), ‘Linguistic Diversity within the Integrated Constitutional Space’, *European Diversity and Autonomy Papers*, 2, http://webfolder.eurac.edu/EURAC/Publications/edap/2006_edap02.pdf (last access: November 2010).
- Shuibhne N. N. (2008), ‘EC Law and Minority Language Policy: Some Recent Developments’, Xabier Arzoz (ed.), *Respecting Linguistic Diversity in the European Union*, John Benjamins, 123-143.
- Toggenburg, G. (2000), ‘A Rough Orientation Through a Delicate Relationship: The European Union’s

- Endeavors for (its) Minorities', European Integration Online Papers, 16/4, <http://eiop.or.at/eiop/pdf/2000-016.pdf> (last access: November 2010).
- Toggenburg, G. (2004), 'Minority Protection in a Supranational Context: Limits and Opportunities', Gabriel Toggenburg (ed.), *Minority Protection and the enlarged European Union: The way forward*, LGI Books, 1-36.
- Toggenburg, G. (2005), 'Who is Managing Ethnic and Cultural Diversity in the European Condominium? The Moments of Entry, Integration and Preservation', *Journal of Common Market Studies*, 43/4, pp. 717-738, <http://www.eurac.edu/en/research/institutes/imr/Documents/IDP.pdf> (last access: November 2010).
- Toggenburg, G. (2006), 'A Remaining Share or a New Part? The Union's Role vis-à-vis Minorities After the Enlargement Decade', *European University Institute*, 2006/15, pp. 1-27. <http://cadmus.eui.eu/bitstream/handle/1814/4428/LAW%202006.15.pdf?sequence=1> (last access: November 2010)
- Toggenburg, G. (2008), 'The EU's evolving policies vis-à-vis Minorities: A Play in Four Parts and an Open End', *Human and Minority Rights in the Life Cycle of Ethnic Conflicts*, http://www.eurac.edu/en/research/institutes/imr/Documents/Web_del30EUandminorityprotection.pdf (last access: January 2011).
- Toso, F. (2004), 'Introduzione', *Lingue d'Europa. La pluralità linguistica dei Paesi europei fra passato e presente*, Baldini Castoldi Dalai, 23 – 54.
- Van Bossuyt, A. (2007), 'Fit for Purpose or Faulty Design? Analysis of the Jurisprudence of the European Court of Human Rights and the European Court of Justice on the Legal Protection of Minorities', *Journal of Ethnopolitics and Minority Issues in Europe*, http://www.ecmi.de/jemie/download/1-2007_van_Bossuyt.pdf (last access: February 2011).
- Urrutia, I. and I. Lasagabaster (2007), 'Language Rights as a General Principle of Community Law', *German Law Journal*, 8, 479-500.
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007), Official Journal C 306 of 17 December 2007.
- Charter of Fundamental Rights of the European Union (2007), Official Journal C 83 of 30.3.2010.
- Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union (2007) Official Journal C 83 of 30.3.2010.

2. European Council conclusions

- European Council meeting in Copenhagen, 21-22 June, Presidency Conclusions (1993).
- European Council meeting in Luxembourg, 12-13 December, Presidency Conclusions (1997).

3. European Parliament Resolutions

- Resolution on a Community Charter of regional languages and cultures and on a charter of rights of ethnic minorities (1981), Official Journal C 287/1981, p. 106.
- Resolution on measures in favor of minority languages and cultures (1983), Official Journal C 68/1983, p. 103.
- Resolution on the languages and cultures of regional and ethnic minorities (1987), Official Journal C 318/1987, p. 160.
- Resolution on linguistic minorities in the European Community (1994), Official Journal C 61/1994, p. 110.
- Resolution with recommendations to the Commission on European regional and lesser-used languages — the languages of minorities in the EU — in the context of enlargement and cultural diversity (2003), Official Journal C 076 E , 25/03/2004 p. 374 – 381.
- Resolution on a new framework strategy for multilingualism (2006), Official Journal C 314E , 21.12.2006, p. 207–210.
- Resolution on the protection of minorities and anti-discrimination policies in an enlarged Europe (2006), Official Journal 124 E , 25/05/2006 p. 405 – 415.
- Resolution on non-discrimination and equal opportunities for all – a framework strategy (2006), Official Journal C 300E , 9.12.2006, p. 259–265.

4. ECJ Cases

- Primary sources**
- 1. Treaties and Charters**
- Treaty on European Union (1992), Official Journal C 191 of 29 July 1992.
- Treaty of Amsterdam (1996), Official Journal C 340 of 10 November 1997.
- Treaty establishing a Constitution for Europe (2004), Official Journal C 310 of 16 December 2004.
- Mutsch, Case C-137/84, (1985) European Court Ruling I-2681, par. 11–17.
- Groener, Case 378/87, (1989) European Court Ruling I-3967, 3967.
- Criminal Proceedings Against Bickel and Franz, Case C-274/96 (1998), European Court Ruling I-7637.

Angonese v. Cassa di Risparmio di Bolzano SpA, Case C-281/98 (2000), European Court Ruling I-4139.

**5. Reports, articles, official speeches
(last accessed in February 2011)**

EurActive.com, (2009), article: EU urged to use new treaty to support language rights:

<http://www.euractiv.com/en/culture/eu-urged-use-new-treaty-support-language-rights/article-187858>

EurActive.Com, (2010), article: Call for 'civic disobedience' to save minority languages :

<http://www.euractiv.com/en/culture/grassroots-action-key-saving-endangered-languages-news-319508>

European Bureau for Lesser Used Languages, (2002), report: Support for Minority Languages in Europe: <http://ec.europa.eu/education/languages/archive/languages/langmin/files/support.pdf>

European Charter for Regional or Minority Languages (2003), report: Second Periodical Report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter:

http://www.coe.int/t/dg4/education/minlang/report/PeriodicalReports/FinlandPR2_en.pdf

European Commission, (2004), report: Many Tongues, One Family: Languages in the European Union: <http://ec.europa.eu/publications/booklets/move/45/en.pdf>

European Committee for Culture and Training, website: <http://www.europarl.europa.eu/activities/committees/homeCom.do?language=EN&body=CULT>

Euromosaic, website:

http://ec.europa.eu/education/languages/archive/languages/langmin/euromosaic/index_en.html

Mercator European Research Centre, website: <http://www.mercator-research.eu/minority-languages/facts-figures>

Network for Multilingualism and Diversity in Europe (2006), report: Facts about Multilingualism: http://www.fuen.org/rml2future/pr/20100721_info/Info-Fakten-Mehrsprachigkeit-EN.pdf

Reding, V. (2002), The future of regional and minority languages in the European Union, Conference on creating a common structure for promoting historical linguistic Minorities within the European Union, speech 02/474.

The political economy of Turkey-EU customs union after the treaty of Lisbon: A Reappraisal

ARIANNA CATALANO

Fellow junior researcher at the International Strategic Research Organization (USAK), Ankara, Turkey



This work stems from a research-period spent in the Summer 2010 at the International Strategic Research Organization (USAK) in Ankara, Turkey. Along with Dr. Mustafa Kutlay, the author took part to a research-project aiming at evaluating the impact of the Treaty of Lisbon on the overall relations between Turkey and the European Union (EU). The analysis outlined in this research-work and the preliminary results presented are the outcome of a series of round-tables with major Turkish political economy experts and policy-makers as regards the current status and future sustainability of Turkey's Customs Union (CU) with the EU.

Abstract

This article analyses the European Union's (EU) trade policy highlighting the gradual shift towards a more penetrating EU Free Trade Agreements (FTAs) policy and institutional changes brought about by the Treaty of Lisbon and their impact on trade policy's functioning. Emphasizing Turkey's changing trade patterns and stressing the growing salience of non-EU trade partners, the article opens up a debate on the rationale of current Customs Union. The analysis brings to the understanding of the on-going cases of trade deflection negatively affecting Turkish economy and the drawbacks arisen from the EU's changing FTA policy. Finally, the political and technical aspects of Turkey's accession process are discussed to shed further light on the current and future meaning behind today's Customs Union.

Introduction

The goal behind the present work is two-fold: on the one hand, it points at investigating the possible effects that the Treaty of Lisbon might have on Turkey-EU trade relations, while on the other hand it aims to stimulate a theoretical debate on a topic lacking sufficient attention, especially in Turkey's academia. In fact the aim of the discussions held at USAK from May to July 2010, was to give a preliminary, and by no means exhaustive, answer to the following question: "How the new commercial policy shaped by the Treaty of Lisbon (ToL) would affect the CU established in 1996 between the EU and Turkey?"

In order to articulate a coherent argument and summarize the diverse positions arisen during the round-tables, this article tackles three relevant aspects concerning the status of Turkey-EU trade relations. Firstly, the paper shows how the ToL modifies and affects

current EU trade policy. Given the high level of technicality surrounding the topic, the article offers a short, but clear and detailed explanation of the institutional novelties introduced by the ToL to the EU's trade policy. Secondly, the focus shifts to the existing institutional arrangement binding Turkey to the EU trade policy. The nature of and the constraints posed by the CU are outlined in order to understand how the CU affects economic relations between EU and Turkey. Finally, the author articulates the main points emerged throughout the research-project to discuss different claims and perspectives on the evaluation of the impact of the EU's new trade policy on the existing CU. The article develops through the following structure. In the first section, the changing nature of the EU's trade policy is analyzed, stressing the gradual shift towards a more bilateral and Free Trade Agreements-based (FTAs) approach, to contextualize the nature of

the institutional changes brought about by the ToL. The second section provides a brief but detailed description of the functioning of the EU's trade policy, and afterwards focuses on the novelties introduced by the ToL and their impact on EU commercial policy. In the third section the CU's origin, economic achievements and structural weaknesses are pointed out in order to outline the overall framework of Turkey-EU trade relations. In the fourth and final section the tentative conclusions from the round-tables on the possible benefits and drawbacks of the EU's new trade policy vis-à-vis the existing CU are discussed. This part is originally thought to open possibilities for further research among Turkish scholars to deepen the analysis of the current rationale behind the CU and to stimulate public debate on the topic. In a similar fashion this paper endeavours to draw the attention of the European scholarship on a less-known area, in particular for those interested in the EU's relations with Turkey.

EU's Trade Policy Strategy before the Treaty of Lisbon

Until 2006 the EU has thoroughly championed a multilateral approach in dealing with international economic matters. However, the year 2006 marked a profound change in attitude, in line with the reconfiguration of trade politics at global level. The shift experienced by the EU towards the use of bi- and plurilateral agreements, and the benefits arising from this change in paradigm, might be better understood by taking into account several factors. The rise in the economic and bargaining strength of fast-growing emerging markets has gradually altered power dynamics within multi-lateral trade fora, especially in the World Trade Organization (WTO). As an evidence, in the Doha Development Round's (DDR) outcome, the effort paid by the EU to include in multilateral negotiations such topics as competition and investments, has been promptly halted by developing countries' opposition. In open contrast with the commitment to multilateralism promoted by former Trade Commissioner Pascal Lamy (1999 – 2004), under the chairmanship of Commissioner Peter Mendelson, the EU put forward a new trade outlook, as illustrated by the Communication 'Global Europe: Competing in the World'. Some commentators suggested (Abbott, 2008; Kutlay, 2009) that the most striking element of novelty of this strategy was by far the emphasis on bilateral and regional agreements.

According to Woolcock (2007) three main aspects had determined the rationale behind EU's renewed commercial interest for FTAs. First, EU-FTAs could neutralize trade diversion effects brought about by the FTAs set up among third countries; second, FTAs would be viable tools to establish deeper commercial relations with countries experiencing rapid economic growth; finally, FTAs could serve as a way to enforce international trade rules. While explaining the EU's attitude towards FTAs, Woolcock affirms that '[the EU] is motivated by a desire to achieve in FTAs what it has failed to achieve in multilateral negotiations' (2007: 4).¹ Yet the author further specifies the causes for the EU's change in trade strategy: in particular, the failure to include the 'Singapore issues' (investment, competition, trade facilitation, government procurement) or 'deep trade agenda' (Young and Peterson 2006) into the DDA; the US renewed attitude towards the use of FTAs; the increased competition over emerging Asian markets (see Sally 2007; Kutlay 2009). As an evidence, the US involvement in important new markets, i.e. South-Korea, through the mean of FTA fostered a 'growing pressure for EU exporters and investors in the region for the EU to strengthen its presence' (Woolcock 2007: 5). The 2006 Communication put emphasis on one particular feature, namely the fact that 'the current geography of EU FTAs mainly covers our neighbourhood and development objectives well, but our main trade interests less well' (EU Commission, 2006: 14). Consequently, the document provided the new benchmarks to enhance EU trade policy:

- Maintaining WTO at the centre of the international trading system to strengthen its multilateral-based functioning, further liberalize world trade and achieve the DDA objectives;
- Widening the EU's economic scope through an enhanced conceptualization of FTAs. Bilateral agreements must regain importance to boost the EU's competitiveness and deepen EU trade relations with emerging markets (especially Asia's markets);
- Taking into consideration partner's market potential (economic size and growth) and level of protection against EU exports (existence of tariff and non-tariff barriers) when setting up new FTAs. Following these criteria particular countries (South Korea, India and Russia) and regional blocs (ASEAN,

1 As regard to this point, also Young and Peterson (2006) stress how the EU is actually trying to push forward the issues not enforceable through multilateral cooperation via alternative channels, such in fact FTAs

Mercosur, GCC) emerge as priorities.

- Widening the areas of liberalization including services, investment, public procurement and competition. Investment promotion and facilitation acquire special importance.²

Bearing these elements in mind, it is shown that the institutional changes introduced by the ToL may be possibly considered as the consequential step taken in order to address EU trade policy's weaknesses and boost EU's trade actorness. Looking at the larger picture, the EU market power has steadily decreased as a consequence of the rise of the developing and dynamic 'Rest' – from 1996 to 2005 in fact EU's world market share has slightly diminished both in value and volume terms, losing respectively -1.3 and -1.7 percentage points in market share (Trade DG 2008: 11). On the internal side, the EU has demonstrated to fall short of political will and suitable measures to become 'the world most dynamic knowledge-based economy', as envisaged by the 2000 Lisbon Strategy³ (Wyplosz 2010).

Hence, the gradual switchover to a FTAs-based regime might be ascribed to a series of interrelated dynamics. On global scale, the world economy's recasting led to the decrease of EU's global economic actorness and to a more general reconsideration of costs and benefits deriving from the thorough acceptance of a multilateral trading system. At EU level, these changes implied the restoration of trade-related postures in open contrast with those previously pursued. The EU committed to the goal of re-asserting and preserving its role in the world economy by maximizing the capacity to expend its range of action, both geographically and in terms of trade-areas. As a matter of fact, 'this relative decline in EU market power is likely to be

2 See Evenett (2007) for a detailed account of EU trade policy's evolution since 1995 and Sally (2007) to grasp EU's shift towards Asia's markets.

3 The Lisbon Agenda stemmed from March 2000 European Council, where EU member states agreed on a platform of ambitious goals aiming at coping with new challenges faced by the EU economy, such as her ageing population (see Gros, 2005). Growth and jobs are in fact the main points to be further developed and strengthened. Research and innovation become the fundamental factors driving the EU towards a knowledge-based, investment-attractive and sustainable economy. The political and economic guidelines spelled out in the Lisbon Declaration also fostered the introduction of a new set of instruments, the so-called 'Open Method of Coordination' (OMC) to ensure better level of flexibility and implementation (João Rodrigues, 2005).

a factor favouring the continued use of bilateral trade agreements in which the EU can make more use of any asymmetry in economic power relative to other countries' (Woolcock, 2010a: 14).

The EU's Trade Policy

Before the enforcement of the ToL, the Article 133 of the Treaty establishing the European Community (TEC) ascribed the EC institutions the exclusive competence to deal with EC trade policy. However, as Woolcock points out (2005: 379), the Commission had often underlined that in the areas of services, investments and intellectual properties the EC powers had to be further extended. Following revision treaties did not substantially widen Commission's powers in trade policy-making. Under Article 133 (TEC) the EU was entitled to negotiate multilateral agreements, whereas Article 310 regulated the EU's role in bilateral and region-to-region agreement's negotiations. There were some differences between the two policy processes involved, but both attained to the 'Community method' procedures.

When the EU negotiated trade agreements within a multilateral organization, such as WTO, the Commission elaborated a draft mandate expressing the EU's position on a given topic, but also mirroring member states' and civil society's claims, above all interest groups. This draft was discussed within a Committee of senior trade officials set up by Article 133 to be finally approved by the General Affairs and External Relations Council (GAERC) by a qualified majority vote (QMV); however practically by consensus. Hence the Commission was the only actor allowed to represent and put forward EU's interest in multilateral negotiations. The outcome of the negotiations would have been adopted by the GAERC, generally again via consensus-building. The assent of the European Parliament (EP) was required only if the agreement implied modifications to the existing *acquis*. By contrast, in bilateral or region-to-region negotiations the EP's role was stronger because it had to grant its simple majority vote's assent over any agreements. Most importantly, the Council decided on the final adoption of the agreement through the unanimity vote.

The ToL brought about several novelties. Yet Woolcock (2010; 2010a) underlines three main changes. First of all, the ToL clarifies the attribution of competence between the EU and the member states; secondly, it enhances the role of the EP in the EU trade policy-making and finally it includes external trade and in-

vestment policy in the overall frame of the European External Action (EEA).

The ToL has fulfilled the task of moving all trade-related aspects for services, intellectual property (IP) and foreign direct investments (FDI) under the EC exclusive competence. De Quevedo Ruiz (2009: 85) in fact points out (see also Woolcok 2010: 22) that under the provision of Article 133 (TEC) there was no clear attribution of competence concerning services and IPs between the EU and member states. As a consequence the competence in those matters was shared, and FTAs dealing with those items were 'mixed' as they also included member states' national competences. Article 207 of the Treaty on Functioning of the EU (TFEU) replacing the Article 133 (1) (TEC) has indeed extended the definition of trade policy thus granting the EU the exclusive competence

...with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.

This provision further entails the GAERC to use the QMV even for agreements related to services and IP, eliminating the unanimity vote.⁴ The straightforward consequence is faster policy-making over a wider range of areas in order to develop a more effective and inclusive trade policy. Article 207 (1) of ToL also casts the EU's exclusive competence over FDI. The Article's provision offers an overall framework for investment liberalization and protection,⁵ even though member states' autonomy to establish Bilateral Investment Treaties (BITs) with third parties will be substantially curtailed. As a matter of fact, EU-BITs will gradually replace individual EU member states' BITs with third countries, on condition that the eventual 'EU invest-

ment model' will provide better terms for investors than the ones offered by member states.

The ToL further strengthen the role of EP in EU trade policy-making. Once the co-decision mechanism has been defined as an ordinary legislative procedure (OLP), the Council and the EP, especially through the International Trade Committee (INTA), share the powers to set up the EU's commercial policy. In particular, since now on INTA will have to be reported by the Commission about the developments during negotiations, although it does not take part in the process as much as the Trade Policy Committee, that actually assists the Commission throughout negotiations. However the EP still lacks the power to shape the objectives and authorize negotiations, but its consent is required for all kind of trade arrangements before Council's adoption of the agreement.

Finally, the inclusion of trade policy in the framework of the EU's external action is a crucial point to start wondering about what role the EU will grant to trade in the context of its foreign policy and more generally, external action. To this extent, the after-ToL trade policy is closely linked with the issue of the EU's international actorness. According to Woolcock (2010a: 3-7) EU trade actorness' attributes are: market power, in terms of size and market access; EU's recognition as an actor independent from EU member states, especially via European Commission's role in negotiations; cohesion among member states in order to shape an autonomous EU position; normative power, stemming from shared norms and standards' ability to influence other actors' decisions. Furthermore, parliamentary accountability over trade policy, which before the ToL was the least developed aspect (see also Young and Peterson 2006).⁶ If one may accurately say that the ToL strengthen the role of both the European Commission and the EP, more should be argued as regards the EU's trade actorness and the deriving way of exercising power. It has been widely acknowledged that the EU's power in international relations is based on the capability to constraint others' conducts through 'soft' means excluding coercitive or military instruments. In his seminal article Ian Manners (2002) defined the EU's power, and therefore the EU's peculiar kind of international actorness, in terms of establishing 'what passes as normal in international relations', which means, the ability to set the normative framework influencing ac-

4 However, Article 207 (4) (a) (b) underlines that the unanimity vote would be used by the Council for agreements concerning trade in cultural, audiovisual, social, education and health services in order to preserve EU's cultural diversity and welfare provisions. This shows that the principle of 'parallelism' introduced with the Treaty of Nice (ToN) has not been overruled.

5 As Woolcock points out (2010: 24), once that FDI have fallen under EU exclusive competence, BITs set up by member states before the entrance into vigour of ToL would provide a case for exemption (grandfathering clause) even violating the relevant provision.

6 However Hagemann (2008) casts some doubts about the new legal framework's ability to foster a higher degree of democratic accountability.

tors' behaviours. However, it might be misleading to adapt the persuasive character featuring the concept of 'soft' power (ye 1991) to the EU when it acts as a 'trade' power (Meunier and Nicolaidis 2005). Assuming that the changes set up by the ToL magnified the EU's trade actorness, would not automatically imply the increase in the EU's power to shape the rule of the global trade-system. Rather, it might be argued that once defined the conditions for the EU to re-emerge as a leading trade actor, the mechanisms of conditionality entailed in the FTAs would acquire further relevance as the crucial element to address others' behaviour in line with the EU's expectations. Conditionality is in fact the tool that the EU uses to transform its economic power, into the leverage capable of shaping others' actions, thus exercising its power 'through' the channel of trade.

Such a consideration may be tested in the case of the EU's CU with Turkey. The question of horizontal coherence across different EU external policy areas, i.e. trade and enlargement, it is in fact the key to understand what kind of effects the post-ToL EU's trade policy is likely to produce vis-à-vis Turkey's accession process. More specifically, how will the EU's new trade strategy affect existing trade agreements, such as the CU established with Turkey in 1995?

The EU-Turkey Customs Union

In 1963 the Association Agreement between the European Economic Community (EEC) and Turkey, the so called 'Ankara Treaty', was signed envisaging three main points: the creation of a CU between the EEC and Turkey; free mobility of labour; and eventually Turkey's ECC full membership (Article 28 of the Treaty). Those goals had to be achieved through a three-phase process consisting of a 5-year 'preparatory stage' when the EEC provided Turkey with economic assistance in order to smooth the passage to the 'transitional stage' to finalize the Customs Union. In 1973 the 'Additional Protocol' modified the Ankara Treaty and outlined 1996 as the deadline to achieve the CU. The Additional Protocol entailed a remarkable reduction of EC protectionist barriers for Turkish industrial goods (textile excluded). Likewise Turkey agreed on lowering tariffs and quotas on EEC exports (Öniş 2001). The 'final phase' would have established the CU; however, owing to the growing political instability and Turkey's debt crisis, in 1977 Turkey froze Additional Protocol's

provisions and unilaterally stopped customs lowering.⁷

The 1980 'January 24 Decision' for economic stabilization and liberalization had the objective to align Turkish economy with the changing European economic environment. The economic reforms contained in the programme, which ushered Turkey into its first phase of economic liberalization (1980-1989), soon produced the desired outcomes. Macroeconomic adjustments were mainly oriented to promote exports and gradually liberalize imports, along with the deregulations of exchange rate and capital movements. Inflation lowered to 35-40% from the three-digit rate of the previous years, the gross domestic product (GDP) grew at an annual average of 5.8% without recession. During the same period, following the liberalization of trade and financial markets, the export-GDP ratio trebled, shifting from 4.1% to 13.3%. However, in this phase foreign direct investment (FDI) flow was still unremarkable, thereby similarly to the Greek case we cannot speak of investment-led growth. After the abolishment of the 'Law for the Protection of the Value of the Lira' in 1984 foreign exchange regime and capital movements were also liberalized. As a result, along with the steady depreciation of Turkish Lira (TL) short-term money markets were established and the whole domestic financial market vigorously stepped into the global financial system (Ertuğrul and Selcuk, 2001). During that period the role of the state as an economic actor, both investor and producer, was dramatically curtailed through an intense process of privatization affecting the so-called 'state economic enterprises' (SEEs). However, wages were constantly eroded by this combination of privatization and restrictive policies. As Mütüfeler (1995) shows, structural adjustments carried on throughout the 1980s had the goal to offset European economic integration's effects over Turkish economy. Non-tariff barriers' removal and Southern countries' new membership further maximized EC market integration at the expense of Turkey's welfare gains. Freer circulation of productive factors magnified intra-EC trade, in particular thanks to the fact that the rest of the EC achieved free access to new EC-members dynamic markets. Thus far Turkey's external trade was dominated by the EC: imports and exports absolute volume steadily increased, however Turkey's shares of im-

⁷ Turkey in fact faced a steep balance of payment's worsening due to the considerable foreign reserves' outflows used to pay energy bills after the 1973-74 oil-shock. Stagflation further decreased EEC's demand for Turkish manufactures, thus fostering industrial recession. Ecevit's expansionary monetary policy meant to boost economy but in fact just helped inflation to spiral (Zürcher, 2007).

ports from the EC started to boost since the second half of the 1980s, as a result of improved macro-economic conditions. Contrarily, Turkey's share of exports to EC between 1985 and 1988 went sharply above and below the average of 45% respectively (see Table 1 and 2). It is then arguable that Common External Tariff's (CET) imposition in the new members' markets increased intra-EC trade at

the expense of Turkish goods' competitiveness in the European markets. Nonetheless, Turkey's competitiveness problem may also be explained looking at Turkey's specialization in lower value-added goods, such as textile, iron and steel. However, on a longer time-frame, Turkey's exports grew rapidly at an annual rate of 17.2%, while the export/GDP ratio shifted from 4,1% in 1980 to 12,8% in

Table 1

TURKISH IMPORTS ³⁶			
Year	Imports (\$)	Imports from EC	% EC
1979	4,946	1,708	34.5
1980	7,815	2,268	29.2
1981	8,864	2,519	28.4
1982	8,794	2,466	28.4
1983	9,179	2,596	28.3
1984	10,663	2,974	27.8
1985	11,275	3,547	31.5
1986	11,020	4,565	41.4
1987	14,093	5,667.8	40.0
1988	14,267	5,894.2	41.1
1989	15,686	6,054.8	38.4
1990	22,302	9,328	41.8
1991	21,047	9,221	43.8
1992	22,872	10,063	44.0
1993	29,429	12,301	41.8

Source: Mütfüleri, Meltem (1995), "Turkish Economy Liberalization and European Integration", Middle Eastern Studies, 31 (19), January 1995, 85-98; p. 89.

Table 2

TURKISH EXPORT PERFORMANCE ³⁷			
Year	Exports (merchandise)	Exports to EC (million \$)	Exports to EC as %
1979	2,261	1,132	50.0
1980	2,910	1,300	44.7
1981	4,703	1,564	33.3
1982	5,890	1,802	31.4
1983	5,905	2,066	36.1
1984	7,389	2,781	39.0
1985	8,255	3,204	40.3
1986	7,583	3,263	43.8
1987	10,190	4,868	47.7
1988	11,662	5,098	43.7
1989	11,627	5,408	46.5
1990	12,959	6,906	53.2
1991	13,594	7,042	51.8
1992	14,715	7,460	50.7
1993	15,344	7,242	47.2

Source: Mütfüleri, Meltem (1995), "Turkish Economy Liberalization and European Integration", Middle Eastern Studies, 31 (19), January 1995, 85-98; p. 89.

1995, one year after the establishment of the CU. The effect of trade liberalization and the growing productive specialization helped Turkish export-industry to con-

centrate on the manufacturing sector, which in fact began to cover a higher share of the overall exports (see Table 3). Between 1980-1990 the manufacturing

sector grew by 7.9% annually, while in the following decade its growth reached 5.9% (World Bank 2000). Through this process Turkey not only reduced its import tariffs, mainly on EC goods, from 10% to 60% in six years (1988-1994) in order to align with CET, but it also experienced a economic growth, boosting Tur-

key's GDP from \$128 billion in 1980 to \$322,1 billion in 1990 and doubling the international trade share over the whole GDP. In terms of annual growth, during the same time-span Turkish GDP increased annually by the average rate of 5.4%. The outcome was less satisfactory in the following decade, when the average GDP

Table 3

	1963	1980	1985	1990	1995	1996	1997	1998	1999	2000	2001	2002
Exports	368	2.910	7.908	12.959	21.637	23.225	26.261	26.974	26.588	27.775	31.334	35.762
Imports	687	7.909	11.343	22.302	35.708	43.627	48.559	45.921	40.687	54.503	41.399	51.270
Trade Volume	1.055	10.819	19.251	35261	57.344	66.851	74.820	72.895	67.274	82.278	72.733	87.032
Trade Deficit	-319	-4.999	-3.435	-9343	-14.071	-20.402	-22.298	-18.947	-14.099	-26.728	-10.065	-15.508
Exports/ Import (%)	53,5	36,8	70,2	58,1	60,6	53,2	54,1	58,7	65,3	51,0	75,7	69,8
Export/GDP(%)	4,9	4,1	11,8	8,6	12,8	12,8	13,9	13,5	14,5	13,9	21,2	19,9
Import/GDP (%)	9,2	11,2	16,9	14,8	21,1	24,1	25,7	23,0	22,1	27,3	28,0	28,5
TRexp/WORLDExp (%)	0,248	0,152	0,437	0,389	0,424	0,440	0,447	0,498	0,477	0,438	0,512	0,561
Manu.Exp/Total Export(%)	19,8	36,0	75,3	79,0	88,2	87,1	88,1	88,5	89,3	91,2	91,5	93,1

Source: State Planning Organization (SPO), IFM. In Utkulu, U. and Seymen, D. (2003), "Trade and Competitiveness Between Turkey and the EU: Time Serie Evidence", 1 – 28, p. 5.

growth was 4.2% (World Bank 2000; OECD 2010). Further reforms aimed at restructuring the bank-system and financial sector, for the TL's exchange rate to be market-determined. In 1989 currency full-convertibility was also established. On the external dimension, financial reforms eased capital inflows and outflows, while on the internal side interest rates and credit-issuing were totally liberalized. However, no adequate financial institutions have been set up in order to supervise the whole transition, consequently fuelling a dramatic increase of corruption (Öniş 2004).

To sum up, throughout the 1980s Turkey actively shifted from an import-substitution to an export-oriented economy, maintaining the EC as the main trade partner. However, it is not accurate to speak

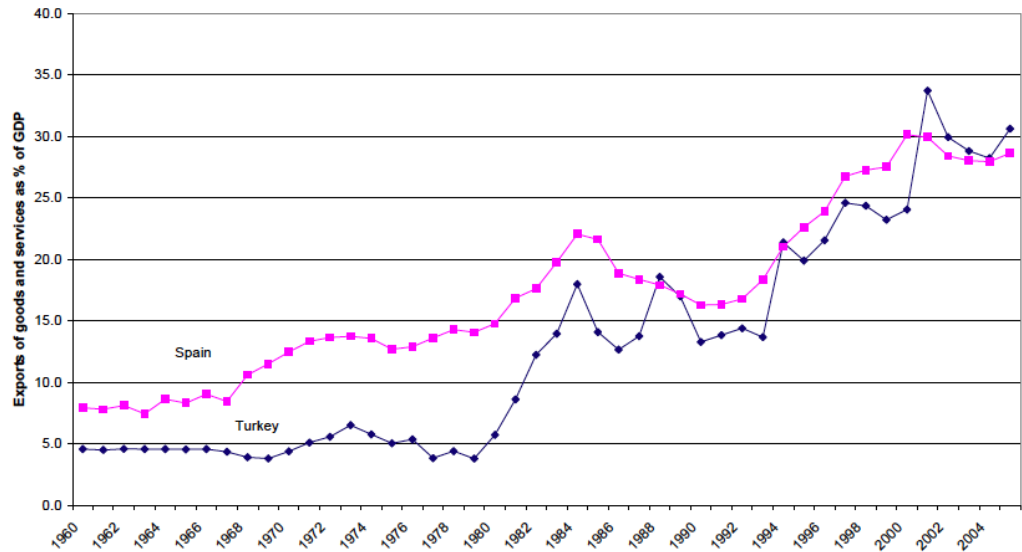
of a proper 'growth effect' deriving from the 'January 24 Decision'. Despite stable GDP growth rate, capital accumulation was undermined by high volatility of financial markets and even higher levels of inflation. Restrictive monetary policies further curtailed rooms for human capital accumulation. Indeed, the Turkish case in 1980s-1990s has been defined as the classic example of 'boom-bust' economy (Ertuğrul and Selcuk 2001): better investment conditions certainly favoured physical capital accumulation, thereby prompting medium-term growth effects; however less focus on human and knowledge capital undermined long-term growth effects (see Baldwin & Wyploz, 2009). The combination of these factors in Turkish economy meant cyclical current account imbalance leading to

Table 4

CURRENT ACCOUNT (CA)	1990	1991	1992	1993	1994	1995
Export	13.0	13.7	14.9	15.6	18.4	21.9
Import	22.6	21.0	23.1	29.8	22.6	35.2
Trade Balance	-9.6	-7.3	-8.2	-14.2	-4.2	-13.2
Current Account Balance	-2.6	0.3	-0.9	-6.4	2.6	-2.3
Capital Account Balance	3.9	-1.3	2.4	6.6	-2.4	8.9
GDP Growth	9.4	0.3	6.4	8.1	-6.1	8.1
Inflation	48.6	59.2	61.4	60.26	149.56	64.9
PSBR (%GNP)	7.4	10.2	10.6	11.7	8.1	6.5

Source: IFM; adapted by the author.

Table 5

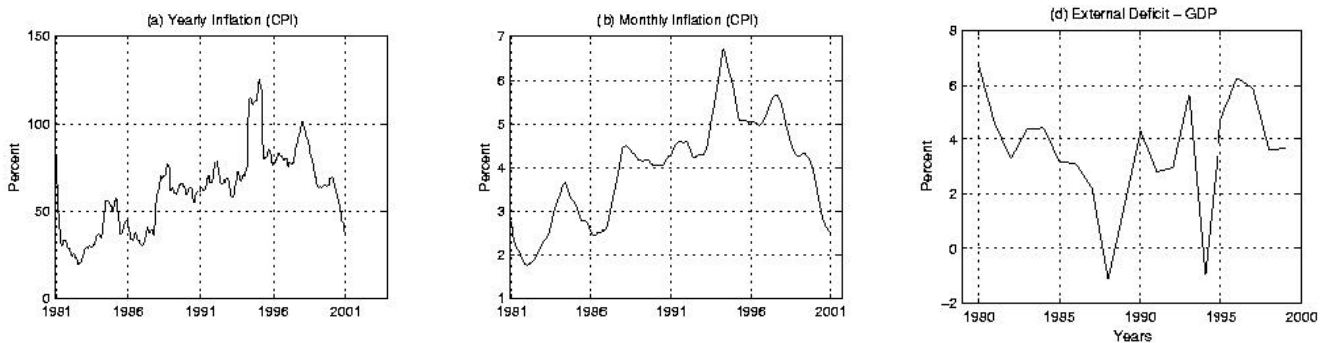


Sources: Eurostat; in Gros, D. (2005), "Economic Aspects of Turkey's Quest for EU Membership", CEPS Policy Brief, 69, April 2005, 1-10, p. 3. The author makes a comparison with Spain's economy, which became an EU's new member when Turkey lodged its application for full-membership, so as to demonstrate the different patterns of economic integration between EU members and non-members.

financial volatility, especially throughout the second phase of liberalization (1989-1995) (see tables 4 and 5). The years before the establishment of the CU were marked by high level of inflation and external deficit (see figures 1). However, the decisive impulse to foster EC-Turkey integration came from politics. In 1989 the EC rejected 1987 Turkey's application for membership. This event shifted Turkish policy-makers' attention towards the creation of a customs union, which was not seen as a mere alternative but as a crucial step towards full-fledged membership. During the 1990s party fragmentation led to the emergence of Necmettin Erbakan's Islamist Welfare Party (WP) at the

expense of the more secular True Path Party's (TPP) leadership. Hence, most prominent TPP figure Tansu Çiller used the rise of political Islam as a scapegoat to trigger the CU's establishment. She in fact argued that the CU's failure, broadly meaning the impossibility to join the EC, was likely to gradually transform Turkey into an Islamist regime, whereas a firm commitment to the EC would have preserved the country's secular and Western-oriented tradition (Mütfüler-Bac 1998). The Association Council Decision N. 1/95, better known as '1995 Agreement', implied for Turkey a 'substantial alignment of regulatory regimes' (Ülgen and Zahariadis 2004). In particular the CU required: 1)

Figure 1



Sources: Ertoğrul, A. & F. Selçuk (2001), "A Brief Account of Turkish Economy, 1980 – 2000", in Russian and East European Finance and Trade, pp. 1 – 27; p. 2.

Sources: Ertoğrul, A. & F. Selçuk (2001), "A Brief Account of Turkish Economy, 1980 – 2000", in Russian and East European Finance and Trade, pp. 1 – 27; p. 8

bilateral removal of industrial tariffs, a process started with the Additional Protocol consisting of customs duties' complete elimination; 2i) the harmonization of Turkey's external industrial tariff with the CET on imports from third countries (an average of 3%) under the provision of Article 16; 3) adoption of the *acquis communautaire* in the matter of TBT's elimination,

protection of competition—in 1995 in fact Turkey developed its own competition laws on the EU model—administration of border procedures, rules of origins, protection of commercial, industrial and intellectual property rights; 4) under the provision of Article 54, the adoption of EU's commercial policy towards third countries, which means accepting all FTAs between

Table 6

Year	Export (TR)	Change (%)	Export (to the EU)	Change (%)	EU Share of Export	Import (TR)	Change (%)	Import (from the EU)	Change (%)	Import share from the EU	Turkey - the EU Trade Balance
1995	21,6		11,1		51,2	35,7		16,9		47,2	-5,8
1996	23,2	7,3	11,5	4,2	49,7	43,6	22,2	23,1	37,2	53,0	-11,6
1997	26,3	13,1	12,2	6,1	46,6	48,6	11,3	24,9	7,5	51,2	-12,6
1998	27,0	2,7	13,5	10,2	50,0	45,9	-5,4	24,1	-3,2	52,4	-10,6
1999	26,6	-1,4	14,3	6,3	54,0	40,7	-11,4	21,4	-11,0	52,6	-7,1
2000	27,8	4,5	14,5	1,1	52,2	54,5	34,0	26,6	24,3	48,8	-12,1
2001	31,3	12,8	16,1	11,1	51,4	41,4	-24,0	18,3	-31,3	44,2	-2,2
2002	35,8	14,1	18,1	12,0	50,5	51,3	23,8	23,1	26,5	45,1	-5,1

Source: State Planning Organization (SPO), IFM. In Utkulu, U. and Seymen, D. (2003), "Trade and Competitiveness Between Turkey and the EU: Time Serie Evidence", 1 – 28, p. 6.

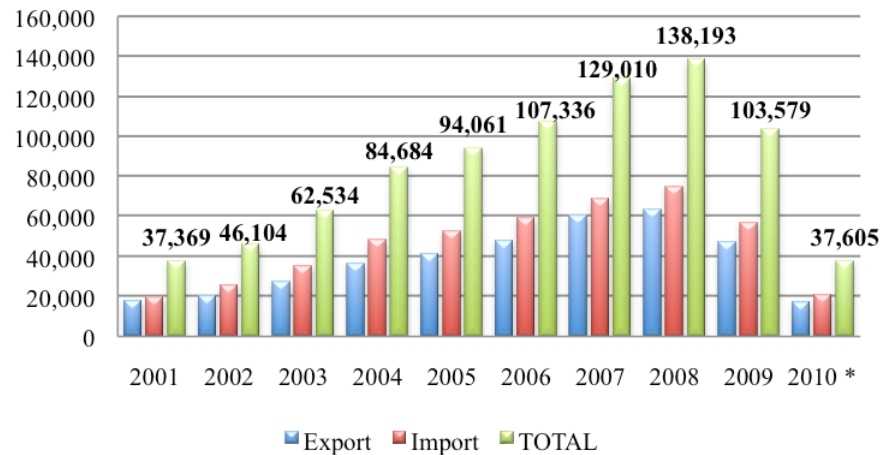
the EU and trade partners and implementing their provisions, including IPs. Through this the CU deepened the extent of economic integration between the EU and Turkey both in terms of legislative harmonization and trade volume. The implementation of the CU certainly impacted Turkish economy, both in terms of foreign trade and EC-Turkey trade. On the import side, in the year of the inception of the CU, Turkey's overall imports raised by 22,2%, but in terms of imports from the EC the increase was by 37,2%. However, these figures decreased sharply in the following years, mostly due to the 1998-99 financial turmoil caused by the crises in Russia and Southeast Asia. In the period of 1995–2002 the average share of imports coming from the EU was around 49,3%, but the pattern was highly uneven: in 2001 for instance Turkey's imports from Europe accounted only for 44,2% of the total. On the export side, Turkey traded on average with the EU the 50,7% of its total exports, especially in 1998 and in the 2000s (see table 6). The establishment of the CU proved to be more beneficial for Turkey in terms of increasing imports rather than exports, thus augmenting Turkey's foreign debt deficit with the EU. However, under the CU regime the EU positively remained Turkey's major trade partner.

EU-Turkey external trade volume in the period 1999-2008 experienced an almost steady increasing trend,

amounting to €93.463 million in the last year (Eurostat 2010). In 1999 Turkey's share of imports coming from the EU was 55.41%. However, interestingly enough in the period 2001-2010 EU's share of Turkey's total trade volume started to decline from 53,63% in 2003 to 42,29% in 2010. This downturn cannot be explained only through the recent economic crisis because the declining share of trade towards EU countries began when Turkey's imports and exports were still booming. On the other hand, Turkey has become the EU's seventh biggest imports partner accounting for 3.0% of the EU's total imports and the fifth major export partner receiving the 4.1% of the EU's exports (European Commission 2008). Is it then arguable that Turkey's economy is highly integrated with the EU's economy? Should this assumption be posed under review? The EU's economy is surely more dependent on the US, China, Russia and EFTA members, especially Norway and Switzerland, than on Turkey. However, in the period of 2001-2010 it is acknowledged that also Turkey started to gradually diversify its trade patterns: Middle Eastern and Asian countries have attracted the bulk of Turkey's import-export shares showing a clearly rising trend. As a combined effect of the 2008 financial crisis and Turkey's trade patterns diversification, total trade between Turkey and the EU dropped from \$138,193 million in 2008 to \$37,605 million in 2010 (see Table 7).

Table 7

Figure: Turkey's Total Trade with the EU (million \$)



Source: Turkstat

Turkey's trade diversification may be understood taking into account several factors. Regions of the Black Sea, the Caspian Sea and the whole Greater Middle East acquired more importance in global trade, and Turkey, due to its peculiar geographical position, may foster a pivotal role in the region. A clear sign of such an intention may be seen nowadays as regard to energy supply, where Turkey is acting to become the 'energy-corridor' bringing hydrocarbons directly to European markets (Tekin and Williams 2009; 2009a). Despite the fact that the EU is still the main commercial partner, Turkey's centrality within countries with abundant energy resources, dynamic economies and growing internal demands seems to set the basis for an on-going economic upgrade. Turkey's efforts to strengthen trade partnership and establish new cooperation agreements with its neighbourhood spells out a certain interest in becoming a major hub in the region. In the meanwhile, trade patterns' diversification would increase Turkey's gains in terms of volume trade, specialization and export-led economic growth. In the light of what has been set up as the new Turkish foreign policy doctrine,⁸ becoming a regional hub for trade and energy would increase Turkey's role vis-à-vis the EU, as the membership does not seem a sudden alternative.

According to the official data in April 2010 in fact export to the Near and Middle East covered the 19,3% of Turkey's total export, while the 8,2% has been traded with other Asian countries. The Organization of Black

Sea Economic Cooperation (OBSEC) amounts to the 13% of Turkey's total exports. On the import side almost 30% of Turkey's imports come from the Asian continent, almost 40% from OBSEC and former Soviet Republics, while almost 14,4% originates from Middle Eastern and South-East Asian countries grouped within the Organization of Islamic Conference (OIC) (Turkey's Undersecretary of the prime Ministry for Foreign Trade 2009).

One of the key issue in the debate about the future sustainability of the CU agreement deals with agriculture. Although the CU set up the basis for deeper integration towards Turkey's full membership, a crucial sector for Turkish economy such as agriculture has not yet been included in the arrangement. Despite the declining weight of agriculture in Turkish economy, in 2007 this sector still employed 26% of Turkish labour force accounting for 9% of the GDP (see Table 8). Turkey's eventual membership would widen the EU's agricultural area of 39 million hectares. Turkey in fact is a major agricultural producer and net exporter: in 2007 its cereal production equaled 11.4% of the EU's production, fruit and vegetables equaled 60%. Given these data it is possible to understand the EU's reluctance to fully liberalize agriculture. Albeit Common Agricultural Policy's (CAP) new logic has moved price floors to market-determined prices compensating farmers' losses with direct payments, if Turkish agricultural products were fully liberalized within the context of the CU, market prices would reach a lower equilibrium level and the EU's reimbursements to farmers would sharply increase. However, it is worth noting that the bulk of agricultural trade between the EU and Turkey already abides with preferential trade rules and

⁸ The concept of "Strategic Depth" created by the current Foreign Minister Ahmet Davutoglu is based on the assumption that Turkey must gain a primary role in world affairs ("centrality") due to its historical legacy and geographical location. One of the means to realize this aim is in fact trade relations.

Table 8

Economic importance of agriculture

<i>Indicators</i>	Turkey	EU 27
<i>Agriculture area (000 ha)*</i>	39 503	182 129***
<i>Proportion of total area</i>	50.4%	41.4%***
<i>Proportion of Arable land</i>	55.6%	59.3%
<i>Proportion of Permanent Grassland</i>	37%	30.9%***
<i>Share of agricultural labour in total labour (%)</i>	26.4	5.6
<i>Share of GDP (%)</i>	8.7	1.8

Source: State Planning Organization (SPO), IFM. In Utkulu, U. and Seymen, D. (2003), "Trade and Competitiveness Between Turkey and the EU: Time Serie Evidence", 1 – 28, p. 6.

* Usable agricultural area (UAA); *** 2006 data.

it is mostly liberalized (Grethe 2003: 27), although no fixed timetable is scheduled to thoroughly include agriculture in the CU. In case of its full inclusion in the CU framework, Turkey would be constrained to lower its prices in accordance with the WTO-led trend pushing towards the liberalization of agricultural goods. This in turn would affect negatively the welfare gains of Turkish farmers, already in a disadvantaged position because mostly concentrated in the poorest areas. Lowering of the agricultural prices would increase the need to support producers through export subsidies, administered prices and direct payments. The ongoing liberalization of agricultural good in fact has already affected Turkey in this sense. In 1998 only producer support in Turkey cost € 9 million, while in 2000 the 86% was granted as price support, creating sharp distortion effects (Grethe 2003: 29).

Thus far, Turkey has benefited from the CU as long as this arrangement provided the framework to gradually shape Turkey's trade legislation on the *acquis* bases. Legislative harmonization, alignment with CET and adoption of FTAs set up by the EU clearly increased Turkey's access to third countries' markets. Harrison, Rutherford and Tarr (1996) argue that acting simultaneously on the 'internal' sphere, i.e. the CU, and the 'external' dimension, i.e. tariff reduction with third countries, would reduce 'trade diversion' effects. As a matter of fact Ülgen and Zahariadis (2004: 21) state that 'stronger bilateral trade has thus been accompanied by stronger trade growth overall [for Turkey]'. Indeed Harri-

son, Rutherford and Tarr (1996) calculated Turkey's gains from bilateral liberalization as recurring and accounting for 1-1.5% of the GDP. However they outlined revenue replacement as a big challenge. Since Turkey would be likely to lose around 1.4% of the GDP from tariffs reduction, fiscal deficit should not be increased in order to offset the loss. Reducing export subsidies applied to trade with third countries is an important measure in order to both diminish distortion effects and alleviate the burden on fiscal deficit. In addition Zahariadis (2004 in Ülgen and Zahariadis, 2004) estimates that harmonization with EU technical regulations and abolition of technical barriers would account for 1.5% of the GDP.

As substantial tariff reduction implies an imports increase, currency depreciation is needed to boost exports and keep the current account in balance. In the Turkish case acting on the exchange rate has often spiralled inflation. However, given the exclusion of agriculture from the CU arrangement and Turkey's maintenance of relatively higher tariff, the agricultural sector ended up being a more protected sector. This led in turn to increase the asymmetry of the integration depth within the CU, with negative effects for Turkey. As a matter of fact, in order to balance different exports level between the industrial and the agricultural sectors Turkey would have to subsidize agricultural goods boosting exports in an inefficient way and negatively affecting fiscal deficit. Therefore the asymmetric nature of the CU posed some problems that should be addressed

fostering widening and deepening measures.

In addition, the CU has also produced several drawbacks. To start with, the CU's main weakness seems to be the lack of cooperation and consultation between the two parties in dealing with commercial policy's choices, since Turkey has actually no say on EU external trade policy. This in turn has led to inconsistency between the EU and Turkey trade policy. After 1996 and especially following the 2006 EU's change in trade policy strategy, Ülgen and Zahariadis (2004: 26) stress that

The EU went ahead and concluded these agreements [FTAs with third countries] without actually taking into consideration the existence of a custom union arrangement with Turkey. As such, there were no prior consultations with Turkey and therefore Turkish concerns did not come into play during the negotiations. Yet, because of the custom union arrangement, Turkey was forced to conclude a similar agreement with those countries after the EU did.

This phenomenon is seen as the origin of a highly detrimental situation for Turkey. The EU's trade partners have proved very often to be unwilling to negotiate with Turkey because via FTA's establishment with the EU and in virtue of EU-Turkey CU, they were able to export tariff-free goods also to the Turkish markets. By contrast, since the preferential agreement just included goods originating from the EU, they were not bound to lower their

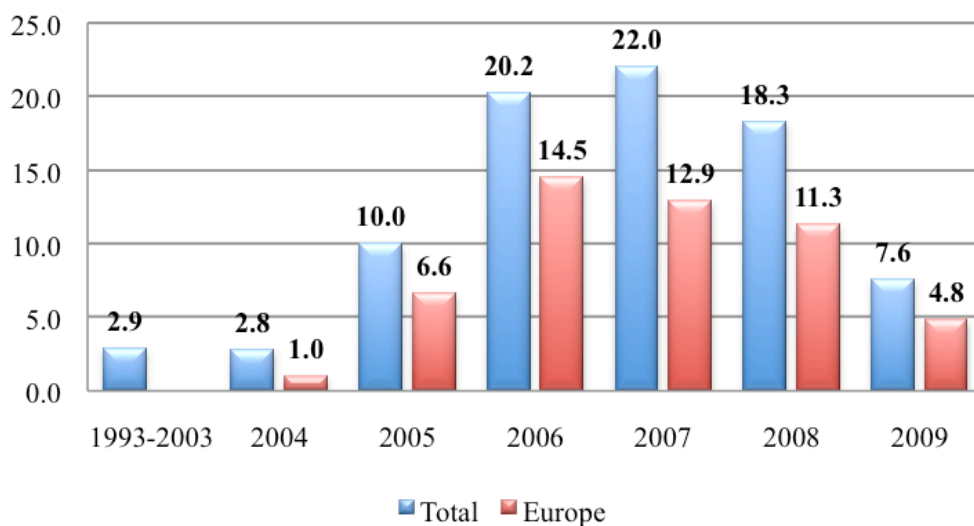
tariffs vis-à-vis Turkish goods. To this extent, EU-Turkey CU created a typical case of 'trade deflection'. Implications for Turkey were, firstly the fact that Turkish exporters found themselves in disadvantage as regards the EU's exporters towards third countries as Turkish goods did not fall within the preferential agreement; secondly the loss of potential tariff revenues from goods coming from third countries who entered the Turkish market via EU (Kutlay 2009: 127).

The second drawback is that several areas are still not included in the CU. Besides the 'in-between' case of agriculture, liberalization of trade in services could have a strong impact on productivity and competitiveness of Turkey's service sector and furthermore, it would curtail state involvement in economic activities, ensure regulatory policy convergence and improve economic governance. In addition, since Turkish economy is rapidly shifting towards a service-led economy— service's share of total GVA raised from 53.4% in 1998 to 64.4% in 2008 (Eurostat 2010)— the liberalization of this sector could further improve CU parties' mutual gains in terms of efficiency and lower prices. However EU members' fear for 'social dumping', yet magnified by the latest enlargement, is likely to deny Turkish enterprises the right to settle and eventually bring their labour force to the EU.

On Turkish side, the 'implementation problem', namely the insufficient and inadequate application of norms and standards, also concerns techni-

Table 9

Figure: FDI flows in Turkey (billion \$)



Source: TurkStat

cal regulations, with the result that some industrial goods categories heavily imported by the EU such as cars, chemicals and foodstuff, still do not fit with the standards. Trade flows then become slower, with obvious welfare losses (Barysch, 2005). Moreover, increasing current-account deficit, huge public debt and lower employment rate undermine Turkey's ability to attract FDI, especially long-term inflows (see Table 9).

to widen the CU also liberalizing the service sector, the EP would be asked to grant its assent and via INTA it will be constantly updated about negotiations' outcomes. However, it would not be able to determine Commission's choice of whether or not to widen the CU, but it will share the decision-making power with the Council to eventually adopt the act.

By contrast, the division of competence between EU and member states would have major repercussions. Since new crucial areas have been included under the umbrella of the EU's exclusive competence, member states have agreed on yielding part of their trade policy's autonomy to the Commission, thus enormously widening its power of initiative. Trade-related aspects of services, FDI and IPs are in fact the furthest challenges to international trade liberalization, given their growing weight

The CU and the ToL

In order to understand what kind of implication the ToL could have on the EU-Turkey CU two factors should be taken into account. First, the likely institutional changes of the ToL affecting the EU trade policy and consequently the existing CU. Second, ToL novelties, interacting with global trade dynamics that may re-shape EU trade actor-ness. With the ToL the EU has achieved institutional channels which widen and strengthen EU trade policy's scope of action. Despite its importance insofar as EU legitimacy is concerned, it might be said that the increased role of the EP is not likely to determine EU-Turkey CU economic improvements or worsening. Rather, as the EP mirrors European society's claims it would work as catalyst or obstacle when time to deepen the EU's relations with Turkey will be ripen. For instance, if the EU decided

on national GDPs, the global shift towards technology and knowledge-based economy and their technical and legislative complexity. EU members decided to maximize their individual strength in bilateral as well as in multilateral negotiations acting collectively within the EU bloc. The obvious result might be two-fold: the Commission's competence in trade policy has been extended in order to pursue a more coherent, encompassing and far-reaching trade policy, and this may strengthen the EU in multilateral and bilateral negotiations; as a result, the overall EU's capability to act as an independent and assertive actor in international trade may be enhanced. Being empowered with the competence to include all the aspects concerning trade and trade liberalization in the globalization era, the EU would be able to exploit the comparative advantage created by high added value and technological goods, knowledge, information and IT economies, highly developed human capital formation and accumulation.

A possible scenario might occur if and when the EU would apply the ToL's provision related to trade policy within the context of the CU with Turkey. In this case the existing arrangement would be widened and deepened to a new dimension of trade integration between Turkey and the EU. In spite of macroeconomic constraints and structural asymmetries, such as agricultural sector's relevance, state-dominated enterprises and low level of competition enforcement, Turkish economy has proved to be dynamic and onward-oriented. Service, especially communication and transport, is a fast developing sector which is expected to become Turkish economy's engine. As shown above, service liberalization between the EU and Turkey could push down prices as a result of the increased competition, thus augmenting net consumers welfare gains and maximizing efficiency for producers. In the case of a more integrated CU, Turkish market will benefit not only in quantitative terms, but also to the extent of stability and reliability. Hence, foreign agents would be more prone to invest in Turkey thus increasing long-term FDI inflows. Under Article 207 (1) the EU will liberalize FDI while protecting EU investors, thus creating a mutually beneficial framework to en-

sure a safe investment-environment and boost economy. Turkey, who still attracts a relatively low portion of FDI given its market size, will be directly favoured by this provision. To sum up, if applied to the existing arrangement the novelties brought about by the ToL could start up the CU on new, more dynamic and more challenging basis.

However, the most thought-provoking point might depend on the EU future trends in trade policy. Once acknowledged that ToL reforms' goal is to grant to the EU the capability to act as a more visible, coherent and effective trade actor, what is important to understand is how and in which direction the EU will carry on its trade policy. To this extent, it is still unclear whether the dynamics taking place at global level, i.e. economic regionalization vs. multilateralism, are likely to have a stronger impact than internal preferences, i.e. switchover to bilateral FTA/PTA-based regimes. Some authors (Abbott 2008; Kutlay 2009; Martin et al 2010), without putting into question the liberalization trend undergone by global trade, have argued that multilateral liberalization has experienced a sharp decline favouring the flourishing of FTAs. As it was shown above, also the EU since 2006 has underpinned its trade strategy to this logic bypassing the multilateral praxis. This shift is likely to hold for two main reasons. On the one hand, the crisis in Greece has prompted an escalation of panic throughout the EU and global markets (Nye, 2010), laying bare Economic Monetary Union (EMU) structural asymmetries and Euroland's currency vulnerability (Ito 2010; Rodrik 2010). The EU has to find a way to reaffirm itself in the international trade arena,⁹ not only to sustain welfare gains achieved so far but also to restate its primary legitimacy source, i.e. economic strength. On the other hand, the EU is still one of the most important global economic actors, and the size and specialization of its economy can produce better trade-offs when it acts on bilateral or regional basis. In sum, it seems that the EU has

started to grant much more value to the net gains achievable through FTAs rather than the ones provided by multilateral arrangements, mainly within the WTO rounds, regardless distortion effects emanating from the discriminatory character of each preferential agreements.

Should the EU keep pursuing its trade liberalization agenda, now including also services, IPs and FDI, by favouring bilateral arrangements, Turkey's gains from the current CU would be unequally distributed. Assuming that the EU carries on negotiations in order to liberalize trade in services, FDI and IPs within the context of the CU, when the EU would set up the FTAs with third countries dealing with the same contents, the 'trade deflection' scenario valid for industrial goods would appear again in Turkey's detriment. Furthermore, if the EU would decide not to extend service, IPs and FDI liberalization to the CU with Turkey, distortion effects arising from preferential agreements between a world major trade bloc and highly dynamic economies on fast growing and gainful sectors would be likely to undermine Turkey's global competitiveness and reduce its capability to penetrate new markets.¹⁰ Moreover, the practice of 'shadowing' the EU's FTAs policy, being the only viable solution to offset the diversion and deflection effects, has proved to be costly. First, the bureaucratic cost of initiating and maintaining separate negotiation in order to settle a final agreement. Second, often the lack of willingness of the third party to negotiate with Turkey a FTA mirroring that established with the EU. Needless to say, the outcome of this long-lasting and resource-draining process, is by no means secure. The inclusion of the 'Turkish clause', requiring the third party to sign a similar FTA with Turkey, is an appropriate step to share this burden. Also, the fact that Turkey is compelled to undertake further efforts in order to counterbalance the effects of the unilaterally decided EU trade policy, from the Turkish standpoint, is the result of the highly asymmetrical nature of the CU.

9 For instance, Lady Catherine Ashton's appointment as High Representative of the Union for Foreign Affairs and Security Policy, who was in fact former EU Trade Commissioner is highly indicative of EU's eagerness to point out trade as EU external action's cornerstone.

10 However, as Kirişçi (2009) points out, Turkey has started to pursue a more active 'trade diplomacy' in order to follow EU external trade policy and too sign bilateral preferential agreements with EU's new trade partners (see also Kutlay, 2009). This practice of 'shadowing EU's FTA policy' has been for long carried on by EFTA (Baldwin & Wyploz, 2009: 461).

Table 10

Status of Preferential Trade Agreements (PTAs) of EU and Turkey in Comparative Perspective				
Country	EU		Turkey	
	Starting Date of Negotiation	Signature Date of the Agreement	Starting Date of Negotiation	Signature Date of the Agreement
Israel	1995	1995	1994	1996
EFTA Countries	1990	1992	1990	1991
Croatia	2000	2001	2000	2002
Bosnia-Herzegovina	2000	2007 (initialized)	2002	2002
Serbia	2005	2007	2007	continuing
Montenegro	1996	2006	2007	continuing
Morocco	1995	1995	1999	2004
Tunisia	1995	1995	2002	2004
Palestine	1995	1997	1999	2004
Syria	1995	2004 (initialized)	2004	2004
Egypt	1995	2001	1998	2005
Albania	2000	2006	2003	2006
Jordan	1995	1997	2005	continuing
Lebanon	1995	2002	2003	continuing
South Africa Republic	1995	1999	2004 (exploratory talks)	continuing
Algeria	1995	2001	Not started	March 2010 JEC*
Faeroe Islands	-	1991	2000	continuing
ACP countries	1998	2000	Not started	-
Mexico	1996	2000	Not started	-
Mercosur	April 2000	continuing	June 2008 (exploratory talks)	-
GCC	1990	continuing	November 2005	continuing
Ukraine	April 2008	continuing	June 2007 (exploratory talks)	-
India	June 2007	continuing	February 2008 (attempt)	-
Chile	2000	2002	March 2008	July 2009
South Korea	May 2007	October 2009	January 2008 (attempt)	-
ASEAN	May 2007	continuing	June 2007 (attempt)	-
Central America	September 2007 (exploratory talks)	April 2008 (I round)	Not started	-
Andean Community	September 2007 (exploratory talks)	April 2008 (I round)	Not started	-
Pakistan	-	-	November 2009	March 2010 MoUs**
Iran	2002	stalled	2007	April 2009

Source: Kutlay, M. (2009), "The Changing Policy of the European Union towards Free Trade Agreements and its Effects on Turkish Foreign Trade: A Political Economy Perspective", USAK Yearbook, 2, 117-132, p. 127.

* Joint Economic Commission (JEC) ** Memoranda of Understanding on economic cooperation, agriculture and investments

Conclusion

From the EU's perspective, the institutional channels opened by the ToL are likely to strengthen the Commission's ability to cast a more coherent and inclusive trade policy, which in turn might be able to shape a more assertive and credible role as an autonomous actor in the international trade arena. Given current patterns of trade globalization, the high volatile nature of the international financial system and the growing intra-systemic asymmetry, multilateral arrangements seem harder to achieve and less attractive in terms of the immediate gains and positive outcomes. Thus, it is arguable that the FTAs will continue to be the most used trade arrangements insofar as trade liberalization on wider and wider sectors is concerned.

In this context, the EU-Turkey CU looks more like a liability, rather than an asset. Comparing economic advantages that the EU would achieve under ToL provision as regards trade policy, and by contrast the detrimental situation that Turkey may face, it seems obvious that the 'in-between' solution offered via CU is not satisfying. Turkey is by far a rising international actor whose power is less and less based on its traditional military strength; economic relations and commercial ties have spread throughout its entire neighbouring area. The geography of Turkey's economic actorness is radically changing: at the time of CU establishment Turkey was in fact exclusively dependent on the trade

flows with the EC, while nowadays trade patterns have widened and diversified to great extent. A highly interesting point is that Turkey's share of market oriented to countries having just a marginal impact on the EU's economy, such as Iran or Central Asian countries if we exclude natural resources, is dramatically growing. In this context, Turkey's ability to act as a fully autonomous economic actor is curtailed by the CU's binding provisions, which compel Turkey's trade policy to attain to EU's unilateral decisions. In this framework, Turkey's wider interests run the risk to be subdued to a far rigid scheme.

Furthermore, if we carefully look at the very reason explaining the establishment of a CU with the EU, namely the prospect of full-fledged membership in the medium-term, and even more carefully we read between the lines of EU political debate about Turkey's accession, it is arguable that the mismatch among Turkey's expectations, the commitment towards membership and the EU's ambiguous behaviour is clearly deepening. More academic and public debate is needed in order to outline the changing nature of Turkey's trade diversification and to evaluate the impact of keeping the CU up. Current arrangement appears too rigid and too less inclusive to match with Turkey's economic dynamism. And without any serious evidence of an eventual membership, the CU long-term sustainability could start to be put into question.

BIBLIOGRAPHY

- Abbott, R. (2008), "EU Trade Policy. Approaching a Crossroad", Chatman House Briefing Paper, June 2008, BP 08/04, 1-8.
- Baldwin, R. & Wyplosz, C. (2009), *The Economics of European Integration*, 3rd ed. (London: McGraw-Hill).
- Barysch, K. (2005), "The Economics of Turkish Accession", CER. Centre for European Reform, June 2005, 1-9.
- De Quevedo Ruiz, J.C. (2009), "Implicaciones del Tratado de Lisboa sobre la Política Comercial Comunitaria", *Cuadernos Economicos*, 77 (Junio 2009), 77-95.
- Directorate General Trade (2008), *Global Europe: EU Performance in the Global Economy*, EU Commission.
- Ertoğrul, A. & F. Selçuk (2001), "A Brief Account of Turkish Economy, 1980 – 2000", in *Russian and East European Finance and Trade*, pp. 1 – 27.
- EU Commission (2006), *Global Europe: Competing in the World*, [COM(2006) 567 Final]
- Evenett, S.J. (2007), "The Trade Strategy of the European Union: Time for a Rethink?", *Bruegel Papers*, April 3, 2007.
- Grether, Harald (2003), "Effects of Including Agricultural Products in the Custom Union between Turkey and the EU", *Dissertation zur Erlangung des Doktorgrades der Fakultät für Agrarwissenschaften*, University of Göttingen.
- Gros, D. (2005), "Economic Aspects of Turkey's Quest for EU Membership", *CEPS Policy Brief*, 69, April 2005, 1-10.
- Gros, D. (2005a), "Prospects for the Lisbon Strategy: How to increase the competitiveness of the Euro-

- pean Union", CEPS Working Document, 224, July 2005, 1-20.
- Harrison, G.W., Rutherford T. F. and Tarr, D. G. (1996), "Economic Implications for Turkey of a Custom Union with the European Union", World Bank. Policy Research Working Papers, n° 1599, May 1996, 1-52.
- Kirişci, K. (2009), "The Transformation of Turkish foreign policy: The rise of the trading state", *New Perspective on Turkey*, 40, 29-57.
- Kutlay, M. (2009), "The Changing Policy of the European Union towards Free Trade Agreements and its Effects on Turkish Foreign Trade: A Political Economy Perspective", *USAK Yearbook*, 2, 117-132.
- Manners, I. (2002), "Normative Power Europe: A Contradiction in Terms?", *Journal of Common Market Studies*, 40 (2), 235-58.
- Meunier, S. and Nicolaidis, K. (2005), "The European Union as a Trade Power", in Hill, C. and Smith, M., *The International Relations of the European Union* (Oxford: OUP).
- Mütfüler, M. (1995), "Turkish Economy Liberalization and European Integration", *Middle Eastern Studies*, 31 (19), January 1995, 85-98.
- Mütfüler-Bac, M. (1998), "The never-ending story: Turkey and the European Union", *Middle Eastern Studies*, 34 (4), 240-258
- Öniş, Z. (2001), "An Awkward Partnership: Turkey's Relations with the European Union in Comparative Historical-Perspective", *Journal of European Integration History*, 7 (1).
- Öniş, Z. (2004), "Turgut Özal and His Economic Legacy: Turkish Neo-Liberalism in Critical Perspective", *Middle Eastern Studies*, 40 (4), July 2004, 113-134.
- Sally, R. (2007), "Looking East: The European Union's New FTAs Negotiations in Asia", *ECIPE Working Paper*, 03/2007.
- Tekin, Ali & Williams, Paul A. (2009), "EU-Russian Relations and Turkey's Role as an Energy Corridor" in *Europe-Asia Studies*, 61 (2): 337-356.
- Tekin, Ali & Williams, Paul A. (2009a), "Europe's External Energy Policy and Turkey's Accession Process", *Centre for European Studies – CES, Working Paper Series # 170*
- Ülgen, S. and Zahariadis, Y. (2004), "The Future of Turkey-EU Trade Relations: Deepening vs. Widening", *Turkish Policy Quarterly*, 3 (4), 18-42.
- Utkulu, Utku and Seymen, Dilek (2003), "Trade and Competitiveness Between Turkey and the EU: Time Serie Evidence", 1 – 28, Follow-up of 2003 OPEN MINDS Conference, University of Lodz.
- Wallace, H. (2005), "An Institutional Anatomy and Five Policy Modes", in Wallace H., Wallace W. and Pollock M.A. (2005), *Policy Making in the European Union*, 5th ed. (OUP: Oxford).
- Woolcock, S. (2005), "Trade Policy. From Uruguay to Doha and Beyond", in Wallace H., Wallace W., Pollock M.A. (eds.), *Policy-Making in the European Union*, 5th ed., (Oxford: Oxford University Press).
- Woolcock, S. (2007), "European Union Policy towards Free Trade Agreements", *ECIPE Working Paper*, 03/2007.
- Woolcock, S. (2010), "EU Trade and Investment Policy-making after the Lisbon Treaty", *Intereconomics*, 1, 22-25.
- Woolcock, S. (2010a), "The Treaty of Lisbon and the European Union as an Actor in the International Trade", *ECIPE Working Paper*, 01/2010.
- Young, A. R. & Peterson, J. (2006), "The EU and the new trade politics", *Journal of European Public Policy*, 13: 6 (September 2006), 795-814.
- Zürcher, E. J. (2007), *Turkey. A Modern History*, 5th ed., (I.B. Tauris: New York).

Internet Sources

- Available at <http://www.voxeu.org/index.php?q=node/4840>. Accessed on June 8, 2010.
- European Commission (2008), *Turkey. EU Bilateral Trade and Trade with the World*. Available at http://trade.ec.europa.eu/doclib/docs/2006/sepember/tradoc_113456.pdf. Accessed on June 6, 2010.
- Eurostat (2010), *Eurostat database. Candidate countries and potential candidates*. Available at http://epp.eurostat.ec.europa.eu/portal/page/portal/candidate_and_potential_candidate_countries/data/database. Accessed on June 6, 2010.
- Hagemann, S. (2008), "Democracy vs. Efficiency", *Vox-EU*, June 21, 2008. Available at <http://www.voxeu.org/index.php?q=node/1256>. Accessed on June 10, 2010.
- Ito, T. (2010), "Trapped in Euroland", *Project Syndicate*, June 3, 2010. Available at <http://www.project-syndicate.org/commentary/ito1/English>. Accessed on June 8, 2010.
- João Rodrigues, M. (2005), "The Debate over Europe and the Lisbon Strategy for Growth and Job". Available at http://www.iee.umontreal.ca/activitieseng_fichiers/PROGRAMME/THE%20DEBATE%20OVER%20EUROPE.pdf. Accessed on

June 4, 2010.

- Martin, P., Mayer, T., Toenig, M. (2010), "The Economics and Politics of Free Trade Agreements", VoxEU, April 9, 2010. Available at <http://www.voxeu.org/index.php?q=node/4840>. Accessed on June 8, 2010.
- Nye, J. S. (2010), "The Future of Europe", Project Syndicate, June 8, 2010. Available at <http://www.project-syndicate.org/commentary/nye83/English>. Accessed on June 11, 2010.
- OECD (2010), OECD Factbook 2010. Economic, Environment and Social Statistics. Available at <http://stats.oecd.org/Index.aspx?DataSetCode=CSP2010>. Accessed on June 6, 2010.
- Rodrik, D. (2010), "Who Lost Europe?", Project Syndicate, June 9, 2010. Available at <http://www.project-syndicate.org/commentary/rodrik44/English>. Accessed on June 10, 2010.
- Turkey's Undersecretariat of the Prime Ministry for Foreign Trade (2009), Foreign Trade Outlook. Available at <http://www.dtm.gov.tr/dtmweb/indexen.cfm>. Accessed on June 12, 2010.
- Wyplosz, C. (2010), "The Failure of the Lisbon Strategy", VoxEU, January 12, 2010. Available at <http://voxeu.org/index.php?q=node/4478>. Accessed on June 4, 2010.

Assessing the legitimacy of the EU

DIRENÇ KANOL

PhD Student at CIRCAP, University of Siena



Abstract

The Lisbon Treaty could not meet the demands of many as regards the issue of the EU's legitimacy and democratic governance. By analyzing the literature on the legitimacy of the EU, the article shows why the EU has to fulfill the legitimacy criteria of the liberal-democratic states by defining the EU as a multi-level governance polity which affects the legitimacy of the member-states. This view discards the arguments for assessing the legitimacy of the EU as of an international organization. Likewise, it rejects the views arguing that the EU is a regulatory state and its legitimacy should be assessed in terms of regulatory legitimacy. A conceptual framework is provided at the end of this article to initiate an empirical research design to measure and subsequently perhaps to increase the legitimacy of the EU.

Introduction

Until the Maastricht Treaty (1992), the European Union (EU) justified its legitimacy by mere 'permissive consensus' (Lindberg and Scheingold 1970: 41-42; Obradovic 1996: 192). As long as the European polity did not influence people's lives radically, they were willing to give their consent to European integration as an elite affair (Obradovic 1996: 192). Since the Maastricht Treaty, however, the policy competences of the EU have increased enormously, making the EU a polity which affects citizens' lives directly on most of the societal matters (De Burca 1996: 350; Eriksen and Fossum 2000b: 264; Obradovic 1996: 192). Failed referenda, low degree of trust in European institutions, decreasing turnout in European elections, increasing number of protests, complaints about the missing social dimension of Europe, and the changing perceptions about the EU's formal legitimacy (the insufficient accountability of the Commission, the insufficient leg-

islative powers of the Parliament in comparison to the Council of Ministers, the transparency deficit in the Council of Ministers etc.) have showed the academics that the days of 'permissive consensus' is over and that there is a problem with the legitimacy of the EU (Obradovic 1996: 192-193; Ehin 2008: 621; Eriksen and Fossum 2000b: 262; De Burca 1996: 350-352; Banchoff and Smith 1999a: 1; Dobson and Weale 2003: 162-165; Wimmel 2009: 182; Höreth 1999: 253-257; De Jonghe and Bursens 2003: 3-5).

Nevertheless, not everyone accepts that the EU is in legitimacy 'crisis' (Moravcsik 1993, 2002; Majone 1998). Confusion on the topic is caused by the conflicting views on how to assess the legitimacy of the EU. Shall the same legitimation criteria be used for the EU that is used for international organizations? Would it suffice to use regulatory legitimacy criteria? Shall the same legitimation criteria that is used for liberal-democratic states be used for the EU? The valid way of assessing

the legitimacy of the EU needs to be found before accepting the legitimacy 'crisis' argument. This article aims to provide a tentative solution to this puzzle by looking at the strength of arguments of different authors after analysing the EU as a multi-level governance polity.

Multi-level Governance

The concept of multi-level governance came to life when Gary Marks (1992) used EU-polity as an independent variable for examining structural policy (Bache and Flinders 2004: 2). The basic argument is that policy-making in the EU is not a centralized process in Brussels but involves European, national, regional, and local levels. Decision-making does not depend on a hierarchical model; decisions are taken after negotiations between these levels. The interaction between these levels enables the governors to decide who is to take the lead in formulating and implementing a particular policy or if the policy process should involve various actors cooperating to come up with effective results (Enderlein 2010:3-4; Bache and Flinders 2004: 3; Pierre and Peters 2005: 72; Delmartino and Pattyn 2007: 187). Strong structure and strict rules are missing in this model, as decision-making process is vague and depends on negotiations (Rhodes, 1996:652; Pierre and Peters 2005: 72; Dobson and Weale 2003:156).

Multi-level governance can be defined by concentrating on four different aspects. Firstly, it is a model of governance; the model is inclusive of various private and public actors (Enderlein, 2010:2; Piattoni 2010:20 and 250). Secondly, different levels of government including European, national, regional and local levels are included in governance in a non-hierarchical way; actions of one specific level can be largely independent from another level. Division of labour exists between public institutions at different levels (Pierre and Peters 2005: 83-84). Thirdly, rather than practising under strict legal frameworks, the non-hierarchical model based on flexible legal frameworks functions through negotiations between the actors who take place in governance process. Thus, transnational multi-level governance resembles domestic networks (Enderlein, 2010:3; Pierre and Peters 2005: 86). Finally, multi-level governance is a political game where highly autonomous actors compete to influence policy. Participating in the game may lead to influencing policy since there is no rigid structure. Players may change depending on policy and strong actors may

moderate their demands in order to maintain their strong positions. The focus is more on efficiency and outcomes rather than procedures, and structures do not automatically decide the outcomes (Pierre and Peters 2005: 86-87 and 90).

Nature of the beast

What is the nature of the EU? Does the EU fit the multi-level governance paradigm? Or does the EU resemble to other types of polities or international institutions? Intergovernmentalists for instance, have sought to describe the EU by concentrating on sovereignty, decision-making authority of the national governments and the mere agent role of the supranational institutions. Even though these agents might influence the decision-making process by dealing with details of policies, the ultimate decision-makers are states. Judiciary and bureaucracy of the EU are not independent of the states. They have been created to ease the common decision-making and implementation process (Hooghe and Marks 2003: 283-284; Marks et al. 1996:342).

According to the intergovernmental theorists, unanimity ensures that the sensitive issues cannot be forced upon any of the member-states and all policy arises out of bargaining and negotiations, ending up in lowest common denominator form (Moravcsik 1993: 517). Liberal intergovernmentalist theory formulated by Moravcsik, does not ignore the influence of various interest groups in shaping states' position at the domestic level; this was a neglected phenomenon in the first intergovernmentalist accounts (Hoffman 1966). However, Moravcsik shares a similar opinion with early intergovernmentalists, arguing that 'supranational institutions' cannot impose their interests on states which are rational actors (Moravcsik 1993: 481-482 and 519).

There are numerous alternative theories to intergovernmentalism and liberal intergovernmentalism: neofunctionalism (Haas 1958), rational choice-theory, sociological institutionalism, historical institutionalism and constructivism have all sought to explain the causes and direction of European integration as a process (Pollack 2005: 26). The goal in this paper however, is to find a successful approach to European Union as an entity, so that different ways of assessing the legitimacy of this entity can be discussed. Scholars who have attempted to explain the EU from a comparative politics perspective have compared the EU to federal and confederal systems and advanced our

understanding of the EU as a polity (Pollack 2005: 26). Governance approach to the EU uses both international relations and comparative politics to explain the EU as a *sui generis* polity which is neither a traditional international organization nor a Westphalian type domestic state (Auberger and Iszkowski 2007: 272; Pollack 2005: 36).

According to Marks's definition, 'governance' dimension of multi-level governance paradigm refers to interdependence between governments and non-governmental actors at different territorial levels (Marks 1993: 402-403). Private actors and informal mechanisms of governing are two unquestionable characteristics of this model. Pierre and Peters argue that none of the European states that we know gives us a better example of this as the EU (Pierre and Peters 2009: 94). After the creation of the single market, domestic actors have moved their locus of attention from the domestic level to the European level (Hooghe and Marks 2003: 291-292). Interest groups try to influence decision-making by lobbying the Parliament, the Council of Ministers, and the Commission. European Commission asks for their opinion and values their input (Schmidt 2004: 983), (Banchoff and Smith 1999a: 14) and (Banchoff and Smith 1999b: 212).

Together with traditional legislation-making that is common in liberal-democratic states, the EU governance uses various soft modes of governance (Borrás and Conzelmann 2007: 531) and (Eberlein and Grande 2005: 100). An example of such soft modes of governance is networks coordinated informally and based on soft harmonization (Hajer and Wagenaar 2003: 2; Jachtenfuchs 2003; Peterson 1995). These networks may involve representatives of nation-states, sub-national actors, experts, economic actors, and civil society. Networks develop benchmarks or 'best-practice' rules and practices for governance – eg. European Forum for Electricity Regulation, Open Network Provision Committee etc. (Eberlein and Grande 2005: 100). Unlike the conventional hierarchical model, Open Method Coordination (OMC) mechanism allows the member-states to form their own goals and benchmarks for pursuing European policies. (Pierre and Peters 2009: 94). OMC mechanism also allows the economic and social actors to take part in policy-making and implementing (Holzhacker 2007: 266). The creation and usage of networks, that include various non-governmental actors have been encouraged by the Commission (Banchoff and Smith 1999a: 12-13; Wallace 2005: 495).

The multi-level dimension of the multi-level governance paradigm suggests that there are different actors operating at different levels, creating governance in the EU by interaction. Central hierarchy is lacking in this model and a considerable interdependence exists between the levels. Involving sub-national groups have been encouraged by the Commission. A good example to this is the cohesion policy where Commission establishes partnerships with the sub-national level: the former bypasses the states and includes the subnational level into the political multi-level governance game. This allows the sub-national level to have the competence to jointly design, finance, and implement economic development programs (Hooghe and Marks 2003: 297-298; Pierre and Peters 2005: 88). Moreover, multi-level governance has the political consequence of creating regional entities.

Policy-initiation in the EU is an empirical evidence of the non-hierarchical, multi-actor, negotiation-based multi-level governance in action. Although the European Commission is set to be the main actor, policy initiation includes interaction between the Commission, the Parliament, the Council of Ministers, the European Council, and interest groups including sub-national ones (Marks et al 1996: 357-358; Hooghe and Marks 2003: 298). The policy implementation proceeds similarly; although the directives coming from Brussels should be complied with, policy implementation is neither a strict hierarchical nor one level process. The commission shares authority with the member-states by cooperating with the national committees (Hooghe and Marks 2003: 306; Pierre and Peters 2009: 96). These committees involve representatives from both public and private sectors, and public sector may involve representatives from national authorities as well as sub-national ones (Hooghe and Marks 2003: 306-307).

All of these phenomena together may suggest that the states are not the sole deciders, and policy-making involves both public and private groups, and different levels— subnational, national and supranational— without a traditional hierarchy¹ (Hooghe and Marks 2003: 282; Delmartino and Pattyn 2007: 185). However, such a claim is not valid if those who take a multi-level governance approach towards the EU can-

1 One may add the transnational level to this. The latter has been ignored by many MLG scholars (George, 2004:124-125) and (Delmartino and Pattyn, 2007:185-186). An extensive argument about this issue is not the purpose of this paper.

not disprove the intergovernmental interpretation of the European institutions, whose role reduces to being mere agents of the member-states. Analyzing the institutions of the EU can shed light on this puzzle.

The European Commission takes decisions by majority rule. Twenty seven Commissioners, who are proposed by each nation-state and are approved by the President of the Commission, are expected to act in favor of the EU as a whole rather than defending national interests (Eriksen and Fossum 2000a: 6). Commission's position, which makes it suitable for acquiring information from national and sub-national institutions, and interest groups, makes it a highly competent informational base that can independently influence policy-making (Marks et al., 1996: 355; Hooghe and Marks 2003: 294). Although the process can be influenced by national and social actors, the European Commission, which is a supranational institution at the EU's level, has the right to initiate legislation (Nugent 2006: 167-169; Hooghe and Marks 2003: 295; Pierre and Peters 2009: 95-96). It also has the agenda-setter and broker role under cooperation and co-decision procedures (Nugent 2006: 187; Hooghe and Marks 2003: 302). Despite member states' involvement due to Commission's lack of capacity to implement policy, the latter also has the right to implementation and ensures that the directives are implemented according to the decisions that are taken in Brussels (Nugent 2006: 175; Pierre and Peters 2009: 95-96). This right also implies interpretation, issuing administrative regulations and decisions for specific cases (Hooghe and Marks 2003: 306).

Comitology can be a misleading concept for some since they might think that nation-states have gained control over the implementation process. Comitology is the weakest in areas where the Commission has strong executive powers (Hooghe and Marks 2003: 306; Marks et al., 1996:367). Moreover, national governments mainly select as members of the committees individuals among epistemic and business communities, academics, sub-national officials (mainly in federal systems) and interest groups (Hooghe and Marks 2003: 306-307; Marks et al., 1996: 367-368).

The Commission negotiates on trade and environment issues and plays a crucial role in international negotiations (Nugent 2006: 186-187; Hooghe and Marks 2003: 295). The Commission also negotiates with countries applying to the EU and with countries seeking economic or cultural partnership with the EU (Nugent 2006: 186; Hooghe and Marks 2003: 296). Moreover, the vague nature of the treaties has en-

abled the Commission to strengthen its role and legitimize its preferences by referring to treaties. This was the case with the structural policy where the Commission has played the most important role in transforming the regional policy into an interventionist policy (Hooghe and Marks 2003: 293).

European Parliament is another example of a supranational institution in the European Union. Since 1979, the members of the Parliament are elected by the EU citizens. Party membership and ideology of the MEPs are often more important to the latter's stance than nationality (Hooghe and Marks 2003: 291). Unlike Moravcsik, Hooghe and Marks argue that strengthening of the Parliament's position has ended with the Council of Ministers losing its ultimate power in decision-making process (Hooghe and Marks 2003: 290). Apart from its power to request the Commission for policy and legislative initiation, influencing budgetary matters and control and supervision of the executive, the European Parliament has the authority to decide on policy and legislation together with the Council of Ministers in most of the policy areas. Co-decision and assent procedures apply to most of the policy areas which give the Parliament a veto on passing legislative proposals (Nugent 2006: 243-244). Cooperation procedure also allows the Parliament to exert considerable influence on the Council of Ministers (Nugent 2006: 243). The important role of the European Parliament in decision-making is a manifestation of the Council of Ministers' restricted power and the formal authority of supranational institutions in the EU (Hooghe and Marks 2003: 291).

State-centric views perceive the European Court of Justice (ECJ) as another agent of the member-states. However, the ECJ has an impartial multinational nature and has the authority to legally oblige the member-states through the treaties. Since the treaties define 'tasks' and 'purposes' for European cooperation e.g. Completion of the internal market (Single European Market), or in other words since there is a lack of precision in the EU's statute law, the Court has played an expansive and interpretive role by specifying competencies of both intergovernmental and supranational institutions, (Marks et al., 1996: 354; Hooghe and Marks 2003: 308; Nugent 2006: 289). An example the ECJ's power is the 'Cassis de Dijon' case where the ruling by the Court has obliged the member-states to recognize any product that is produced and recognized in any other member-state (Hooghe and Marks 2003: 308-309; Marks et al. 1996: 370). The constitutionalization

of EU treaties does not seem to comply with the preferences of the national governments but is a product of the Court's actions (Hooghe and Marks 2003: 293). The Council of Ministers is arguably the most important decision-making body of the EU (Nugent, 2006: 192). It has the power to request the Commission to produce proposals and vote on legislations. Even though the Council of Ministers is comprised of national ministers defending their national interests, one can see that the application of the QMV limits the control of individual national governments (Obradovic 1996: 202; Marks et al., 1996:350; Hooghe and Marks 2003: 286). The QMV is used for decision-making for most of the issues (Auberger and Iszkowski 2007: 274; Hooghe and Marks 2003: 299). Although a serious blow to this principle has come by the 1966 Luxembourg Compromise, the Luxembourg veto is not used since June 1985 (Marks et al. 1996: 362-363; Hooghe and Marks 2003: 299-300).

Apart from the Council of Ministers which has certain intergovernmental features, the European Council is an intergovernmental institution. The European Council meets rarely and its decisions are mainly comprised of general policy frameworks to be set up by the Commission. This gives maneuverability to the Commission to create legislative programs (Marks et al 1996:357; Hooghe and Marks 2003: 296).

Do the abovementioned factors have a coercive influence on member-states when maintaining their sovereignty? Does the deficiency of military power at the EU level make the EU an intergovernmental organization lacking major independence from the sovereign member-states? If member-states do not comply with the decisions that are being taken at the EU level or pull out of the EU, what can the EU do? One can argue that the traditional approach to state sovereignty, based on mere physical power cannot be applied to political control in the contemporary capitalist societies. It should not be forgotten that there are crucial economic and political sanctions and subsequent dislocation that would maintain the order by inhibiting member-states on not following the EU rule (Marks et al., 1996:352; Hooghe and Marks 2003: 287; Scharpf 2007: 16).

A quick analyses of the institutions and the functioning of the EU demonstrates the fallacy of the state centric models, arguing that the national governments dominate policy making and the supranational institutions are mere agents of the member-states (Beetham and Lord 1998b: 17; Hooghe and Marks 2003: 294). Inter-

governmental relations as well as supranational institutions make up the EU. It is crucial to understand that the EU is not comprised only of delegate institutions of the member-states and the member-states but it is an independent authority which has its own competencies (Wallace 2005: 493; Höreth 1999: 249-250; Auberger and Iszkowski 2007: 275; Eberlein and Grande 2005: 91; Hooghe and Marks 2004: 19; Weale 1995: 83; Sand 1998: 280-282; Beetham and Lord 1998b: 17-19). Many of the decisions that affect the EU citizens' lives are taken by the EU polity and these decisions have direct effect on the policies and political legitimacy of the nation-states (Dobson and Weale 2003: 159-160; Marks et al., 1996:342-343; Beetham and Lord 1998a: 13-14; Beetham and Lord 1998a: 16; Beetham and Lord 1998b: 17-18).

Legitimacy of the EU

"Legitimacy is the recognition of the right to govern" (Coicaud 2002:10). The governors possess power and it is only when the acquisition and exercise of power takes place according to justifiable rules and there is evidence of consent that we can call a power relationship legitimate (Beetham 1991: 3). Legitimacy comprises of three different elements. Political power is legitimate, to the extent that:

- "It is acquired and exercised according to established rules (legality); and
- the rules are justifiable according to socially accepted beliefs about (1) the rightful source and (2) the proper ends and standards of government (normative justifiability); and
- positions of authority are confirmed by the express consent or affirmation on the part of appropriate subordinates, and by recognition from other legitimate authorities (legitimation) (Beetham and Lord, 1998b:15).

The enhanced order, stability, and efficiency are the consequences of a legitimate system. A legitimate system can be maintained easier since the maintenance of order presupposes obedient people who are subordinated to power (Beetham 1991: 33). The obedient subordinates make a regime stable since higher levels of support for the system mean that the regime will be resistant to economic crisis, political failures etc. (Beetham 1991: 33). This high support for the system allows the powerful to achieve their goals by enjoying high performance by the subordinates (Beetham

1991: 33; Rothstein 2003: 333).

Moravcsik (2002) argues that the legitimacy of the EU can be assessed by using the same criteria used for international organizations. Nevertheless, the EU is a multilevel governance polity rather than an international organization and the legitimation criteria used for international organization would not be fully applicable. Though not absolutely inapplicable, it is simply insufficient for fulfilling the legitimacy criteria of the EU (Beetham and Lord 1998a: 16; Ehin 2008: 834). International institutions acquire legitimacy through legitimate member-states or other institutions, not through citizens directly. Thus this type of legitimacy is indirect (Beetham and Lord 1998a: 11). This applies to the EU on occasions where the member states negotiate and ratify treaties without citizen participation, participate in decision-making process (recognition from other legitimate authorities), oblige to to rule of law in the EU created by the member states (legality), and try to establish and reach goals that are not possible to achieve individually (normative justifiability) (Beetham and Lord 1998a: 11-13).

Like Moravcsik (2002), Majone also falls in the trap of misperceiving the nature of the EU. Consequently, his assessment of the legitimacy of the EU is erred. Majone (1996a: 287) argues that the EU is a regulatory state since it has competences only in limited scope of social and economic regulation and its legitimacy should consequently be a regulatory legitimacy. He considers the administrative supranational institutions such as the Commission, the Court of Justice and the European Central Bank as 'non-majoritarian institutions' meaning that they are not directly accountable to electors or elected officials (Majone 1996a: 285; Majone 1998: 15). Their legitimacy rather depends on performance than political accountability (Majone 1996a: 285-286). Delegation of policy-making power to 'non-majoritarian' supranational institutions such as the European Commission is necessary since it is not possible to be sure that the agreements between the nations will adhered to without a monitoring agency (Majone 1996b: 617). Technocratic institutions are set up and their existence can be justified by the lack of expertise in solving complicated technical problems. Moreover, they allow policy continuity since they are less influenced by election results (Majone 1996b: 617). Majone differentiates between two types of legitimacy:

"Procedural legitimacy implies, among other things, that the agencies are created by democratically enacted

statutes which define the agencies' legal authority and objectives; that the regulators are appointed by elected officials; that regulatory decision-making follows formal rules, which often require public participation; that agency decisions must be justified and are open to judicial reviews" (Majone 1996a: 291).

Substantive legitimacy on the other hand:

"Relates to such features of the regulatory process as policy consistency, the expertise and problem-solving capacity of regulators, their ability to protect diffuse interests and, most important, the precision of the limits within which regulators are expected to operate" (Majone 1996a: 291-292).

Majone argues that procedural legitimacy of the EU can be improved by regulators giving reasons for their decisions; this will enable the EU to have transparency and accountability in decision-making (Majone 1996a: 292-294; Majone 1998: 21). Substantive legitimacy can be improved if non majoritarian-institutions' purposes are clearly defined (Majone 1996a: 294; Majone 1998: 24).

Looking at the substantive legitimacy, Majone (1996a: 298-299) argues that the highly heterogeneous nature of the EU does not allow the EU to take the equity side of the efficiency-equity tradeoff. A more active role of the EU in redistribution can only aggravate the legitimacy of the EU polity. As long as these non-majoritarian institutions only deal with efficiency issues (maximization of aggregate welfare) rather than redistributive issues (redistribution of income and wealth), which can only be decided by elected officials or administrators accountable to elected officials because of the zero-sum nature of the redistributive policies, the non-majoritarian institutions can be legitimate (Majone 1996a: 294-295; Majone 1998: 28). In addition, the understanding of Madisonian type of democracy in Europe with serious cleavages would suggest that the majoritarian types of finding solutions for increasing the legitimacy of the EU can only exacerbate its legitimacy (Majone 1996a: 287). Majone misses the point with his defense of regulatory legitimacy for the EU. It is one thing to defend the independence of regulatory bodies in a liberal democratic state where government is directly elected by 'demos', and another to argue for an independent executive body influencing the decisions both at the European and the domestic levels when this body is not directly elected

by a certain 'demos' or is not politically accountable to an elected body. Majoritarian or Madisonian, an unaccountable executive branch, being a crucial actor in policy-initiation and implementation, creates problems for normative justification in a democratic polity (Hansen and Williams 1999: 245; Beetham and Lord 1998a: 21; Rothstein 2003: 340).

Majone's perception of the EU and its legitimacy reduces the latter's accountability. Political accountability here is limited with mere reasoning of the decisions. Majone's recipe for legitimacy is a good example for output legitimacy. Technocratic or (output) legitimacy is about policy outputs or delivering the needs of the society (Scharpf 1999; Höreth 1999: 251; Wimmel, 2009:184,191; Dobson and Weale 2003: 160). However, the EU policy competencies have exceeded the competencies of a regulatory state. Reducing the legitimacy of the EU governance to only technocratic legitimacy cannot be normatively justified in a democratic society (Auberger and Iszkowski 2007: 274; Wincott 2006: 762; Höreth 1999: 261; Beetham and Lord 1998a: 22).

The EU is neither controlled by the member-states nor is it a regulatory state. The EU is a model of multi-level governance which influences the policies and the legitimacy of liberal democratic states. Thus, one should follow the way of reasoning that raises the stakes and obliges the EU to comply with the legitimacy criteria that are used to assess the legitimacy of liberal-democratic states. The EU can fulfill the legitimacy criteria only by ensuring that it conforms to legality, normative justifiability, and legitimation that is used for liberal democratic states (Beetham and Lord 1998a: 22; Ehin 2008: 634). However, this does not mean that fulfilling these criteria will be achieved by the same methods

that are used for liberal democratic states (Schmitter 2007: 5; Vink 2007: 317-319; Scott 2009: 172; Georgiev 2008: 111). Neither does it mean that indirect legitimacy that is appropriate for the international organizations should be replaced by the liberal-democratic criteria. They can indeed be complementary. Direct and indirect legitimacy coexist together for the legitimation of the EU polity: the so-called 'double legitimacy' (Dehousse 1995: 22-26). The task is to find specific means to acquire legitimacy by both direct and indirect methods that are available for the EU-polity (Beetham and Lord 1998a: 23).

The first element of normative justifiability for liberal-democracies is performance. Performance can be used interchangeably with technocratic legitimacy which solely depends on efficiency and effectiveness without democratic procedures. The second element is democracy that encompasses accountability, electoral authorization of government and representation, as these ensure that the source of political authority lies only with the people (Beetham and Lord 1998a: 6; Beetham and Lord 1998b: 16; Dobson and Weale 2003: 160). Popular sovereignty also requires that people as the source of political authority are clearly defined, thus identity is the third element (Hansen and Williams 1999: 236; Wimmel, 2009:190; Beetham and Lord 1998a: 6; Beetham and Lord 1998b: 16). The legality criterion in liberal democracies depends on the constitutional rule of law and the legitimation criterion in liberal democracies depends on the consent subsumed in electoral authorisation and recognition by other legitimate authorities (Beetham and Lord 1998a: 5, 7-8; Beetham and Lord 1998b: 16). Table 2 shows the criteria for assessing normative justifiability, legality and legitimation in liberal-democracies.

Table 1 - Legitimacy of Liberal Democracies

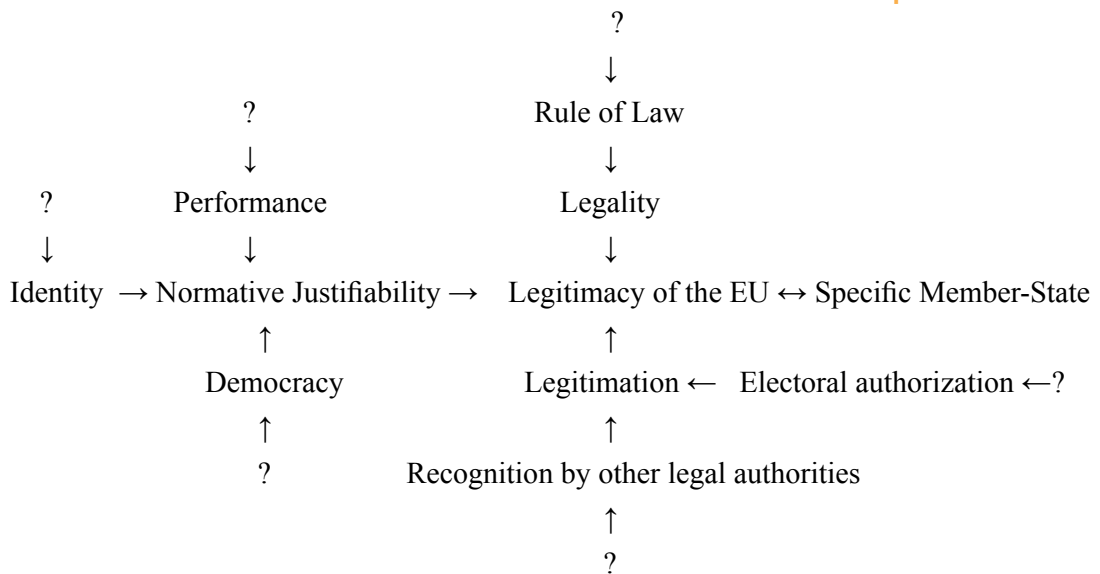
Normative Justifiability	Legality	Legitimation
Performance	Constitutional rule of law	Consent subsumed in electoral authorisation
Accountability, Electoral authorisation of government and Representation (Democracy)	-	Recognition by other legitimate authorities
Identity	-	-

Source: Author's own compilation.

Another crucial point is that ‘the legitimacy of political authority in Europe is now a two-level process, which cannot be analyzed at one level but only as a process of interaction between the EU and its member-states’ (Beetham and Lord 1998a: 30; Beetham and Lord 1998b: 18; Thomassen and Schmitt 1999: 8). This is due to the legitimacy deficits under identity, democracy and performance having different consequences on

the member-states and their legitimacy (Jachtenfuchs et al. 1998: 433; Beetham and Lord 1998a: 30-31). Differing perceptions of legitimacy of the EU among the member-states and varying effects of the legitimacy of the EU on different member-states also cause varying impact on the legitimacy of the EU. Table 3 gives a conceptual framework for assessing the legitimacy of the EU.

Table 2 - Multi-Level Governance Legitimacy of the EU: A Conceptual Framework²



Source: Author’s own compilation.

Conclusion

This article reviewed the literature to find applicable standards for the assessment of the EU’s legitimacy. This article has analysed different arguments, discussed the flaws of the ones arguing that the EU is not in need of democratic legitimation because it

is an ‘intergovernmental organization’ or a ‘regulatory state’. The author argued that the weakness of these authors’ arguments emanates from their impaired understanding of the nature of the EU which hinders correct assessment of the EU’s legitimacy. The author stated that analyzing the EU from a multilevel governance perspective should point to the researchers that Beetham and Lord’s (1998a) theoretical framework is currently the most applicable for the assessment of the legitimacy of the EU. The EU is a multilevel polity that influences the legitimacy of its member-states. The EU is obliged to meet the same criteria that liberal democracies have to meet. These criteria are democracy, performance, identity (normative justifiability), rule of law (legality), electoral authorization and recognition by other legal authorities (legitimation). However, one should note that indirect legitimacy, relevant to international organizations, can coexist with the EU’s direct legitimacy and can be complementary. In addition, any assessment of the legitimacy of the EU should

² The question marks in the table represents the view that not all the methods that can be used for increasing the legitimacy of the EU is known to us since fulfilling the legitimation criteria does not need to be identical with the liberal-democratic states.

The double sided arrow between the legitimacy of the EU and specific member-state notifies the reader of three things: 1) The legitimacy of the EU and the changes made towards the legitimacy of the EU affect each member-state differently. 2) This specific effect makes specific changes in the legitimacy of the EU depending on which member-state is exposed to this effect, as each country would conceive the effect of the legitimacy of the EU in a different way. 3) The legitimacy of the EU is affected by the legitimacy of the member-states as the EU also depends on indirect legitimacy acquired through the member-states.

take into account the interaction between the EU and the member-states. Legitimacy of the EU affects each member-state differently and different understandings

of legitimacy of the EU among the member states and the different effects of the former on the member-states have an impact on the legitimacy of the EU.

BIBLIOGRAPHY

- Auberger, T. and Iszkowski, K. (2007). 'Democratic Theory and the European Union: Focusing on 'Interest' or 'Reason'?' *Journal of European Integration*, 29(3), pp. 271-284.
- Bache, I. and Flinders, M. (2004). 'Themes and Issues in Multi-level Governance,' I. Bache and M. Flinders (eds), *Multi-level Governance*. New York: Oxford University Press.
- Banchoff, T. and Mitchell, S.P. (1999a). 'Introduction: Conceptualizing Legitimacy in a Contested Polity,' in T. Banchoff and S.P. Mitchell (eds), *Legitimacy and the European Union: The Contested Polity*. London and New York: Routledge.
- Banchoff, T. and Mitchell S.P. (1999b). 'Conclusion,' in T. Banchoff and S.P. Mitchell (eds), *Legitimacy and the European Union: The Contested Polity*. London and New York: Routledge.
- Beetham, D. (1991). *The Legitimation of Power*. Basingstoke: Palgrave Macmillan.
- Beetham, D. and Lord, C. (1998a). *Legitimacy and the EU*. London: Longman.
- Beetham, D. and Lord, C. (1998b). 'Legitimacy and the European Union,' in A. Weale and M. Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*. London: Routledge.
- Borrás, S. and Conzelmann, T. (2007). 'Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn,' *Journal of European Integration*, 20(3), pp. 531-548.
- Coicaud J-M. (2002). *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility*. Cambridge: Cambridge University Press.
- De Burca, G. (1996). 'The Quest for Legitimacy in the European Union' *The Modern Law Review*, 59(3), pp. 349-376.
- Dehousse, R. (1995). 'Institutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?' *European University Institute Working Papers* (4).
- De Jonghe, K. and Bursens, P. (2003). 'How to Increase Legitimacy in the European Union? The Concept of Multi-level Governance Legitimacy' *PSW Papers*, 2003(4), pp. 1-24.
- Delmartino, F. and Pattyn, V. (2007). 'The Constitutional Debate in the European Union: A Quest for a New Paradigm,' in M. O'Neill and M. Paun (eds), *Europe's Constitutional Crisis*. Cluj-Napoca: European Studies Foundation.
- Dobson, L. and Weale, A. (2003). 'Governance and Legitimacy,' in E. Bomberg and A. Stubb (eds), *The European Union: How Does it Work?*. Oxford: Oxford University Press.
- Eberlein, B. and Grande, D. (2005). 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State' *Journal of European Public Policy*, 12(1), pp. 89-112.
- Ehin, P. (2008). 'Competing Models of EU legitimacy: The Test of Popular Expectations' *Journal of Common Market Studies*, 46(3), pp. 619-640.
- Eriksen, E.O. and Fossum, J.E. (2000a). 'Post-national Integration,' in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?*. London: Routledge.
- Eriksen E.O. and Fossum J.E. (2000b). 'Conclusion: Legitimation through Deliberation,' in E.O. Eriksen and J.E. Fossum (eds), *Democracy in the European Union: Integration Through Deliberation?*. London: Routledge.
- George, S. (2004). 'Multi-level Governance and the European Union,' in I. Bache and M. Flinders (eds), *Multi-level Governance*. New York: Oxford University Press.
- Georgiev, J. (2008). 'Democracy in the EU: National Parliaments and the Quest for Legitimacy,' in N. Siskova (ed), *The Process of Constitutionalization of the EU and the Related Issues*. Groningen: Europa Law Publishing.
- Haas, E.B. (1958). *The Uniting of Europe: Political, Social and Economical Forces 1950-1957*. London: Stevens.
- Hajer, M. and Wagenaar, H. (2003). 'Introduction,' in M. Hajer and H. Wagenaar (eds), *Deliberative Policy Analysis: Understanding Governance in the Network Society*. Cambridge: Cambridge University Press.
- Hansen, L. and Williams, W.C. (1999). 'The Myths of Eu-

- rope: Legitimacy, Community and the 'Crisis' of the EU' *Journal of Common Market Studies*, 37(2), pp. 233-249.
- Heritier, A. (1999). 'Elements of Democratic Legitimation in Europe: An Alternative Perspective' *Journal of European Public Policy*, 6(2), pp. 269-282.
- Heritier, A. (2003). 'Composite Democracy in Europe: The Role of Transparency and Access to Information' *Journal of European Public Policy*, 10(5), pp. 814-833.
- Hoffman, S. (1966). 'Obstinate or obsolete? The Fate of the Nation State and the Case of Western Europe' *Daedalus*, 95, pp. 862-915.
- Holzacker, R. (2007). 'Democratic Legitimacy and the European Union' *Journal of European Integration*, 29(3), pp. 257-269.
- Hooghe, L. and Marks, G. (2003). 'Multi-level Governance in the European Union,' B.F. Nelsen and A.C.G. Stubb (eds), *The European Union: Readings on the Theory and Practice of European Integration*. Basingstoke: Palgrave Macmillan.
- Höreth, M. (1999). 'No Way Out for the Beast? The Unsolved Legitimacy Problem of European Governance' *Journal of European Public Policy*, 6(2), pp. 249-268.
- Jachtenfuchs, M., Diez, T. and Jung, S. (1998). 'Which Europe? Conflicting Models of a Legitimate European Political Order' *European Journal of International Relations*, 4(4), pp. 409-445.
- Jachtenfuchs, M. (2003). 'The Governance Approach to European Integration,' in B.F. Nelsen and A.C.G. Stubb (eds), *The European Union: Readings on the Theory and Practice of European Integration*. Basingstoke: Palgrave Macmillan.
- Lindberg, L.N. and Scheingold, S.A. (1970). *Europe's Would-be Polity: Patterns of Change in the European Community*. Englewood Cliffs: Prentice-Hall.
- Lord, C. and Magnette, P. (2004). 'E Pluribus Unum? Creative Disagreement about Legitimacy in the EU' *Journal of Common Market Studies*, 42(1), pp. 183-202.
- Majone, G. (1996a). 'Regulatory Legitimacy,' in G. Majone (ed). *Regulating Europe*. London and New York: Routledge.
- Majone, G. (1996b). 'Public Policy and Administration: Ideas, Interests and Institutions,' in R.E. Goodin and H.E. Klingemann (eds), *A New Handbook of Political Science*. Oxford: Oxford University Press.
- Majone, G. (1998). 'Europe's 'Democratic Deficit': The Question of Standards,' *European Law Journal*, 4(1), pp. 5-28.
- Marks, G. (1992). 'The Structural Policy in the European Community,' in A.M. Sbragi (ed), *Euro-politics: Institutions and Policymaking in the 'New' European Community*. Washington: The Brookings Institute.
- Marks, G. (1993). 'Structural Policy and Multilevel Governance in the EC,' in A. Cafruny and G. Rosenthal (eds), *The State of the European Community Vol. 2: The Maastricht Debates and Beyond*. New York: Lynne Rienner.
- Marks, G., Hooghe, L. and Blank, K. (1993). 'European Integration from the 1980s: State-Centric v. Multi-level Governance' *Journal of Common Market Studies*, 34(3), pp. 343-378.
- Moravcsik, A. (1993). 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' *Journal of Common Market Studies*, 31(4), pp. 473-524.
- Moravcsik, A. (2002). 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union' *Journal of Common Market Studies*, 40(4), pp. 603-624.
- Nentwich, M. and Weale, A. (1998). 'Legitimacy and the European Union,' in A. Weale and M. Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship*. London: Routledge.
- Nugent, N. (2006). *The Government and Politics of the European Union*. Hampshire and New York: Palgrave Macmillan.
- Obradovic, D. (1996). 'Policy Legitimacy and the European Union' *Journal of Common Market Studies*, 34(2), pp. 191-221.
- Peterson, J. (1995). 'Decision-making in the European Union: Towards a Framework for Analysis' *Journal of European Public Policy*, 2(1), pp. 69-93.
- Piattoni, S. (2010). *The Theory of Multi-level Governance: Conceptual, Empirical and Normative Challenges*. Oxford: Oxford University Press.
- Pierre, J. and Peters, G.B. (2005). *Governing complex societies: Trajectories and scenarios*. Basingstoke: Palgrave Macmillan.
- Pierre, J. and Peters, G.B. (2009). 'Governance Approaches,' in A. Wiener and T. Diez (eds), *European Integration Theory*. Oxford: Oxford University Press.
- Pollack, M.A. (2005). 'Theorizing EU policy-making,' in H. Wallace, W. Wallace and M.A. Pollack (eds), *Policy-making in the European Union*. Oxford: Oxford University Press.

- Rhodes, R.A.W. (1996). 'The new governance: Governing without government' *Political Studies*, 44, pp. 652-667.
- Rothstein, B. (2003). 'Political legitimacy for public administration' in J. Pierre and G.B. Peters (eds), *Political Legitimacy for Public Administration*. London: Sage Publications.
- Sand, I.J. (1998). 'Understanding the new forms of governance: Mutually independent reflexive, destabilised and competing institutions' *European Law Journal*, 4(3), pp. 271-293.
- Scharpf, F.W. (1999). *Governing in Europe: Effective and Democratic?*. Oxford: Oxford University Press.
- Scharpf, F.W. (2007). 'Reflections on Multilevel Legitimacy' *MPIfG Working Papers*, 2007, (3).
- Schmidt, V.A. (2004). 'The European Union: Democratic Legitimacy in a Regional State?' *Journal of Common Market Studies*, 42(5), pp. 975-997.
- Scott, C. (2009). 'Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU' *European Law Journal*, 15(2), pp. 160-173.
- Thomassen, J. and Schmitt, H. (1999). 'Political Representation and Legitimacy in the European Union,' in J. Thomassen and H. Schmitt (eds), *Political Representation and Legitimacy in the European Union*. New York: Oxford University Press.
- Vink, E. (2007). 'Multi-level Democracy: Deliberative or Agonistic? The Search for Appropriate Normative Standards' *Journal of European Integration*, 29(3), pp. 303-322.
- Wallace, W. (2005). 'Post-sovereign Governance: The EU as a Partial Polity,' in H. Wallace, W. Wallace and M.A. Pollack (eds), *Policy-making in the European Union*. Oxford: Oxford University Press.
- Weale, A. (1995). 'Democratic Legitimacy and the Constitution of Europe,' in R. Bellamy, V. Buffachi and D. Castiglione (eds), *Democracy and Constitutional Culture in the European Union*. London: Lothian Foundation Press.
- Wimmel, A. (2009). 'Theorizing the Democratic Legitimacy of European Governance: a Labyrinth with No Exit?' *Journal of European Integration*, 31(2), pp.181-199.
- Wincott, D. (2006). 'European Political Development, Regulatory Governance, and the European Social Model: The Challenge of Substantive Legitimacy' *European Law Journal*, 12(6), pp. 743-763.
- Zürn M., Wälti, S. and Enderlein, H. (2010). 'Introduction,' in H. Enderlein (ed), *Handbook on Multi-level Governance*. Cheltenham: Edward Elgar Publishing.

The European Union readmission policy after Lisbon

JUDY BATT

Associate fellow at FRIDE



*This article was originally published in English by FRIDE in December 2010
<http://www.fride.org/publication/840/the-eu-and-the-western-balkans-preparing-for-the-long-haul>*

Highlights

- *In 2010, several Western Balkans states have taken steps towards EU integration, but after Croatia's accession, the rest of the region will have to work hard for many years before it is ready to join.*
- *EU concerns with problems at home do not favour further enlargement prospects, but sustaining momentum also depends on deep reforms in the Western Balkans region.*
- *More realistic expectations regarding enlargement could buy some time to pay more attention to the democratic quality of the process, building popular trust in political elites and institutions, and enhancing mutual understanding between the EU and the Western Balkans.*

As the year draws to an end, all eyes in the Western Balkans turn somewhat nervously towards Brussels and the European Commission's annual Enlargement Strategy and Progress Report. This year, results were rather mixed, but the Commission attempted to stress the positive aspects. According to the Commission, in general, this past year has witnessed 'new momentum' in the enlargement process, and important milestones were achieved. From December, Bosnia and Herzegovina and Albania will join the visa liberalisation regime (implemented in Macedonia, Montenegro and Serbia in December 2009), showing that even the laggards can meet the required standards when the conditions are clear and the incentives compelling. Montenegro is ready to become an official EU candidate in December. Serbia's application for EU membership, submitted in December 2009, has now been sent to the Commission, which is expected to issue a formal 'opinion' and recommendation to EU member states before the end of 2011. Serbia not only hopes to be

granted candidate status (like Macedonia, and shortly Montenegro), but also expects the opening of immediate accession negotiations.

Croatia, commended for 'steady progress', has resumed accession talks, which are now at a 'final stage' after several months of stagnation due to a border dispute with Slovenia. This, if not yet resolved, would be dealt with bilaterally according to an agreed process that should not affect Croatia's EU entry. If talks proceed without further hitches, the Accession Treaty will be ready for signature sometime in the second half of 2011. Accession will follow about a year later, once all member states have ratified the treaty. This will represent a landmark for the enlargement process.

For the Commission, Croatia's future accession shows the remaining countries of the region that they too could enjoy the same prospects provided they fulfil the required conditions. This should encourage additional efforts in the Western Balkans to speed up the pace of reform.

Nonetheless, concerns abound that the EU's preoccupation with its huge internal problems, especially regarding the euro's legitimacy in the face of the threat of economic meltdown in Greece, Ireland and possibly other member states, could further diminish the Union's enthusiasm for enlargement towards the Balkans. Thus, Croatia's accession could be the last for many years, perhaps a decade or more. But governments in the Western Balkans need a much faster pace of integration if they are to be motivated to sell tough reforms to weary electorates.

Dreams postponed

The sober reality is that several years need to pass before the remaining aspirants in the Western Balkans region are able to join. And it is not just a question of how many years it will take the EU to overcome its current economic woes, regain confidence and turn its attention back to its unfinished business in the Balkans. There are practical, technical limits too, as well as longstanding weaknesses in the Western Balkans states that need to be addressed.

Thus, if Serbia, for example, which is often cited as the most administratively capable among the remaining states of the region, were indeed invited to begin accession negotiations in, let's say, early 2012, it is hard to imagine it concluding them much faster than Croatia. This would

imply a realistic accession date of 2019–20. But Serbia still has to deal with two specific political challenges before being deemed fit to enter accession talks: first, capturing indicted war criminals, and second, better cooperation with the EU over Kosovo.

While the Netherlands agreed in October that Serbia's membership application could be forwarded to the Commission for consideration, it still insists on Serbia handing over indicted war criminals Ratko Mladic and Goran Hadzic to the International Criminal Tribunal for the former Yugoslavia (ICTY) before allowing any further steps towards EU membership. Most member states felt that Serbia deserved to be rewarded for dropping its confrontational stance over Kosovo. At the United Nations in September, President Tadic finally took the reins back from his abrasive young foreign minister, Vuk Jeremic, and agreed to a joint EU-Serbia resolution that committed Serbia to dialogue with Kosovo without reopening the status question. In recognition of the Netherlands' flexibility over Serbia's membership application, the EU reiterated (to the Netherlands' satisfaction) that 'full cooperation'

with the ICTY – meaning delivery of the indicted war criminals – was a sine qua non condition to gaining candidate status. President Tadic has therefore one year to solve the question that has long bedevilled Serbia's European prospects and that, if unattended to, will block Serbia's otherwise quite good chances of securing candidate status in 2011.

Unfortunately, the latest report on Serbia's performance in this respect, to be delivered in December to the United Nations by ICTY Chief Prosecutor Serge Brammertz, will not be encouraging. In recent statements, Brammertz declared that, as late as 2006, Serbia's security forces deliberately missed the chance of arresting Mladic. The current Serbian war crimes prosecutor, Vladimir Vukcevic, admitted as much in a press interview in November. The main problem is that Serbia's political leaders are still unable effectively to control the security forces responsible for arresting the fugitives. Similarly, they seem to lack the courage to confront key individuals firmly ensconced in those forces, who are allegedly connected to the shadowy Serbian underworld that assassinated former Prime Minister Zoran Djindzic when he started to pose serious challenges.

In addition, there is the still uncertain course of the Kosovo dialogue scheduled to begin early next year. At present, Kosovo's leaders are the ones who are dragging their feet, having called for early elections in December after the fall of the government in Pristina – much to the EU's frustration, as it wanted talks to start straight away. In the meantime, however, Serbia has to start preparing its answers to the questionnaire that Enlargement Commissioner Stefan Fuele delivered to Belgrade on 24 November. The questionnaire includes thousands of detailed questions on all aspects of Serbia's policy-making, administrative and regulatory structures, legislative framework and laws relevant to its EU bid. It is on this basis that the Commission will produce its opinion and its recommendation on Serbia's application.

Although Serbia had started working on draft answers to the anticipated questionnaire long before the application was submitted, there is no doubt that, in many fields, Serbia's insistence on Kosovo being a part of Serbia will greatly complicate matters. What may seem narrow, technical questions could rapidly lead to political minefields that the technocrats of the European Integration Office will have to throw onto the overloaded desks of their political masters. These might prove hard to handle as the electoral cycle ap-

proaches, with both president and parliament reaching the limits of their terms in early 2012.

Even if these political time bombs can be sidestepped, the Commission's latest Progress Report on Serbia points out just how much still has to be done with regard to the 'normal' reform agenda if the country is to be granted candidate status. Having read the previous progress reports, the Commission's critical tone this year is unsurprising. Serbia has failed to address long-standing weaknesses, particularly in the judicial field. The general opinion that Serbia has developed an 'administrative capacity' is only true in comparison with its neighbours, but still falls short of the standards required by the EU. Public administration reform and the fight against organised crime and corruption require 'additional efforts' too. Only 'limited progress' has been made in turning Serbia into a 'functioning market economy', and structural reforms, privatisation and labour market reforms have been postponed again this year.

So much energy and attention has been consumed on the Kosovo issue that nitty-gritty issues have been neglected. And just as the government seemed ready to focus on EU integration, it was knocked down by the severe impact of the European economic and financial crisis and has had to turn to the International Monetary Fund. In other words, Serbia needs more time to handle its formidable political agenda: to digest the loss of Kosovo; unravel the sinister tentacles of the 'deep state' that stunt its democracy; overhaul the judiciary and the state administration in order to entrench the rule of law; and advance with the transition to a market economy. All this amidst a deep economic crisis and dim prospects for foreign investment and assistance inflows.

If we look at Macedonia, we can also see the limits to accelerating the EU's integration process. Macedonia gained EU candidate status in December 2005. This was done somewhat 'prematurely', some would argue, given that the country was then in much poorer shape in technical, administrative and economic terms than Serbia is today. The decision was political and belonged to a reward package for implementing the politically difficult Ohrid Agreement that settled the terms of peaceful coexistence between Macedonia's ethnic Macedonians (Slavs) and its sizeable Albanian minority after the country narrowly avoided civil war in 2001. Nevertheless, political stability in Macedonia remains fragile, and political life polarised not only along ethnic lines but also within the ethnic

communities themselves. Although Macedonia has worked hard and made huge progress (for example, the country has for several years been near the top of the World Bank's rankings of improvers of business conditions), at times reform has been hostage to wider political struggles. For some time, Macedonia argued that it was ready to begin accession negotiations, and indeed, needed to begin them in order to keep politics on track

– a telling reversal of the normal logic of conditionality that rewards states for keeping themselves on track.

In its 2009 Progress Report the Commission supported Macedonia's readiness to embark on accession negotiations, but domestic politics has become increasingly poisoned by the protracted

– and increasingly bizarre – dispute with Greece over the country's name and the language spoken by the Slavic majority. Festering since the very emergence of the state itself back in 1991, the dispute now blocks Macedonia's accession to both NATO and the EU, due to Greece's veto. This, in turn, frustrates the Albanians, for whom the name issue is a symbolic matter of no significance and who consider NATO and EU integration a priority. The government, increasingly dominated by strident – and popular – Macedonian nationalists, has been adding fuel to the fire. It has embarked on an extravagant programme to rebuild the centre of Skopje that includes a gigantic, central statue of Alexander the Great. This not only inflames Greek outrage at the 'expropriation' of what they see as essentially Greek cultural heritage, but also infuriates Albanians and the Macedonian opposition who see it as a wilful squandering of scarce resources.

In this year's report, in a heroic understatement the Commission notes the need to 'strengthen political dialogue' and desist from 'actions and statements which could adversely affect good neighbourly relations'. Although the Commission continues to back Macedonia's hopes to begin entry talks, it also underlines that reforms have continued 'at an uneven pace' in the past year. There remains a lengthy state building agenda before Macedonia fully meets EU membership obligations. Thus, while Greece's behaviour towards Macedonia shocks most of its European partners, the Macedonian government is far from innocent. However, even if this political spat were to melt away and Macedonia began accession negotiations next year, for instance, state weakness and politico-institutional fragility would continue to slow the pace of the integration process.

Good things come to those who wait

Sustaining the momentum of EU enlargement is clearly vital to consolidating peace and security in the Western Balkans, but the onerous process of preparing for EU accession cannot be rushed. Excessive pressure can also strain democratic institutions and democratic practices in weak states in transition. Harmonising the vast array of laws, regulations and policies with the EU's *acquis* – now approaching some 100,000 pages – almost inevitably leads to short-cuts in the democratic process, leaving little scope or time for serious parliamentary debate and scrutiny. This can reinforce the already strong tendency in leader-dominated political cultures to concentrate power in the hands of the government, and to centralise control within a narrow elite.

The argument that 'there is no alternative' to the dictates of the EU is open to exploitation by governments that are frequently intolerant towards civil society criticism and exercise an iron rule over their party supporters through their extensive powers of patronage. Laws drafted in excessive haste by overworked legal experts, sometimes by simply cutting and pasting from EU templates, often turn out to be incompatible with existing laws, requiring frequent amendments and revisions. All this generates a sense of legal instability that hardly contributes to strengthening the rule of law.

It also has several implications for the development of a wider democratic political culture. While for the region the strategic importance of joining the EU is clear, the European Union can loom almost too large in domestic politics, eclipsing the equally important challenge of strengthening the democratic accountability of political leaders and the population's trust in political institutions. Successive opinion polls conducted by the Gallup Balkan Monitor (www.balkan-monitor.eu) reveal the very low level of popular trust in governments, parliaments, political parties and the judiciary. In most states of the region, vast majorities profess to have 'only a little trust' or 'no trust at all' in their government.

What people want to see is greater effort to bring about immediate, tangible improvements in their everyday standards of living and employment prospects. EU integration, a dominant question during election time, offers no quick fix here, yet competing party programmes rarely address these issues with clear and

practical, alternative policies. Thus, it is unsurprising that approximately two-thirds of citizens in Serbia, Bosnia and Herzegovina and Macedonia say that no politician or political party really represents their views. The EU could be an important ally for domestic civil society in the region, by providing relatively impartial information on governments' performance and supporting capacity-development. However, NGOs also need to build strong and extensive roots in the wider society in general, which remains a passive and sceptical observer of the EU's integration processes.

How can the European Union maintain the credibility of the 'EU perspective' in the region? The EU's own poor performance in this respect is widely acknowledged, but further transparency and realism are also needed with regard to the challenges facing the Western Balkans over the next decade. The Greek foreign minister recently floated again the idea of setting a clear accession timetable for the rest of the region after Croatia's accession. But there is still strong resistance in Brussels and many member state capitals, which are mindful of the political pressures raised by the arguably premature accession of Romania and Bulgaria in 2007.

But more important than the timing of accession itself, is the effectiveness of the reforms carried out in the years preceding that. In the coming years, the EU needs to get over its introversion and redouble its efforts to support such reforms, engage with more determination in 'member state building', especially in Bosnia and Herzegovina and Kosovo, and improve its communication with the general public both in the region and at home. In the economic field, the EU should allocate more resources to development and growth, not just the implementation of the *acquis*, tailored mainly to the needs of much more prosperous and sophisticated economies.

In the interim, the abolition of the visa regime for the Balkans this year is perhaps the most promising and significant gesture that the EU could make. EU support for 'people-to-people' exchanges must now expand so that citizens in the Western Balkans can more easily experience the European way of life. They may indeed find it sobering, but this is no bad thing if it entails a more realistic, down-to-earth, and solid understanding of what they can expect of the EU, and what they must demand of their own governments if their aspirations are to be achieved.

call for papers

(IdPS) is the first Italian English-language graduate journal in political studies launched by the CiRCAP, University of Siena and the SIS, University of Trento. IdPS is published three times a year at <http://www.idps.unisi.it>

Though submissions are reviewed on rolling basis, the journal currently accepts submissions for its second issue to be published in June with the deadline of 7 March.

In case of interest please send manuscripts of articles, policy briefs or commentaries to idps.journal@unisi.it For more information please visit the Submissions page of our website <http://www.idps.unisi.it>

*IdPS Editors
Stefano Braghiroli and Nelli Babayan*

