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About Eipascope

Eipascope is the Bulletin of the European Institute of Public Administration and is published biannually. The articles in Eipascope are written by EIPA faculty members and associate members and are directly related to the Institute's fields of work. Through its Bulletin, the Institute aims to increase public awareness of current European issues and to provide information about the work carried out at the Institute. Most of the contributions are of a general character and are intended to make issues of common interest accessible to the general public. Their objective is to present, discuss and analyse policy and institutional developments, legal issues and administrative questions that shape the process of European integration.

In addition to articles, Eipascope keeps its audience informed about the activities EIPA organises and in particular about its open seminars and conferences, for which any interested person can register. Information about EIPA's activities carried out under contract (usually with EU institutions or the public administrations of the Member States) is also provided in order to give an overview of the subject areas in which EIPA is working and indicate the possibilities on offer for tailor-made programmes.

Institutional information is given on members of the Board of Governors as well as on changes, including those relating to staff members, at EIPA Maastricht, Luxembourg and Barcelona.

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The full text of current and back issues of Eipascope is also available online. It can be found at: <http://publications.eipa.eu>

Eipascope dans les grandes lignes

Eipascope est le Bulletin de l'Institut européen d'administration publique et est publié deux fois par an. Les articles publiés dans Eipascope sont rédigés par les membres de la faculté de l'IEAP ou des membres associés et portent directement sur les domaines de travail de l'IEAP. A travers son Bulletin, l'Institut entend sensibiliser le public aux questions européennes d'actualité et lui fournir des informations sur les activités réalisées à l'Institut. La plupart des articles sont de nature générale et visent à rendre des questions d'intérêt commun accessibles pour le grand public. Leur objectif est de présenter, discuter et analyser des développements politiques et institutionnels, ainsi que des questions juridiques et administratives qui façonnent le processus d'intégration européenne.

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Administrative Capacity for Effective Implementation of EU Law

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Article 197 of the Treaty on the Functioning of the European Union stipulates that effective implementation of Union law by the Member States shall be regarded as a matter of common interest. This article considers how Member States may improve their administrative capacity to apply EU law effectively. A law or policy is effectively implemented when it can be confirmed that its objectives, targets or results are actually achieved. It is proposed that effective implementation in the EU is a 'collaborative project'. This is not only because Member States benefit when others correctly implement common rules, but also because they learn from the experiences of other Member States. It follows that the public authorities responsible for implementation of EU law need to benchmark their performance against that of their peers in other Member States and therefore need to develop the institutional capacity for assessing and adjusting their own performance.

Introduction

A law is a set of rules that prescribe or proscribe in order to regulate the behaviour of persons or organisations¹. This regulatory responsibility is normally the prerogative of the state. In practice, however, it is the agents of the state that ensure that laws are applied correctly. These agents are the various components of the civil service or public administration.

Article 197 of the Treaty on the Functioning of the European Union provides that

- '1. Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest.
2. The Union may support the efforts of Member States to improve their administrative capacity to implement Union law. ...'

Article 197 TFEU makes two connections: one explicit, the other implicit. It explicitly concatenates the proper functioning of the EU and effective implementation of its law; and it implicitly links the achievement of effective implementation to the administrative capacity of Member States.

6 The purpose of this article is to explore the second connection and consider what kind of 'administrative capacity' may be necessary for effective implementation of EU law. This is not an easy task, given that there appears to be no definition of effective implementation in primary or secondary legislation or in the case law of EU courts². Therefore, this article proposes, first, a definition of effective implementation of law or policy and, then, relates the achievement of effective implementation to administrative capacity.



The main propositions developed in the article are the following. A law or policy is effectively implemented when it can be confirmed that its objectives, targets or results are actually achieved. Since policy objectives can be overly general and legal obligations can be vague or ambiguous, effective implementation must start with the 'operationalisation' of general or vague objectives. This operationalisation derives tangible goals from general or vague objectives. For example, the general objective of 'raising national well-being' can be translated into the tangible goal of 'access to health services'.

But this process of operationalisation encounters another problem: it is rarely obvious what kind of tangible goals can or should be derived. This requires interpretation either on the basis of theory and analysis, or on the basis of experience and comparison with similar situations. If the implementing authority chooses the latter approach, it may ask what a peer authority would do in the same situation. It should not choose

arbitrarily from the range of possible options; it needs to make a reasonable case.

A comparison of decisions made by similar authorities provides guidance not only in cases of vague policy objectives, but also in cases where the effects of policy instruments are uncertain. The overall objective may, in fact, be very clear and measurable but it may not be easy to define *ex ante* the most effective instrument for achieving that objective. For example, the objective of reducing road fatalities, which is measurable, may be achieved by different means such as reduction of speed limits, installation of more speed cameras, increasing fines for speeding, improvement of roads or compulsory re-training of drivers. These means may vary significantly in terms of their cost, deterrent effect and gestation period.

Because comparison of policy performance or legal enforcement is an indispensable component of assessing the effectiveness of implementation of policy or law, this article argues that in the context of the EU, effective implementation becomes a 'collaborative project'. This is not only because each partner country benefits when others implement fully or correctly common rules, but also because each partner country cannot be absolutely certain that it has implemented fully or correctly unless it compares its efforts to those of others. Effective implementation of EU law requires continuous benchmarking of the performance of national authorities against those of their peers in other Member States. All these considerations have implications on how public administrations function³.



The nature of the problem

Before defining the meaning of effective implementation, it is instructive to provide examples of the problem of ineffective implementation so that the reader gains a better understanding how it affects the 'proper functioning of the Union', in the meaning of Article 197 TFEU. This section presents two recent cases. The first highlights the challenge of correct policy application, while the other demonstrates how incorrect legal interpretation impacts on institutional structure.

The policy side

Since July 2004, the Council of the EU has been recording that Hungary's budget deficit exceeded the allowable threshold – 3% of GDP – and has been issuing successive recommendations to Hungary to take appropriate measures. On 24 January 2012 the Council again examined Hungary's response and concluded that it was inadequate. Hungary claimed that it had turned the budget deficit into a surplus, but in fact that was merely a temporary change. It was the result of a one-off increase in revenue. There was no effective correction. More specifically, the Council Decision noted that 'Hungary had not taken effective action'. 'While Hungary formally respected the 3% of GDP reference value, this was not based on a structural and sustainable correction. The budget surplus in 2011 hinged upon substantial one-off revenues of over 10% of GDP and was accompanied by a cumulative structural deterioration in 2010 and 2011 of 2.75% of GDP compared to a recommended cumulative fiscal improvement of 0.5% of GDP⁴'. Hungary claimed the facts vindicated it, but the Council looked beyond the headline numbers.

In the end, after eight years of warnings and recommendations, the patience of the Council was exhausted. On 13 March, the Council decided to withhold, as of 1 January 2012, €495 million from the money that had been provisionally earmarked in the EU's Cohesion Fund for Hungary⁵.

This case illustrates the difference between formalistic implementation and effective implementation. On the surface, the dispute between the Council and Hungary is about numbers. In reality, however, it is about the real impact of Hungary's measures to reduce its deficit. Hungary maintained that it had formally conformed to the deficit requirement. The Council saw no real compliance with the spirit of the rule on sustainable public finances. The Council was right, of course.

The legal side

Recently the Court of Justice was asked to rule on the interpretation of Article 6(3) of Directive 2001/42⁶. This Directive lays down rules on environmental impact assessment and requires, *inter alia*, that public authorities prepare reports on the likely environmental effects of their measures. An authority that prepares such a report has to consult widely, since, 'as a rule, the inclusion of a wider set of factors in decision-making will contribute to more sustainable and effective solutions'⁷. Article 6(3) of the Directive provides that 'Member

entity internal to it has real autonomy, meaning, in particular, that it is provided with administrative and human resources of its own and is thus in a position to fulfil the tasks entrusted to authorities to be consulted as provided for in that directive, and, in particular, to give an objective opinion on the plan or programme envisaged by the authority to which it is attached'¹¹.

The outcome of this case was unpredictable. Opinions among the most senior legal professionals diverged significantly. The Court reached its conclusion by asking what the objective of the Directive was and how it could be most effectively achieved. Different judges could have drawn different conclusions. The point here is not that conclusions could differ, but that effective implementation always requires assessment of whether what is achieved corresponds indeed with the objectives defined in law or policy.

Effective implementation: theoretical considerations

The dictionary definition of the verb 'to implement' is 'to put into effect according to or by means of a definite plan or procedure'¹². This implies that in order to implement anything you need first to set an objective or goal, and then draw up directions on how to reach that objective or goal. The addition of the adjective 'effective' to the noun 'implementation' connotes that the act of implementation is not mechanical, formalistic or perfunctory. Rather it highlights the intention to achieve fully the desired objective or goal. The focus of the action is not on the process but on the result.

Therefore, at the heart of the concept of effective implementation is an implicit but indispensable ability to determine whether the desired objective has been achieved: to put it differently, you need to know whether you have reached your goal. This in turn entails that the objective or goal can be measured or quantified and that there are ways to verify that the results of the implementing action or actions correspond to the desired objective.

Effective implementation of a policy is a never-ending process. It involves constant monitoring of the effects of implementing actions and adjustment, if necessary, of implementing instruments.

To understand why policy implementation is more likely to follow a circular rather than linear path, one needs to appreciate the 'root problem' of policies. The word 'root' here has two meanings. First, it indicates a problem which is at the core of any policy formulation and application. Second, it is a pictorial representation of the nature of that problem. It very much looks like the root system of plants.

The root problem has two aspects. First, a policy objective can normally be achieved through multiple instruments. It follows that the right instrument has to be selected according to certain desirable features such as efficiency or cost.

Effective implementation of a policy is a never-ending process. It involves constant monitoring of the effects of implementing actions and adjustment, if necessary, of implementing instruments.

States shall designate the authorities to be consulted... In the *Seaport* case⁸, the question arose as to what happens when the authority that prepares an environmental report is also the sole designated authority for consultation⁹. Must it consult itself? In this situation must the Member State concerned – the UK in this case – designate another authority?

The Commission and the UK argued that the Directive was silent on this point and that it was therefore up to the Member States to decide what to do. The Advocate General disagreed in his opinion. He stated that even though it was not explicitly required by the Directive, Member States had to designate a separate authority to be consulted. The Court of Justice in its judgement of 20 October 2011 adopted an intermediate, and more reasonable, position.

According to the Court, the reason that the consultation of the relevant authorities was included in the procedure is to take 'due account' of environmental effects and for alternatives to be 'objectively considered'. The provisions of Directive 2001/42 would be 'deprived of practical effect if in circumstances where the authority designated... is itself also required to prepare or adopt a plan or programme'¹⁰. 'However, in such a situation, Article 6 does require that, within the authority usually responsible for consultation on environmental matters, a functional separation be organised so that an administrative

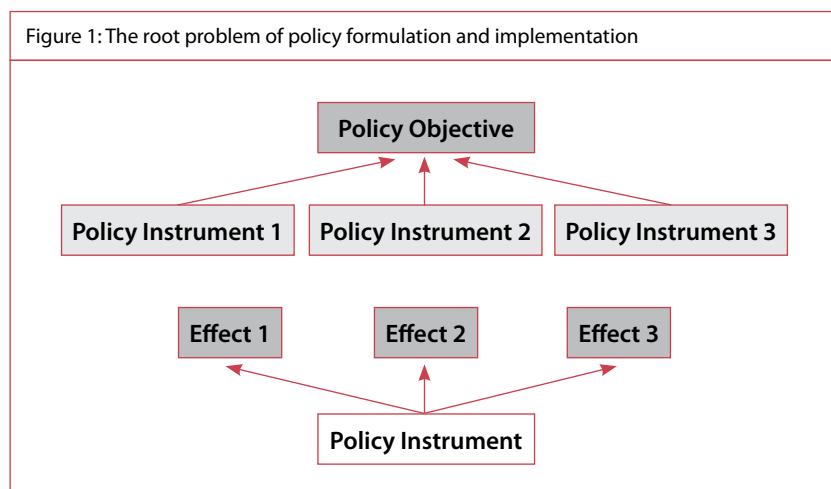


For example, the economic integration of migrants can be achieved through training courses to help them develop new skills or through a more interventionist measure involving actual placement of migrants in selected jobs. Protection of consumers from abusive selling practices by energy providers can be achieved directly through price regulation or indirectly through market liberalisation and entry of more providers. The choice of the right instrument is dependent on factors such as availability of information on costs, the need to incentivise market operators to invest and offer cost-efficient services and the administrative costs of supervision.

The second aspect of the root problem is the mirror image of the first. The same instrument may have multiple effects some of which may be undesirable. These side-effects can be costly and counter-productive.

For example, as is now well understood, price regulation of energy utilities can keep prices at an affordable level for consumers by preventing energy suppliers from charging excessively above cost. That, however, comes at the expense of not inducing sufficient investment which can lead to lower prices in the long term. Companies can be incentivised to make long-term investments only if there is a prospect of adequate profit, which implies that in the short-term, prices may have to remain considerably above costs.

The figure below depicts the two aspects of the root problem.



The root problem entails the results having to be constantly monitored and assessed. Failure to reach pre-determined targets should lead to adjustment of policy application or of legal enforcement. In a world of informational imperfections, policy makers can never be sure that what appears feasible can indeed be achieved, and if it is eventually achieved, that it is the best that could be achieved. The act of implementation itself generates information which is useful and has to be fed back into the design of the implementation process and the choice of right instruments. Since, however, the information that the act of implementation generates is partly shaped by the efforts of the implementing or enforcing authority, one can never be certain about the extent to which such information reflects the objective state of the world or the subjective efforts of the authority.

One way of making sense of the feedback is to compare what that authority achieves or how it performs with the

performance of other similar authorities. Peer comparison is a valuable 'reality check'.

To summarise so far, policy implementation means purposeful action. It means that authorities: a. define *ex ante* one or more operational targets; b. carry out *ex post* checks to confirm that the targets are achieved; and c. benchmark their own performance against peers to ensure that targets are credible and achievements are within the boundaries of what is reasonable.

Necessary administrative capacity and the usefulness of comparative assessment

Let's consider how this formulation of effective implementation can be translated into administrative capacity¹³. A public authority such as a ministry or agency that is responsible for enforcing a law or implementing a policy and, as a consequence has to act purposefully towards that end, must obviously have: a. knowledge about what has to be achieved (*i.e.* expertise); b. ability or capacity to reach its objectives (*i.e.* legal empowerment and human and material resources); and c. motivation to reach them (*i.e.* incentives, which can be inducements or penalties). Let's call these the 'three pillars of institutional capacity'.

A timely and rather sad reminder of the indispensability of these three pillars of institutional capacity has been provided by the Second Quarterly Report of the Task Force for Greece, which was issued in March 2012. The Report observes that 'preparatory work shows that in certain areas the Greek administration lacks the monitoring, reporting or control systems needed to ensure effective policy implementation.' [p.4] In other words, Greece does not have the requisite administrative capacity because public authorities do not have sufficient information on the impact of the policy instruments they deploy and, even worse, they are not able to steer those instruments towards the objectives they seek to achieve.

Of course, Greek public authorities must be aware of these deficiencies. So the inevitable question is why do they not take remedial action? The First Quarterly Report¹⁴ of the Task Force referred to structural weaknesses such as 'no accountability of the results' and 'lack of supervision' [p.15]. In order to implement effectively, public authorities have to be incentivised to do so. Accountability mechanisms do provide such an incentive. Examples of accountability mechanisms are obligations to follow transparent procedures and to explain and motivate policy decisions.

In addition, the implementing authority has to be accountable to a principal for its actions. Otherwise there can be no assurance that it will try as hard as it can to achieve the objectives of the policy for which it is responsible. The principal should be able to exercise at least minimal control¹⁵.

But, there is another problem here. The 'root problem' suggests the existence of inherent uncertainties and informational imperfections in policy-making and policy implementation.

How would those who oversee performance of agents be satisfied that it is good enough, if they are not sure how overall policy objectives can be operationalised in specific targets, what policy instruments are the rights ones or how the effects of those instruments can be measured, for example?

Therefore, a different approach to raising accountability and offering incentives for better results is to benchmark organisational performance against those of peers. Benchmarking here is another way of asking what a comparable organisation would do in similar circumstances in order to find out whether both the operational policy targets set by the organisation in question and the outcomes it achieves are reasonable.

Peer or comparative assessment is an indispensable component of administrative capacity for effective implementation.

The need to assess whether performance is satisfactory stems from the fact that any law and any policy has to be interpreted in the sense that it has to be decided by those who apply a policy or enforce a law as to whether it fits the specific circumstances of each particular instance of implementation¹⁶. Recent empirical research has also shown the importance of asking what someone else would do in the same situation. Apparently, when different persons are asked to interpret the same piece of legislation, their answers vary depending on their personal preferences and ideological inclinations. By contrast, when the same persons are asked to bear in mind what the average person would do in the same situation, their answers converge¹⁷.

Peer or comparative assessment is an indispensable component of administrative capacity for effective implementation and has to be built in the structure of any implementing or enforcing organisation through institutionalised regular self-reviews or external reviews.

Comparative assessment of performance is both, more feasible and more important in the context of the EU. It is more feasible because there are at least 27 authorities responsible for the same task. It is more important for the EU than



for individual countries because of the significant degree of discretion that Member States have to determine their own methods of implementation of EU law and policies. Such discretion exists not only in the case of directives, but also in the case of regulations. The important point here is that effective implementation becomes a collaborative project. We all benefit by learning from each other.

However, if cross-border comparison is to generate valuable information, policy outcomes and institutional performances across the different Member States need to be assessed systematically. This comparative assessment is the natural task

of the Commission or more specialised European agencies. In this connection, there is a gap in the text of Article 197 TFEU. It does not provide for this type of assessment. It limits itself to action that 'may include facilitating the exchange of information and of civil servants as well as supporting training schemes'¹⁸. Exchange of information and training is indeed very useful; but unfortunately 'no Member State shall be obliged to avail itself of such support'.

Effective implementation of EU rules: the 'reality check' performed by the European Court of Auditors

The previous sections considered how effective implementation could be understood and what kind of administrative capacity was necessary to achieve that kind of implementation. This section examines how this concept has been applied in practice in the assessments carried out by the European Court of Auditors.

The main task of the ECA is to audit the annual accounts of EU institutions and agencies and the accounts of national authorities which receive and disburse EU funds. In addition, it conducts, on its own initiative, assessments of EU policies, of the application of EU law and of the corresponding administrative procedures and management performance of Member States. The results of these assessments are then published in so-called 'special reports'. This section summarises the main critical findings of a sample of special reports drawn from the publications of the past few years. The sample is not random; rather it was chosen in such a way so as to cover diverse policy areas.

The following reports have been examined [references indicated in brackets]:

- **The EU Transit System** [11/2006]
- **Are Simplified Customs Procedures for Imports Effectively Controlled?** [1/2010]
- **The Audit of the SME Guarantee Facility** [4/2011]
- **Are the School Milk and the School Fruit Schemes Effective?** [10/2011]
- **Do the Design and Management of the Geographical Indications Scheme allow it to be Effective?** [11/2011]
- **Does the Control of Customs Procedure 42 Prevent and Detect VAT Evasion?** [13/2011]
- **Has EU Assistance Improved Croatia's Capacity to Manage Post-Accession Funding?** [14/2011]
- **Effectiveness of EU Development Aid for Food Security in Sub-Saharan Africa** [1/2012]
- **Financial Instruments for SMEs Co-financed by the European Regional Development Fund** [2/2012]

What can we learn from the ECA special reports? The ECA reports can be read and understood on two levels: that of the methodology adopted in each report, and that of the substance and findings of each report. The precise methodology naturally varies from report to report. But what is striking about it is that despite using different words and methods of framing it, in essence the ECA always asks the same question: how can institutional performance and policy results be measured? The ECA always tries to define measurable indicators before it carries out its audits.

The findings of the reports, of course, also vary. But in general, the ECA identifies faults in implementation largely where:

- a. performance cannot be measured;
- b. what can be measured does not correspond to the desired targets as defined in the relevant legislative acts; or
- c. Member States apply the rules formalistically.

They are concerned more about following the prescribed procedure rather measuring the actual impact of those rules.

With respect to the problem of measuring performance, the reports suggest that it is caused by vague definitions of the overall legal or policy objectives. Member States do not always bother to operationalise more meaningfully those vague definitions.

Concerning the discrepancy between policy objectives and actual performance, the reports indicate that this is caused by the failure of authorities to adopt implementing instruments that can reach the pre-set policy objectives. Instruments are chosen from those readily available rather than specifically designed for the purpose at hand.

Regarding the formalistic application of the rules, the reports criticise the Member States for not acting intelligently when focusing their enforcement efforts in high-risk areas, high-risk market operators or on those with the greatest need.

In all of these cases, implementation is ineffective because it cannot be verified whether the pursued policy objectives are indeed achieved. Member States make claims but do not back these up with tangible evidence.



These faults in implementation reflect institutional weaknesses and constraints on administrative capacity. Implementing authorities do not always have the requisite expertise. They do not seem to set verifiable goals, nor do they appear accountable to define and reach such goals. They also appear unable to learn and adjust, possibly because they are not sufficiently empowered and endowed and, apart from the audit by the ECA, their performance is not regularly assessed.

Conclusions

No law or policy is laid down in such precise terms that interpretation and elaboration at the stage of implementation become unnecessary. The implementing authority must always translate broad objectives into operational targets, adopt rules and procedures and utilise the right instruments.

The term 'effective implementation' implies that there is: a. a definition of feasible and verifiable objectives; b. continuous measurement of the results or impact of rules, procedures and instruments; and c. continuous assessment of whether the actual effects match the desired or stated objectives of the law or policy.

To succeed in these tasks, implementing authorities must have the capacity to learn and assess the impact of their actions and adjust their rules, procedures and instruments appropriately. They must be sufficiently empowered and endowed. They must also be accountable; they have to explain and justify their decisions. Indeed, accountability is indispensable for self-assessment and learning.

Accountability is also an important component of institutional capacity for effective implementation in the context of integrating economies. Comparison of performance against peers in partner countries strengthens accountability. Comparison is useful because often there is no standard of performance that can be set *ex ante* with an adequate degree of certainty. Good results can only be 'revealed' *ex post* through comparison of the performance of those authorities that attempt to reach the same policy objective.

In conclusion, the essence of effective implementation is that the actions of public authorities have an actual impact that corresponds to the aims defined by law or policy. Public authorities can act purposefully to achieve those aims only by establishing a certain institutional capacity.

In the context of the EU, effective implementation becomes a collaborative project because of the diversity of implementing instruments and procedures adopted by the various Member States. Comparative analysis of implementing or enforcement performance is a necessary component of determining whether Member States apply EU rules as best as they can.

Notes

* I would like to acknowledge the valuable research input by Maria Geilmann. A previous version of this article was presented at a Lisbon Network Workshop on Policy Implementation after Lisbon, which was organised by EIPA on 29 February 2012 in Brussels. I am grateful to the participants of the workshop and to the editors of *Eipascope* for helpful comments on an earlier draft.

¹ See **Dworkin, R.**, *Law's Empire*, (Cambridge, MA: Harvard University Press, 1986); **Hart, H.**, *The Concept of Law*, (Oxford: Oxford University Press, 1994) 2nd Ed.

² There seems to be no definition of 'effective implementation of EU law' either in the jurisprudence or secondary legislation. See **Nicolaides, P.** and **M. Geilmann**, *What Is Effective Implementation of EU Law?* *Maastricht Journal of European and Comparative Law*, forthcoming 2012.

³ There is abundant literature on the performance of Member States in applying EU law and policies and the factors that determine that performance. On the whole, the literature is empirical and does not propose remedies that address weaknesses in administrative structures. By contrast, this article focuses on the normative issue of how effectiveness may be understood and how institutions can be structured so as to have the capacity to apply policies and enforce law effectively. See, for example, **Falkner, G., M. Hartlapp** and **O. Treib**, *World of Compliance: Why Leading Approaches to European Union Implementation Are only Sometimes-True Theories*, *European Journal of Political Research*, 2007, vol. 46(3), pp. 395-416; **Borzel, T., T. Hofmann, D. Panke** and **C. Sprungk**, *Obstinate and Inefficient: Why Member States do not Comply with EU Law*, *Comparative Political Studies*, 2010, vol. 43(11), pp. 1363-1390; **Haverland, M., B. Steunenbergh** and **F. van Waarden**, *Sectors at Different Speeds: Analysing Transposition Deficits in the European Union*, *Journal of Common Market Studies*, 2010, vol. 49(2), pp. 265-291; **Kaeding, M.** and **K. Voskamp**,

Better Implementation of EU Legislation is not just a Question of taking Member States to Court: SOLVIT, working paper, EIPA, 2010; **Kaeding, M.**, Better Regulation in the European Union: Lost in Translation or Full Steam Ahead? The Transposition of EU Transport Directives across Member States, (Leiden: Leiden University Press, 2007); **Kaeding, M.**, Administrative Convergence Actually: An Assessment of the European Commission's Best Practices for Transposition of EU Legislation in France, Germany, Italy, Sweden and Greece, *Journal of European Integration*, 2007, vol. 29(4), pp. 425-445. **Versluis, E.**, Even Rules, Uneven Practices: Opening the 'Black Box' of EU law in Action, *West European Politics*, 2007, 30(1), pp. 50-67; **Versluis, E.**, Explaining Variations in Implementation of EU Directives, *European Integration online Papers*, 2004, vol. 8(19).

- ⁴ Council Decision 2012/139/EU of 24 January 2012 establishing whether effective action has been taken by Hungary in response to the Council recommendation of 7 July 2009, OJ L 66, 6 March 2012, p. 6.
- ⁵ Council Implementing Decision 2012/156/EU of 13 March 2012 suspending commitments from the Cohesion Fund for Hungary with effect from 1 January 2013, OJ L 78, 17 March 2012, p. 19.
- ⁶ Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21 July 2001, pp. 30-37.
- ⁷ Case C-41/11 *Inter-Environment Wallonie* (Judgement 28 February 2012).
- ⁸ Case C-474/10,
- ⁹ Case C-474/10 *Seaport* (Judgement 20 October 2011)
- ¹⁰ *Ibid.*, Para. 39.
- ¹¹ *Ibid.*, Para. 42.
- ¹² See www.dictionary.com.
- ¹³ I have explored this issue in more detail in a recent book entitled *Managing the European Union: Microfoundations of Policy Implementation*, EIPA/Routledge, forthcoming 2012.
- ¹⁴ SI(2011) 399/3.
- ¹⁵ **McCubbins, M.** and **T. Schwartz**, Congressional oversight overlooked: Police patrols versus fire alarms, *American Journal of Political Science*, 1984, vol. 28, pp. 16-79; **Kiewiet, R.** and **M. McCubbins**, *The Logic of Delegation*, (Chicago: University of Chicago Press, 1991).
- ¹⁶ On the connection between application and interpretation of law, please see **Farnsworth, W. et al**, Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation, *Journal of Legal Analysis*, 2010, No 2, p. 257; **Farnsworth, W.**, *The Legal Analyst* (Chicago: University of Chicago Press, 2007).
- ¹⁷ **Farnsworth, W. et al**, Ambiguity About Ambiguity, op. cit.
- ¹⁸ It appears that so far Article 197 TFEU has only once been used as a legal basis for a Commission proposal. See Commission Proposal for a Regulation of the European Parliament and of the Council Establishing for the Period 2014 to 2020 the Rights and Citizenship Programme, COM(2011) 758 final, 15/11/2011.

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Pulling the Strings: Party Group Coordinators in the European Parliament

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Since its post-Lisbon increase in (legislative and non-legislative) powers, the European Parliament (EP) is more relevant than ever in the geographically diversified multilevel system of the EU. Party group coordinators occupy a crucial position in collective decision-making within the EP. However, knowledge about these pivotal actors is absent. This raises the question as to who these party group coordinators are, what they do, and what indeed makes a good coordinator. A new data set shows that in 2012, more than one-fifth of coordinators of the three largest and most influential groups are German, with British and Spanish coordinators ranking a distant second before Romanians. Among coordinators from NMS, only one-eighth were newcomers.

Introduction

Who establishes the speakers' lists for plenary sessions in Strasbourg and decides that *Claude Turmes*, a Green Member of the European Parliament (MEP) from Luxembourg, becomes the rapporteur for the controversial Energy-efficiency Directive; or that *Angelika Niebler*, a German centre-right MEP who chaired the Parliament's Industry, Research and Energy committee (ITRE) between 2007 and 2009, is appointed rapporteur for the Mobile-phone roaming charges Directive; and that *David Martin*, a senior British MEP from the Socialists & Democrats group (S&D), is put in charge of the Anti-Counterfeiting Trade Agreement (ACTA)? Who acts as so-called 'whips' maximising voting cohesion among party groups' contingents in committee and full plenary meetings? Who prepares the organisation of the hearings of Commissioners-designate in parliamentary committees and decides whether the Commissioners-designate are qualified both to be members of the Commission's College and to carry out the particular duties they have been assigned?

These decisions are taken by a small group of highly influential MEPs; so-called party group coordinators. These individuals, such as *Jean-Paul Gauzès*, a French European People's Party (EPP) member on the Economic and Monetary Affairs committee (ECON) with a firm grip on the complicated and fast-changing world of finance and *Ingeborg Gräßle*, a German centre-right MEP on the Budgetary Control committee (CONT), occupy a crucial position in collective decision-making in the European Parliament (EP). Political coordinators are the nexus mediating between individual MEPs, national party delegations that citizens voted for, and the European party group. They are members chosen to represent their groups at preparatory discussions on policy guidelines, on the strategy pursued by the parliamentary committee and on organising the practical side of the committee's work. They convene short meetings in closed session, where they assign rapporteurships to groups and each of them compiles voting instructions along which MEPs of their group vote very cohesively.

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However, knowledge about these pivotal actors is absent. This raises the question as to who these coordinators are, what their role is, and what makes a good coordinator. This article seeks to answer these questions. It is structured as follows: first, we outline the various important tasks carried out by party group coordinators in the EP. Drawing on a novel dataset comprising information on EP6 (2004-2009) and EP7 (2009-2012), we formulate a number of lessons regarding the distribution of party group coordinator posts. Eventually, we conclude by providing a first analysis of the qualities coordinators should have.

What is the role of political party group coordinators in the European Parliament?

Most of the parliamentary work is carried out in the EP's committee structure. There are 20 standing parliamentary committees, two sub-committees (on human rights; security and defence) and one special committee (on organised crime, corruption and money laundering). Within every parliamentary committee a significant part is played by party group coordinators. Only recently recognised in the EP's rules of procedure (Rule 192), party group coordinators considerably influence the work of the EP's committee system, while often rivalling the committee's bureau (chair and vice-chair persons). In particular 'the balance of power between chairs and party group coordinators appears to vary in terms of personality and size of the groups from which the holders of these offices are drawn' (Whitaker, 2011, 91; 2001).

Rule 192: Committee coordinators [..]

1. The political groups may designate one of their members as coordinator.
 2. The committee coordinators shall if necessary be convened by their committee Chair to prepare decisions to be taken by the committee, in particular decisions on procedure and the appointment of rapporteurs. The committee may delegate the power to take certain decisions to the coordinators, with the exception of decisions concerning the adoption of reports, opinions or amendments. The Vice-Chairs may be invited to participate in the meetings of committee coordinators in a consultative role. The coordinators shall endeavour to find a consensus. When consensus cannot be reached, they may act only by a majority that clearly represents a large majority of the committee, having regard to the respective strengths of the various groups.
 3. The committee coordinators shall be convened by their committee Chair to prepare the organisation of the hearings of Commissioners-designate. Following those hearings, the coordinators shall meet to evaluate the nominees in accordance with the procedure laid down in Annex XVII.
- [..]

Source: Rules of procedure of the European Parliament (April 2012)

Despite the importance of party group coordinators for the EP's day-to-day decision-making, much is not known about these influential individuals. Elected by each party group's members on every committee at the start of each legislative term and mid-term, in line with other committee and EP leadership positions, their powers cover a considerable range of activities. They can mainly be divided along three categories:

In each committee they *act as the party group's spokesperson* in the subject area concerned, *debate the committee's future agenda*, *allocate reports* to one of the party groups, *discuss forthcoming plenary votes* and possible compromise amendments, *establish the speakers' lists* for plenary sessions, *prepare the organisation of the hearings* of Commissioners-designate, and *decide* whether the Commissioners-designate are qualified.

Among the members of their party groups, they play a key role in formulating the party group's policy, allocate (shadow) rapporteurships for legislative and non-legislative acts, and convene preparatory meetings before the start of the committee meeting.

At the full plenary they *maximise their party group's presence* during key votes in committee and the full plenary, and ensure voting cohesion among their party group's contingent in committee and full plenary meetings.

The distribution of party group coordinators in the European Parliament

In order to shed light on who the coordinators are, we compiled a novel data set covering the four largest political groups – EPP, S&D, ALDE (Alliance of Liberals and Democrats for Europe), and Greens/EFA (European Free Alliance) – across all standing committees and their subcommittees for the sixth and seventh legislative terms, that is from 2004 until 2012. It comprises almost 250 MEPs who served as coordinators for at least part of the last eight years. We thus obtain unique insights into the MEPs effectively ‘running the show’. Here, we focus on the nationality of some of these coordinators.

Analysing the Nationality of Coordinatorships

The nationality of MEPs holding leadership positions is relevant as national interest might influence MEPs' preferences. On the ECON committee dealing with issues such as financial regulation, for instance, a French MEP might have different views than a British MEP seeking to protect the City. In addition, within party groups, nationality represents a proxy for different constituent national party groups, to which committee work is of increasing importance following the increase in powers of the EP (Whitaker, 2011). In order to agree on a party line within a political group, conflicts between different national party delegations, such as British Labour, German Social Democrats or the French Socialist Party, needs to be settled. Coordinators hold a party group role which requires independence, acting as brokers seeking to avoid divisions. It is hence reasonable to expect that they have some room for manoeuvre so as to influence the party group line. Research has established that MEPs vote very cohesively along that line once it has been set (Hix *et al.*, 2007).

In 2012, more than one-fifth of coordinators of the three largest and most influential groups are German, with British and Spanish coordinators ranking a distant second before Romanians. The strong presence of German MEPs in these positions can partly be explained by the strength of their national party delegations within the three groups (see Figure 1a-c).

research has highlighted that many German MEPs commit to long-term work in the EP rather than short stints before returning to positions in their home countries (Scarow, 1997). The lower turnover is thus arguably reflected in the share of coordinator positions, with which MEPs can be rewarded for building up long-term experience and expertise.

New Member States versus old EU 15 Member States

When considering the experience of MEPs as an explanatory factor in the election of coordinators, the presence of new Member States (NMS) as opposed to the old EU15 in+ these posts is interesting. Kaeding & Hurka (2010) find that MEPs from NMS are underrepresented in the allocation of rapporteurships, which implies that the group of rapporteurs is clearly no microcosm of the full plenary. The allocation of reports appears to be a self-selection process where MEPs seek reports that reflect their particular interests. This is astonishing if we acknowledge the growing importance of informal trilogues, in which rapporteurs are the key parliamentary negotiators with essential legislative and non-legislative powers. This time, we therefore ask how MEPs from NMS are represented amongst the coordinators that allocate rapporteurships.

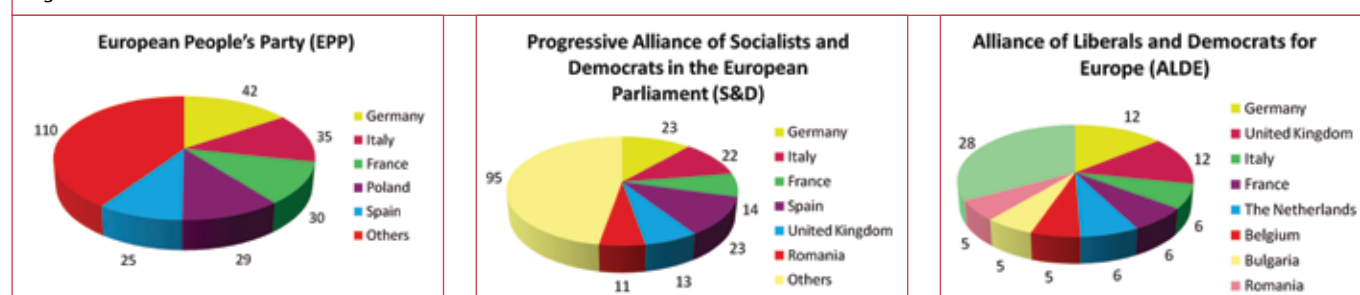
Figure 2

	EP 6: MEPs		EP 6: Coordinators		EP7: MEPs		EP7: Coordinators	
	NMS	Old MS	NMS	Old MS	NMS	Old MS	NMS	Old MS
EPP	31%	69%	6%	94%	33%	67%	44%	56%
S&D	22%	78%	3%	97%	27%	73%	7%	93%
ALDE	32%	68%	3%	97%	22%	78%	25%	75%
Plenary	28%	72%			27%	73%		

The data show that the 2004 and 2007 enlargements were not yet fully reflected among coordinators during EP6. This holds for all three party groups during the sixth legislative term when their countries joined the EU; this is also in line with expectations, since this was the first term for these MEPs, with those from Romania and Bulgaria only joining after mid-term. The picture changes dramatically in the current term, when many of the Members had already gained parliamentary experience.

However, the representation of MEPs from NMS among coordinators differs vastly among groups. The EPP, in which representatives from new Member States make up a third

Figure 1a-c



Other national delegations, such as from the UK or Poland, have larger contingents in less influential fringe groups such as the ECR (European Conservatives and Reformists), which we do not focus on here (but see Figure 1). In addition, previous

of the faction, has seen a steep increase in coordinators from NMS, up by 38 percentage points to 44 per cent. For ALDE, while the share of MEPs from NMS decreased by 10 percentage points, the share of coordinators defied the

trend and increased by 22 points. Remarkably, MEPs from NMS are thus better represented in EPP and ALDE among coordinators than in their faction at large. For S&D, in contrast, the share of MEPs from NMS is still very low in EP7. This suggests that more MEPs clung on to their positions.

Experience of coordinators

When we consider the experience of the coordinators as a factor influencing their election as coordinators, it is first notable that almost one-third of the coordinators of the three groups were newcomers to the Parliament at the outset of the 7th legislative term. Among coordinators from NMS, only one-eighth were newcomers, pointing to a group of MEPs from these countries who came to stay, even though the EP is often only considered a transit station qualifying them for national-level positions.

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This is a particularly interesting result, especially when compared with the findings of Kaeding & Hurka (2010) on the rapporteurship selection in the EP. They showed that the chances of becoming rapporteur in the sixth term were significantly lower for MEPs from the accession countries than for MEPs from the long-standing Member States. Curiously, this even remained true when they held seniority to be constant and considered only MEPs who had served for exactly the same time period. First-timers from the 'old' Member States were clearly at an advantage in the report allocation process in comparison with their colleagues from the accession countries. This bias towards nationality does seem to hold for coordinators.

Once elected and doing a good job, coordinators and their colleagues might not wish to change successful arrangements. A party's successful management of a policy area stands and falls with the coordinator, so members of the committee have a strong incentive to select the person they deem most fit for the job.

More generally speaking, the election of coordinators (for the biggest party groups) does seem to be influenced by party groups, which control leadership positions, or national party delegations, which ascribe different levels of importance to expertise in the European Parliament. So what makes a good coordinator in the eyes of committee members and their party group? The answer is, the task of coordinators is challenging and requires a certain set of skills.

Conclusions

Coordinators are usually very committed MEPs, characterised by expertise, interpersonal and negotiating skills, paired with credibility to represent the party group line. Particularly in large groups, the post is often hotly contested and MEPs canvass and enmesh their colleagues in series of personal meetings. While there are some horizontal skills that coordinators require across the board, there are some differences across party groups.

Coordinators face different challenges when comparing small and large groups. While for the Greens/EFA, there are currently two members sitting on the International Trade committee, there are eleven from the EPP group representing eight national delegations. In order to find a common party position, coordinators for large groups need to mediate between individual MEPs and various national party delegations. Those for smaller groups will often need to find compromises without immediate feedback from colleagues, and thus need excellent knowledge of their colleagues' preferences in order for their group to support the deals and to protect their very own credibility. While coordinators from large groups will thus spend much of their time in meetings with MEPs from their own group, they can rely on colleagues' support for (shadow-) rapporteurships. Their counterparts in smaller groups, in contrast, often need to engage in these themselves, and thus take part in many informal trilogues with the Commission and Council to draft amendments and negotiate with them.

Regardless of the party group, thorough expertise in the policy area is indispensable in order to credibly negotiate on these matters. Knowing the ins and outs of parliamentary work, *i.e.* EP experience, is likewise crucial. And here nationality does not seem to matter; first-timers from the 'old' Member States were at an advantage in the selection process when compared with their first-timer colleagues from the NMS.

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When executing these responsibilities, personal networks matter, and national party delegations are key components of these. Pulling the strings from behind the scenes, coordinators are thus key players in the Parliament, and a better understanding of their role will help us to better understand EU policy-making.

Figure 3: European Parliament party group coordinators (2012)*

	Committee	EPP	S&D	ALDE	Greens	ECR	GUE/NGL
AFET	Foreign Affairs	Salafranca (ES)	Gomes (PT)	Neyts-Uyttebroeck (BE)	Lunacek (AT) and Brantner (DE)	Tannock (UK)	Meyer (ES)
AFCO	Constitutional Affairs	Trzaskowski (PL)	Gualtieri (IT)	Duff (UK)	Häfner (DE)	Fox (UK)	Sondergaard (DK)
AGRI	Agriculture and Rural Development	Dess (DE)	Capoulas Santos (PT)	Lyon (UK)	Häusling (DE)	Nicholson (UK)	Rubiks (LV)
BUDG	Budgets	Garriga Polledo (ES)	Färm (SE)	Haglund (FI)	Trüpel (DE)	Ashcroft (UK)	Portas (PT)
CONT	Budgetary Control	Gräßle (DE)	Geier (DE)	Mulder (NL)	Staes (BE)	Czarnecki (PL)	Sondergaard (DK)
CULT	Culture and Education	Scurria(IT)	Kammerevert (DE)	Takkula (FI)	Benarab- Attou (FR)	Migalski (PL)	Vergiat (FR)
DEVE	Development	Kaczmarek (PL) and Mitchell (IE)	Cortés Lastra (ES)	Goerens (LU)	Grèze (FR)	Deva (UK)	Le Hyaric (FR)
ECON	Economic and Monetary Affairs	Gauzès (FR)	Ferreira (PT)	Goulard (FR) and Schmidt (SE, deputy)	Giegold (DE)	Swinburne (UK)	Klute (DE)
EMPL	Employment and Social Affairs	Óry (HU)	Cercas (ES)	Hirsch (DE) and Harkin (IE, deputy)	Lambert (UK)	Cabrnock (CZ)	Händel (DE)
ENVI	Environment, Public Health and Food Safety	Liese (DE) and Seeber (AT)	McAvan (UK)	Davies (UK)	Hassi (FI)	Rosbach (DK)	Liotard (NL)
IMCO	Internal Market and Consumer Protection	Schwab (DE)	Gebhardt (DE)	Manders (NL) and Chatzimarkakis (DE, deputy)	Rühle (DE)	Bielan (PL)	De Jong (NL)
INTA	International Trade	Caspary (DE)	Lange (DE)	Kazak (BG)	Jadot (FR)	Sturdy (UK)	Scholz (DE)
ITRE	Industry, Research , Energy	Del Castillo Vera (ES)	Riera Madurell (ES)	Rohde (DK)	Turmes (LU)	Chichester (UK)	Matias (PT)
JURI	Legal Affairs	Zwiefka (PL)	Berlinguer (IT)	Wikström (SE)	Lichten-berger (AT)	Karim (UK)	Mastalka (CZ)
LIBE	Civil Liberties, Justice and Home Affairs	Busuttil (MT)	Moraes (UK)	Weber (RO)	Sargentini (NL)	Kirkhope (UK)	Triantaphyllides (CY)
PECH	Fisheries	Antinoro (IT)	Rodust (DE)	Gallagher (IE)	Lövin (SE)	Grobarczyk (PL)	Ferreira (PT)
PETI	Petitions	Jahr (DE)	Bostinari (RO)	Valean (RO)	Auken (DK)	Chichester (UK)	Chountis (EL)
REGI	Regional Development	Van Nistelrooij (NL)	Krehl (DE)	Manescu (RO)	Alfonsi (FR)	Vlasak (CZ)	Omarjee (FR)
TRAN	Transport and Tourism	Grosch (BE)	El Khadraoui (BE)	Meissner (DE)	Cramer (DE) and Lichtenberger (AT)	Zile (LV)	Kohlicek (CZ)
FEMM	Women's Rights and Gender Equality	Nedelcheva (BG)	Thomsen (DK)	Parvanova (BG)	Cornelissen (NL)	Yannakoudakis (ECR)	Zuber (PT)
DROI	Human Rights	Tóké (RO) and Vaidere (LV)	Howitt (UK)	Donskis (LT)	Tavares (PT)	Tannock (UK)	Vergiat (FR)
SEDE	Security and Defence	Gahler (DE)	Koppa (EL)	Van Baalen (NL)	Cronerg(FI)	Van Orden (UK)	Lösing (DE)

* Unfortunately, we were not able to retrieve the respective information for the EFD.

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The Member States' Initiatives: An Inter-Institutional Turf War after the Treaty of Lisbon

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With the introduction of the Treaty of Lisbon came the possibility for Member States to launch an initiative under the Ordinary Legislative Procedure. This came into being as the scope of co-decision was expanded to cover the more sensitive issues of the third pillar (such as judicial cooperation in criminal matters and police cooperation). It was considered necessary that Member States have a shared right of initiative with the European Commission. One case in which the right of initiative was invoked was the Initiative for a European Protection Order (EPO). This dossier is one of the first and few cases in which the Member States' Initiative after the Treaty of Lisbon was used. It resulted in a turf war between the Presidency and the Commission regarding the scope of the Member States' Initiatives. This article looks into the Member States' Initiative as it was introduced after the Treaty of Lisbon and the debate that took place on the EPO.

Introduction

With the entry into force of the Treaty of Lisbon several changes in the domain of Freedom, Security and Justice (FSJ) took place. Amongst the changes made, the shared right of initiative in the Ordinary Legislative Procedure (OLP), as is presented in Article 76 of the Treaty on the Functioning of the European Union (TFEU), is one of the novelties in which the Commission shares with the Member States the prerogative of presenting legislative proposals in the field of police and judicial cooperation in criminal matters (Chapter 4 TFEU) and Policy Cooperation (Chapter 5 TFEU). In terms of decision-making, the Article presents a junction from which two separate forms of decision-making procedures in the field of FSJ sprout, pending upon the actor(s) who seize the legislative initiative. This article will examine the role of the institutional actors in a Member State's Initiative, the policy scope on which it applies, as well as reflecting on some of the future developments. The article will use the case of the initiative on the European Protection Order (EPO) to analyse some of the more practical implications of a shared initiative as it sparked an institutional debate on the limitation of a Member State's Initiative.



Commission, the Commission will also no longer be able to withdraw it. Additionally, Article 294(15) TFEU further restricts the Commission. In the first indent it is stated that the opinion given by the Commission at the end of the second reading is no longer part of the OLP. According to the normal OLP, should the Commission issue a negative opinion on the amendments, the Council has to adopt its decision by unanimity instead of Qualified Majority Voting (QMV). By removing this requirement the Council will always make decisions using QMV when dealing with Member States' Initiatives. Possibly, this was done to ensure that the Commission would not categorically give negative opinions on Member States' Initiatives, thus making it virtually impossible to arrive at an agreement on the basis of a Member States' Initiative on such sensitive matters as criminal matters and police. According to the second indent of Article 294(15) TFEU, the only role of the Commission in the whole process is restricted to giving advice should the Council or European Parliament ask for it or should the Commission want to present it at its own initiative. Thus, any policy initiated under Article 76b TFEU will significantly reduce the formal legislative powers of the Commission.

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Sharing the Initiative

When the Treaty of Lisbon entered into force, the pillars of the EU were abandoned except for some of the special rules and procedures that remain in place for the Common Foreign and Security Policy (CFSP). For FSJ, this meant that co-decision would be further extended into this domain and that the EU would now use the same legal instruments and decision-making procedures as the community had been using over the years. Yet, there is a notable exception to this general rule. Decision-making regarding cooperation in criminal matters and police cooperation does not always follow the standard OLP procedure as outlined in the TFEU: instead, it is governed by two different procedures. The starting point of either procedure can be found in Article 76 TFEU which specifies that the right of initiative is to be shared between the Commission and the Member States. The first procedure stated in Article 76 TFEU is the OLP which starts on a proposal from the Commission. The second procedure deals with the Member States' Initiative and requires a quarter of the Member States to support the initiative: this means that the support of seven Member States is needed in order to launch the initiative.

Article 294 TFEU, which outlines the decision-making procedure, includes some special provisions to cover the matter of the Member States' Initiative in paragraph 15. Consequently, it can be stated that there are two decision-making procedures that govern the cooperation in criminal matters and police cooperation. If the Commission presents a proposal under Article 76a TFEU, the OLP will apply. Yet, if the Member States present an initiative under Article 76b TFEU, the OLP with the special provisions outlined in Article 294(15) TFEU will apply.

Under the later procedure (the Member State's initiative), the role of the Commission is weakened considerably. Firstly, if the Member States launch an initiative under Article 76b TFEU, the Commission is no longer the engine of the European integration process. Instead, a quarter of the Member States develop a proposal. As it is no longer the proposal of the

Scope

Secondly, there is the question of interpretation of Article 76b TFEU in relation to issues other than cooperation in criminal matters and policy cooperation. Policy issues do not always restrict themselves to one specific issue, but instead they tend to have overlaps with other domains. Each of these policy elements might be adopted on a different legal basis which might require a different decision-making procedure to be followed.

The main question, therefore, is how Article 76b TFEU should be read when overlaps occurs.

The EU has, since the Treaty of Maastricht and until the Treaty of Lisbon, separated the different pillars with each of their different decision-making procedures. Naturally, policy overlaps occur between these pillars. This raises the question of which policy pillar and which decision-making procedure should be used in case of such overlaps. The EU resolved this through the so-called 'double-text mechanism'. If the EU would consider it necessary that an EC policy proposal requires measures against criminal activities, a parallel third pillar proposal would be made. This mechanism would allow the Member States to guard their sovereign right on these

topics. Yet, problems emerged as soon as 'criminal-regulatory' policy issues were addressed. Here, both the Commission and the Council claim competence, resulting in a clash between the two¹.

The clash came when the Council adopted the Framework Decision 2003/80/JHA on the protection of the environment through criminal law. The Commission presented a proposal on the criminalising of environmental offences through Article 175(1) of the Treaty establishing the European Community (TEC). The Council felt that the Commission went beyond its competence which resulted in a Member State Initiative² from Denmark. The Commission, on the other hand, did not agree with the approach of the Council. It believed that the Council was using third pillar instruments to deal with first pillar policy issues. The issue came before the ECJ who ruled in favour of the Commission, stating that the Council has violated ex Article 47 TEU as the Framework Decision as it '... encroaches on the powers which Article 175 TEC confers on the Community'³. Even with regard to other TEC articles, the ECJ believed that such an encroachment should be prevented.



With the protection of ex Article 47 TEU, the Commission could combine Community legislation with legislation on cooperation in criminal matters, but the Member States could not establish Union legislation and apply it to the Community. Thus, the Community pillar is protected from any interference of the third pillar through Article 47 TEU. This provides for the safeguarding under TEU and it prevents the decision-making procedures of the Justice and Home Affairs (JHA) pillar from being dealt with by Community Policy.

Yet, with the Treaty of Lisbon, the JHA pillar structure disappeared. Article 40 TEU is the new article of the Treaty of Lisbon which has replaced the ex Article 47 TEU. The wording has been changed drastically as has its focus. Before the Treaty of Lisbon, ex Article 47 TEU covered second and third pillar issues in relation to first pillar legislation. The new article refers only to provisions dealing with CFSP. For the decision-making procedure regarding cooperation in criminal matters and police cooperation, the main question, therefore, is how Article 76b TFEU should be read when overlaps occur. Are Member States allowed to present initiatives if the topic is also related to matters on which the European Commission has the exclusive right of initiative? If so, the role of the Commission in the decision-making procedure dealing with Member States' Initiatives is much weaker than when the Commission presents a proposal. A broad interpretation of legislation in Chapter 4 TFEU and Chapter 5 TFEU would make it possible for the Member States to block the Commission from playing an effective role in the decision-making process. It would also mean the penalisation of EU policy as the Member States, probably under the leadership of the Council Presidencies, will be more eager to propose initiatives on matters outside the scope of the Member States' Initiative, but add a component dealing with criminal matters or police cooperation to give it the appropriate legal basis.

European Protection Order

Political drive of the Presidency

This eagerness of Member States to use the provision of Article 76b TFEU became obvious when, just two months after the entry into force of the Treaty of Lisbon, the initiative of Belgium, Bulgaria, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania, Finland and Sweden to establish a European Protection Order (EPO) was launched. Victims of a crime (e.g. sexual assault, harassment, domestic violence) can receive protection from a state by means of a protection order (e.g. a restraining order). Yet, an order issued in one EU Member State might not be recognised by another EU Member State. Consequently, the victim's right of free movement through the EU is restricted to the territory which recognises the protection order. It is the purpose of the initiative to rectify this situation.

In particular, Spain was very eager to move ahead with this subject. Under the Franco regime, domestic violence was not considered a criminal offence. Awareness grew in the decades after Franco as more field studies and institutions were created. A milestone was reached when the Parliament unanimously approved the Act for Comprehensive Protection against Gender Violence and it has been a policy priority ever since. Considering this background, Spain wanted to combat domestic violence on a European scale and used its term in Presidency for this. According to its Presidency programme:

*'The Union's capacity to eradicate gender-based violence should be improved. The creation of a European Observatory to draw up a common diagnosis of this terrible problem, as well as the adoption of a European Protection Order for the victims, will be two essential initiatives that will be advanced by the Spanish Presidency to achieve concrete progress on this matter.'*⁴

Consequently, the European Protection Order became one of the policy flagships of the Spanish Presidency and Spain aims to have it adopted in June 2010 at the end of its term.

The decision-making process

Spain started the implementation of its programme by sending a questionnaire⁵ to the various delegations on 23 September 2009, which appears to serve as an alternative to an impact assessment of the Commission. The Spanish Presidency presented the Member States' Initiative⁶ at the Council meeting on 22 January 2010. Overall there was general political support in the Council for the ideas of the Spanish Presidency. Yet, several questions still remained to be answered.

It was the Commission who pointed out in the first Council meeting on the EPO that the legal base Article 82 TFEU does not cover civil matters which are covered by Article 81 TFEU. From the questionnaire sent out by the Presidency, it appeared that not all Member States had adopted their protective measures through criminal law. In most Member States, civil courts can also issue protective measures. Only in a few countries are protective measures restricted to criminal law. Nevertheless, covering both criminal and civil matters will bring forth various difficulties, amongst them an incomplete legal basis of only Article 82 TFEU. The Commission presented some possible alternatives. Firstly, the initiative would restrict itself to criminal matters and would later be combined with other legislative measures. Secondly, the Commission had

already started working on a legislative package which will be presented at the beginning of 2011 under the Hungarian Presidency. The package will be based on an impact assessment and public consultations. However, to maintain the momentum, the Commission suggested giving a strong formulation in the Council Conclusions on this matter. Yet, though it would send a strong political signal, it would not be binding. At the end of the meeting the Presidency agreed with other delegates that binding measures were needed and discarded the idea of the non-binding conclusions.



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During the second meeting of the JHA Council on the initiative, it became clear that the Council was divided. The first group agreed with the opinion of the legal service of the Council that Article 82 TFEU is sufficient as a legal base and that this could be applied before both civil and criminal courts. The second group, on the other hand, agreed with the opinion of the Commission which stated that the text had to be limited to criminal matters and that civil matters should be excluded. During this meeting, the Commission once again reiterated its views that the Article 82 TFEU needed to be limited to criminal matters. As guardian of the treaty, the Commission also announced that it would bring the matter before the ECJ should the adopted directive also cover civil matters. The sharpening of the tone of the Commission, including the threat of going before the ECJ, shows the increasing friction between the Commission and the Spanish Presidency and would set the stage for the time to come.

This friction came to a boiling point at the last JHA Council meeting under the Spanish Presidency. It became clear that neither side was willing to budge. In the period leading up to the Council meeting the legal service of the European Parliament gave an oral presentation on the scope of the EPO. The Commission responded very sensitively during the Council meeting to findings of the legal service on the Parliament. The EP legal service stated that Article 82 TFEU in itself was not sufficient but should be read in combination with Article 3 TEU. The Commission believes that such an interpretation will make it possible to create criminal law using Article 82 TFEU regarding all domains of Article 3 TEU (e.g. internal market). This would thus also mean that Article 76b TFEU can be used to make legislation covering the matters of Article 3 TEU and thus vastly extending the rights of initiative for the Member States. The Presidency, on the other hand, believes that the Commission's opinion is a minority and wants to push for an agreement to move ahead in the talks with the European Parliament.

In the end, the issue was not put to a vote. The Presidency stated that this was not the right stage to make such a decision. Instead, a formal decision would take place under the Belgian Presidency. Commissioner Reding gave her views at the end of the Council meeting on the whole procedure so far and

considered it 'a mess'⁷. The Presidency on the other hand, in its final statement claimed to have not received 'the sincere cooperation of the Commission'⁸ and voiced its frustration about the reluctance of the Commission to change its views on the interpretation of Article 82 TFEU. Consequently, the final meeting of JHA Council under the Spanish Presidency ended with the Commission and the Presidency falling out with each other during a public meeting.

After the Spanish Presidency, the file entered into calmer waters. The council reconfigured the initiative to only cover criminal matters. In the final adopted version of the European Protection order, recital 10 states that 'This Directive applies to protection measures adopted in criminal matters, and does not therefore cover protection measures adopted in civil matters'⁹. With these modifications a position of the Council at first reading was adopted on 24 November 2011 and sent to the European Parliament. With no amendments of the European Parliament to the Council's position on the EPO initiative and the Commission proposal

on civil matters on the table, the initiative was adopted as an early second reading agreement on 13 December 2011¹⁰. With this, the Commission was successful in its turf war against the Council.

Conclusions

From the EPO case, several conclusions can be drawn regarding the role of the actors and the scope of the decision-making process. Firstly, the Presidency plays a pivotal role. The Member States' Initiative is driven by the political desire of the Presidency. It also shows that the innovation of the Treaty of Lisbon to make sure that the Member States' Initiative is supported by a quarter of the Member States appears to be lowered as the submission of an initiative will most likely need the support of the whole trio. This support is needed not only to ensure a good cooperation between the Trio Presidency but also because an Initiative might last longer than one Presidency period. As a result, it can be seen that to initiate the right of initiative for the Member States the formula is rather the Trio Presidency plus four other Member States. So it is appears that the threshold is low enough to make the Member States' Initiative a feasible instrument.

Having said that, the role of the Commission – which no longer is the engine – is by no means weak. Even though it virtually no longer plays a formal role in the decision-making process, it has many friends sitting around the table. In the EPO case, it was possible for the Commission to gather a blocking minority for the EPO proposal. When the Spanish Presidency tried to gain a majority by opting out the UK (the UK opted in but was not in favour of the proposed form of the proposal), other Member States which initially supported the Spanish proposal started to back down in their support. The support for the Presidency is therefore by no means fixed and the Commission can through informal channels always influence positions. As a final measure the Commission can at all times approach the ECJ as guardian of the Treaties.

Finally, with the EPO, the battle appears to be won in favour of the Commission. With the Council limiting the initiative to

just criminal matters, the Commission successfully defended its ground. However, the main question on ex Article 47 TEU remains unanswered as it is still unclear as regards to what extent the Member States can use the initiative to wander into the domains of OLP. Most likely a future court case will have to provide clarity.

Nevertheless, considering the inter-institutional debate and outcome of the EPO case, it is not likely that many more controversial Member States' Initiatives will be presented soon. For a Presidency to push a policy initiative, it requires a significant political impulse and the political costs of failure are high. Instead it is easier and politically safer to contact the Commission directly and ask them for a proposal. In most cases, the Commission will act upon these requests. Yet, as long as the instrument is available in the treaty, it will remain a usable option and at some point new inter-institutional conflicts are bound to occur as the dust has still not settled around the edges of FSJ.

Notes

- ¹ Fletcher, M., R. Löff and B. Gilmore (2008) EU Criminal Law and Justice. Cheltenham: Edward Elgar.
- ² Under TEU it is possible for any Member State of the EU to launch an initiative. No quorum is needed.
- ³ ECJ (2005). Commission of the European Communities v. Council of the European Union, (C-176/03), para. 53.
- ⁴ Spanish Presidency (2010). The Programme for the Spanish Presidency of the Council of the European Union. Published on 14 January 2010.
- ⁵ Spanish incoming Presidency (2010). Questionnaire to delegations in view of the possible presentation by Spain and other Member States of an initiative for a Council Framework Decision on the European Protection Order, (13577/09). Published on 23 September 2009.
- ⁶ Council (2010b). Initiative for a Directive of the European Parliament and of the Council on the European Protection Order, (PE-CONS 2/10). Published on 22 January 2010.
- ⁷ Council Meeting (3018) in Luxembourg on 3-4 June 2010.
- ⁸ *Ibid.*
- ⁹ Directive of the European Parliament and of the Council on the European Protection Order, (PE-CONS 71/11).
- ¹⁰ *Ibid.*

Calendar of Events

September - October 2012

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6-7 Sept.	PPP in the Transport Sector. <i>Brussels</i>
10-11 Sept.	Implementation of Environmental Legislation: How to Avoid Infringements, Court Cases and Financial Penalties. <i>Maastricht</i>
12-14 Sept.	Tutorial: Project Cycle Management: A Technical Guide. <i>Maastricht</i>
13-14 Sept.	The New European Rules on Concessions: What Will They Mean in Practice? <i>Maastricht</i>
17-18 Sept.	Preparing for new EPSO Competitions: The Road to the European Institutions. <i>Luxembourg</i>
17-18 Sept.	State Aid in the Agricultural Sector. <i>Maastricht</i>
17-18 Sept.	Financial Management of EU Structural Funds. <i>Maastricht</i>
20-21 Sept.	Public Sector Budget Review and Service Reform in a Cold Economic Climate. <i>Brussels</i>
20-21 Sept.	CAF and Justice: Quality Development in the Field of Justice. <i>Luxembourg</i>
20-21 Sept.	Managing Change in Public Administration. <i>Maastricht</i>
24-25 Sept.	State Aid from A to Z. <i>Maastricht</i>
24-25 Sept.	The Nuts and Bolts of Delegated and Implementing Acts after Lisbon (Art. 290-291 TFEU). <i>Maastricht</i>
26-28 Sept.	Introductory and Practitioners Seminar: European Public Procurement Rules, Policy and Practice. <i>Maastricht</i>
26-28 Sept.	EU Negotiation Techniques - European Negotiations I. <i>Maastricht</i>

1-5 Oct.	Cost-Benefit Analysis (CBA) of EU Financed Projects. <i>Barcelona</i>
1-2 Oct.	Working with Impact Assessment in the European Union. <i>Maastricht</i>
1-2 Oct.	From Project Proposal to Final Report: Formal Writing in English for Public Officials. <i>Maastricht</i>
4-5 Oct.	Understanding EU Decision-Making: Principles, Procedures, Practice. <i>Maastricht</i>
4-5 Oct.	Competitive Dialogue and Negotiated Procedures Master Class. <i>Maastricht</i>
4-5 Oct.	Evaluation and Monitoring of EU Structural Funds. <i>Maastricht</i>
4-5 Oct.	CAF Training Event: The Common Assessment Framework in Action. <i>Barcelona</i>
4-5 Oct.	Management and Control Structures for Migration Funds. <i>Barcelona</i>
4-5 Oct.	The Infringement Procedure Under Articles 258 & 260 TFEU - A Practical Overview. <i>Luxembourg</i>
8-9 Oct.	Adapting HRM in the Public Sector to Tighter Budgets and Demographic Change. <i>Maastricht</i>
8-11 Oct.	Practical Tools for Implementation of EU Policies at the National Level. <i>Luxembourg</i>
11-12 Oct.	Making Sense of Migration Statistics: Comparing Data and Practical Application. <i>Maastricht</i>
11-12 Oct.	Managing Negotiations with the European Parliament - European Negotiations III. <i>Brussels</i>
15 Oct.	EU Delegated and Implementing Acts at a Glance. <i>Brussels</i>
15-16 Oct.	Environmental Law: Overview of EU Horizontal Legislation and Principles. <i>Luxembourg</i>
17-18 Oct.	The Preliminary Rulings Procedure in Practice. <i>Luxembourg</i>
18-19 Oct.	State Aid in the European Union: Latest Developments on Policy and Practice. <i>Maastricht</i>
18-19 Oct.	Europe on the Internet: Finding your Way through the European Information Jungle. <i>Maastricht</i>
18-19 Oct.	Evaluation of Public Policies: Learning from Comparative Experiences. <i>Barcelona</i>
23-24 Oct.	European Public Procurement, Public-Private Partnerships (PPP) and Concessions. <i>Dubrovnik</i>
24-25 Oct.	Comprendre tous les rouages des actes délégués et des actes d'exécution après Lisbonne (articles 290 et 291 TFUE). <i>Paris</i>
24-26 Oct.	Internal and External Audit of the EU Funded Programmes and Projects. <i>Barcelona</i>
24-26 Oct.	EU Law for Non Lawyers. <i>Luxembourg</i>
25-26 Oct.	EU External Relations and European-Level Diplomacy. <i>Maastricht</i>
26 Oct.	Financing PPP schemes - Choices, challenges and opportunities. <i>Brussels</i>
29-30 Oct.	Budgetary Decision-Making After Lisbon: Actors, Procedures and Dynamics. <i>Maastricht</i>



Now We Are One... A Rough Start for the EEAS

Dr Simon Duke, Professor, EIPA Maastricht

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The first year of the European External Action Service (EEAS) has already elicited much comment, both internally and externally. This contribution briefly reviews the nature of this commentary and then suggests some possible short-term 'wins' for the Service, as well as some challenges that will require a longer-term perspective. The main shorter-term issue considers the need to create stronger linkages and priorities between existing strategies and to start the difficult process of melding a common mindset within the Service. The longer-term challenges revolve around recruitment, balance and resources. The latter is particularly important in order to enable the delegations to assume their full roles. The barrage of criticism that greeted the EEAS's first birthday is also a commentary on how critical the role of the Service is to achieving the core goals of the Lisbon Treaty in external relations; namely, to aim towards more coherence, effectiveness and visibility.

Introduction

Alan Milne is perhaps best known for creating Winnie the Pooh. He was also a fine poet and playwright. One of his better-known poems is 'Now We Are Six' which commences, 'When I was one, I had just begun. When I was two, I was nearly new'. This is particularly appropriate when applied to the European External Action Service (EEAS), which, whatever its merits and demerits, is still very young and like Milne's poem, real maturity will take several more years. This contribution will review the various reactions to the Service's first year and will consider the implications for the second year of the EEAS, during which the first formal review of the functioning of the Service is due. Although much of the focus is on the forthcoming review, it is important to be sanguine about what may be accomplished in the shorter term and what should be considered for the longer term, covering the next five years or so.

The EEAS was conceived of as a quasi *corps diplomatique* in the making for the European-level of diplomacy. The basic function of the EEAS, going back to the Convention on the Future of Europe, was to help enhance the coherence, effectiveness and visibility of the EU's external actions. The emergence of the Service was difficult and fraught with not only disagreements but inevitable compromise. The resulting birth was not that of an institution but a *sui generis* body with a vague mandate and an even more awkward initial composition, comprising former officials of the Commission's Directorate General for External Relations, the Council Secretariat General and more substantial numbers of national diplomats. The inherent ambiguities of the Service, its place in the EU institutional architecture as a 'Service' and the enormous expectations surrounding the Service and its head, the High Representative for Foreign Affairs and Security Policy and Commission Vice President (HR/VP), perhaps created excessive expectations that now risk being counter-balanced by undue pessimism a year later.

Navel-gazing

The first anniversary of the EEAS was greeted with a flurry of official and unofficial analyses of the establishment of the Service and its first year in operation. The observations and suggestions that have surfaced are numerous, but all are marked by the common denominator of recognising the extraordinary importance of the EEAS to the attempts to introduce more coherence, efficiency and visibility to the EU's external action. Many of the analyses, inevitably, cast a slightly wider net and consider the other linked changes introduced by the Lisbon Treaty, such as the appointment of the HR/VP; the President of the European Council; and the EU delegations. Indeed, the analysis should properly be extended to the President of the Commission since the Service is mandated to support all of the senior positions in EU external relations, as well as the Commission itself.

A joint letter from twelve foreign ministers to the HR/VP of 8 December 2011 offered a number of suggestions designed to 'further enhance the effectiveness of the EEAS and to help it develop its full potential'¹. The building up of the Service was acknowledged to be a 'complex process' that will require



time. The proposals included suggestions for ways to optimise the identification of 'political priorities' in the Foreign Affairs Council; measures to ensure that foreign policy issues are fully reflected in the discussions of the external relations (Relex) Commissioners; measures to improve internal procedures including more manuals, guidelines and common training; building up the delegations 'to their full potential' and, finally, full involvement of the Member States. All of these points are, to varying extents, reflected in the external analyses of the EEAS.

In the report by the High Representative to the European Parliament, the Council and the Commission of 22 December 2011, the HR/VP laid out a number of achievements of the young Service, notwithstanding the challenges of transition². There are undoubtedly positives and it is important to consider these as a balancer to the barrage of criticism of not only the Service but Ashton herself. It is, however, worth asking how many of the 'positives' (the response to the Arab Spring, the International Task Force for Libya, the heightened urgency of the Middle East Peace Process or the coordination of anti-piracy efforts in the Horn of Africa) are specifically due to the creation of the EEAS or the wider changes instigated by the Lisbon Treaty. Indeed, the rudiments of many of the responses to international events had been established prior to the entry into force of the Lisbon Treaty.

The main gist of the HR/VP's remarks concerns the changes wrought by the Lisbon Treaty and these include the assumption of the responsibilities of the rotating Presidency in external relations; enhancing consistency in EU external relations; the role of the EU delegations; organisational issues including staff and recruitment; and budget and financial management issues. The HR/VP claims progress in each of these areas, but also notes substantial challenges remaining. The future priorities include 'a consolidation of the capacity to deliver policy substance', an emphasis on the work of the EU delegations; progress in building a 'shared organisational culture for the EEAS' and a resolution to the remaining outstanding issues in the relationship with the Commission.

The External Fascination Service

Most of these points are picked up in the external analyses, but a number of additional points of interest also arise. For instance, Stefan Lehne, makes a number of practical suggestions to enhance the institutional capacity of the EEAS, such as introducing two-level deputies to the High Representative, addressing the 'semi-detached' status of the crisis management bodies, greater delegation of responsibility, greater use of planning and option papers prepared by the Service and streamlining of the political dialogue mechanism. He notes, presciently, that any such institutional enhancements depend heavily upon Member States' 'buy in', constructive engagement on the part of the Commission, and stronger and more visible leadership on behalf of the High Representative³.



A report by Chatham House makes a number of compelling suggestions for the development of the EEAS but, like Lehne, the authors note that, 'The single biggest challenge for the next phase of the EEAS's development is to set a clear and compelling direction for the medium and long term, and ensure that the main stakeholders are prepared to back it up politically, diplomatically and with the necessary resources'⁴.

The analyses continued, in the same vein, into this year. A report from the European Policy Centre took a slightly different approach by looking at specific policy areas or aspects of them. Their conclusions nevertheless reflected those of other studies in terms of the need for a strategy for the delegations so that they might emerge as 'fully-fledged political actors' with appropriate and enhanced staffing; better coordination at all levels of the Service; space for 'creative

of the Service's existence, which posed obvious coordination challenges and was detrimental to the construction of an *esprit de corps*. A common location will facilitate communication and will contribute to a possible socialisation effect.

The key problems facing the EEAS are twofold. The first concerns the general lack of strategic direction of the EU's external relations and, more narrowly, the lack of vision within the Service. The issue, as often stated, is not so much one of a lack of strategy per se, but a surfeit. Reflections on the first year of the EEAS contained in a Chatham House Report make this clear when the authors observe that, 'Beyond 134 individual country strategies, [the EU] has strategies for most regions (Central Asia, the Andes, etc.), thematic issues (counter-terrorism, non-proliferation, etc.), even whole continents (Asia, Africa, Antarctica)'⁸.

The issue then is not so much strategy as a clearer connection and, in particular, priorities between the various geographical, thematic and continental strategies.

policy entrepreneurship' and, finally, longer-term strategic thinking on foreign policy which is 'not yet sufficiently reflected in the organisational structure of the EEAS'⁵. Steven Blockmans notes that the structural weaknesses that perhaps hinder the development of a single voice need addressing, but this is insufficient without more concentration on 'passing a single message, in partnership with Member States and based on a substantial agenda'⁶.

In addition to the 'inside' and outside reviews, David Spence's contribution deserves special mention since it offers a 'practitioner's view' from a recently retired EEAS, and former Commission official. His particular vantage point enables him to pin-point 'an issue that dare not speak its name' – the existence of varying mind-sets⁷.

Unsurprisingly, given the newness of the EEAS, there are plenty of suggestions for how to improve the EEAS with the 2013 review in mind. Some of the suggestions are, however, clearly longer term in nature. This prompts the question of where the priorities should lie with the review in mind and what will need to be addressed in the longer term. Although many of the reports mentioned above cover most of the pertinent issues, they were generally not structured around shorter- and longer-term priorities.

Short-term wins

In this context short-term means from now until 2013 (the HR/VP report will be presented in September) which means that most of the changes suggested in the reports referred to above will be of a longer-term nature.

There are a number of suggestions though which could yield shorter-term wins and thus boost the morale of those in the Service and its external standing. The first is to capitalise on the presence of most of the EEAS in one location. EEAS officials were spread across eight locations for the first year

The issue then is not so much strategy per se, but the need for a clearer connection between the various geographical, thematic and continental strategies, and importantly, more sense of priority that would lend real substance to widely used but largely meaningless terms such as 'strategic partnerships'. The very fact that Ashton claims that in the period 1 January–November 2011, 504 statements were issued, including 78

HR declarations, 279 HR statements, 102 Spokesperson's statements and 45 local EU statements, invites an incredulous response – so what?⁹ Does this give third parties an idea of where the EU's priorities are? More to the point, have the six reviews of a number of strategic partners (Brazil, China, India, Russia, South Africa and the United States) really helped clarify the EU's strategic interests? Has the clearer enunciation of the EU's values on the world stage, in Articles 3 and 21, of the Treaty on European Union significantly influenced EU external relations? Does the EEAS and, more generally the EU, have a clear idea of its 'actorness' (to use the political science jargon) on the international stage including the role and place of the more normative aspects? The answer in many cases is negative, not only because of a lack of vision within the EU, but also because of reluctance on the part of the Member States (some more than others) to embrace the EU as a strategic actor.

Naturally, any formulation of short- to long-term objectives should be 'linked to the mobilization of resources both at the national and the European levels'¹⁰. Although the EU's Member States may lack obvious overarching external strategies, they are not trying to define the nature and substance of their actorness since they lack the Union's *sui generis* international nature. The growth and development of the EEAS and the EU more generally will therefore depend upon what is the essence of the 'distinctive European approach to foreign and security policy'; a claim made prematurely in the 2008 review of the implementation of the European Security Strategy¹¹.

The response to the issues of strategy and vision will defy quick fixes, yet three shorter-term solutions might set things on the right track. The first suggestion is to embrace what Balfour *et al* call 'creative policy entrepreneurship' consisting of policy communities around clusters of issues¹². Two examples would be development and conflict prevention where the Commission has actively sought wide participation in policy debates, especially among the non-governmental organisations. Greater buy-in by the Member States could be sought through the involvement of think tanks, many of whom

enjoy the official or quasi-official blessing of the governments or foreign ministries in question.

Second, the strategic planning office within the EEAS needs to be bolstered and this might also provide a useful role for a reinvigorated EU Institute for Security Studies, relocated to Brussels. The role of the European Council should not be ignored, especially since a broader strategic debate seemed to be what Herman Van Rompuy had in mind in February 2010 in his speech to the College d'Europe. Unfortunately,

of the socialisation effect is only possible with concentrated training, especially at induction. Beyond this, there needs to be acknowledgement that aside from some common courses, training has to be tailored to the specific demands of the individual. This point was made eloquently by Lehne when he correctly argued that, 'Joining the EEAS requires significant adjustment. Some Commission officials used to implementing technical programs find it difficult to get used to diplomatic work and the more political approach of the EEAS, just as some diplomats experience difficulties coping with the technical and financial aspects of the work of EU delegations'¹⁷.

The effect of the current composition of the Service is that it has imported some significant legacy problems into the Service.

but understandably, this debate was curtailed by the financial crisis and the subsequent preoccupation with '*gouvernement économique*'¹³. Such a debate will be difficult, but it is fundamental.

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Third, the starting point would be a (more) serious twofold review. The first should be the instigation of a comprehensive review of the EU's relations with the United States, which remains the EU's only real strategic partner. The second is to build upon last year's review of the European Neighbourhood Policy which was replete with sensible sounding notions, like 'deep democracy', 'inclusive economic development' and 'conditionality'¹⁴. But, these urgently need substance since the way in which the EU handles the aftermath of the Arab spring in its self-proclaimed neighbourhood will be a litmus test for many external partners, as will the seriousness of its commitments to the rule of law, effective multilateralism and human rights.

The second group of shorter-term objectives arises from the different organisational cultures represented in the original configuration of the Service. The predominant 'Relex' culture tends to be hierarchical and technocratic. The former Council Secretariat officials are used to smaller, lighter structures and have more experience in working closely with the Member States. The Member States defy a common diplomatic culture, other than the fact that they are all national diplomats on temporary assignment (or seconded military or civilian crisis management personnel) and, as such, will probably place national loyalty to the fore. To David Spence, the success of the EEAS will depend upon the extent to which EEAS officials 'take on the mind-set of an integrated diplomatic service'¹⁵. Although changing organisational culture, or mindsets, will be an ongoing process, there are some shorter-term tools that have been put in place to begin addressing this important issue. Training is by no means the only one, but it has been frequently mentioned as being of particular importance in this context. For instance, Spence notes that 'Intense training, accompanied by retreats and other devices can reverse signs of regression into competing mind-sets'¹⁶. It is worth noting that training is also mentioned in the letter of twelve foreign ministers to the HR/VP, as well as in her response. Drawing upon the EEAS's training strategy of 2011 the exploitation

Longer-term challenges

Most of the issues and problems identified in the documents quoted above will not be addressed by September 2013 and the first major review of the EEAS. Nevertheless, evidence that reform has started will be a positive attribute. Some issues are more intractable. One of the most obvious is the composition of the Service itself drawn from the Commission, the Council Secretariat and the Member States. The effect of the current composition of the Service is that it has imported some significant legacy problems into the Service.

The first is that the recruitment process has done little to change the geographical bias against the newer (post 2004) Member States nor, incidentally, has it addressed the lack of women at senior levels in the EEAS. Although the former may be explained away by the lack of diplomatic experience of many of these countries in Africa, Asia, Latin America and the Caribbean, the latter is harder to explain. It is therefore important that the EEAS should resemble the EU members if a sense of ownership is to evolve. At the senior level this can be shaped by the Consultative Committee on Appointments and by the High Representative herself. The overwhelming concentration at the senior level, especially heads of delegation (all EU members are now represented) has diverted attention from the mid-level positions which, as Hemra *et al* observe, is a

The slew of academic, media and official comment on the EEAS could be seen as demoralising for those in the EEAS. Conversely, it could be seen as recognition of the extraordinary importance of the support role assigned to the EEAS.

'critical layer in terms of defining the organizational culture'¹⁸. A secondary challenge in this area is the need to create a level playing field. Although appointments are made first and foremost on the grounds of merit, there are significant differences between equivalent experience and rank for some national diplomats and those who entered the Service from the Commission. This is a particularly vexatious issue since, on the one hand, strict equivalence that involves demotion in terms of rank for some national diplomats would clearly be demotivating. On the other hand, relevant prior diplomatic

experience and language abilities (especially traditionally 'hard languages') should be recognised. Hence, it may be necessary to further develop the notion of 'merit', including an understanding of equivalence and a recognition of special qualities where they exist, which may be of particular relevance to the delegations.

The third issue of considerable importance, highlighted in all of the reports mentioned above, is the future of delegations. Most of the 140 delegations remain modestly staffed at the AD level (albeit with some notable exceptions), yet they are expected, now that they are Union delegations, to assume a greater range of responsibilities including those more oriented towards traditional foreign and security policy preoccupations. Given the economic environment in which the EEAS must operate, with a view to budget neutrality by the end of next year, there is little chance of substantially improved resources. Although this is a serious constraint on innovation, a more strategic approach to the EU's external role which establishes priorities, of the type advocated above, would help direct needs and resources. Similarly, more pooling and sharing of reporting and analysis at the national and European levels, as suggested by Lehne, would be of benefit not only to the delegations, but also to financially stressed national diplomatic services¹⁹. The continuing and expanded involvement of senior national diplomats in delegations is of critical importance, in part because it is more likely to encourage pooling and sharing, but also because it makes charges (such as those from the United Kingdom) of 'competence creep' less likely if, by so doing, they will indirectly damage national diplomats assigned to the Service.



Finally, the conflict prevention, peace-building and crisis management aspects of the EEAS remain inadequately joined up. Indeed the former aspects were co-developed (sometimes competitively) under the CFSP and Commission guises. The term 'peace-building' was a Commission term seldom heard in the Council Secretariat and crisis management has remained hobbled by Member State political concerns and resource shortages. The choice of when and how to intervene needs to be more closely steered by clear strategic priorities (as argued above) and few crises that are likely to confront the EU are uni-dimensional. There is a compelling need to give substance to the comprehensive approach to security that the EU espouses.

Conclusions

The slew of academic, media and official comment on the EEAS could be seen as demoralising for those in the EEAS. Conversely, it could be seen as recognition of the extraordinary importance of the support role assigned to the EEAS. These comments, as well as the articles cited, are offered in this spirit.

There are no easy fixes and in all likelihood the Service will take years to mature and to define its space and role. Yet, as with any person, the early years are critical in influencing the paths of development in later years. Of the challenges likely to be faced, the most urgent is to address the organisational culture and mindsets of not only those in the Service and the EU institutions but, just as importantly, the Member States – especially the big three. A change of mindset will do wonders to aid the development of the EEAS, without it the Service's development risks being stifled and the aspirations for the change introduced by the Lisbon Treaty – greater coherence, effectiveness and visibility in the EU's external relations – will be lost. As in Milne's poem, quoted at the outset, it may well take the EEAS six years to reach its full potential and, hopefully, to be 'as clever as clever'.

Notes

- ¹ Joint letter from the Foreign Ministers of Belgium, Estonia, Finland, France, Germany, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Poland and Sweden, to the High Representative of the Union for Foreign Affairs and Security Policy and Vice President of the Commission, Catherine Ashton, 8 December 2011.
- ² Report by the High Representative to the European Parliament, Council and the Commission, 22 December 2011.
- ³ Lehne, S., More Action, Better Service: How to strengthen the European External Action Service, *Policy Outlook*, 16 December 2011 (Carnegie Endowment for International Peace).
- ⁴ Hemra, S., T. Raines and R. Whitman, A Diplomatic Entrepreneur: Making the most of the European External Action Service, *Chatham House Report*, December 2011.
- ⁵ Balfour, R., A. Bailes and M. Kenna, The European External Action Service at work: How to improve EU foreign policy, (Brussels: European Policy Centre), pp. 47-49.
- ⁶ Blockmans, S., The European External Action Service on year on: First signs of strengths and weaknesses, (Den Haag: CLEER Working Papers, 2012/2), p. 38.
- ⁷ Spence, D., The Early Days of the European External Action Service: A Practitioner's View, *The Hague Journal of Diplomacy*, vol. 7, 2012, p. 133.
- ⁸ Hemra, S., *et al.*, p. 9.
- ⁹ Report by the High Representative, Para. 11.
- ¹⁰ Duke, S., K. Pomorska and S. Vanhoonacker, The EU's Diplomatic Architecture: The Mid-term challenge, *DSEU Policy Paper No 10*, February 2012.
- ¹¹ Report on the Implementation of the European Security Strategy: Providing Security in a Changing World, Brussels, S407/08, 11 December 2008.
- ¹² Balfour *et al.* *supra* Note 5, p. 48.
- ¹³ Address by Herman Van Rompuy, President of the European Council to the College d'Europe, Bruges, 25 February 2010, PCE 34/10.
- ¹⁴ A New Response to a Changing Neighbourhood: A review of European Neighbourhood Policy, Joint Communication by the High Representative of The Union For Foreign Affairs And Security Policy and the European Commission, Brussels, COM(2011) 303, 25 May 2011.
- ¹⁵ *Ibid.* p. 133.
- ¹⁶ Spence, p. 133.
- ¹⁷ Lehne, *supra* Note 3, p. 16.
- ¹⁸ Hemra *et al.* *supra* Note 4, p. 18.
- ¹⁹ Lehne, *supra* Note 3, p. 5.

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Bosnia, Kosovo and the EU: Is Accession Possible without Full Sovereignty?

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Bosnia and Kosovo are the only two members of the EU enlargement zone that have never tried to apply for EU membership, given that both are too far from complying with the required minimum standards. But besides lacking basic capacities, these two potential candidates share another common feature: both are limited, to different degrees, in their national sovereignty. This lack of sovereignty not only limits the capacity of the potential candidates to negotiate or to enter into agreements with the EU; it also undermines their readiness to undertake serious reforms. The EU tries to dodge the political blockades that are the root cause of the problem by focusing on the technical issues; this might provide a temporary relief but cannot substitute a realistic accession perspective, which is currently absent. However, without this perspective, the EU's 'normative power' in these countries will continue to erode – which bears the risk that both Kosovo and Bosnia will, in the end, try to solve existing problems through unilateral measures, such as partition. Given its lack of ability to provide alternatives, the EU has to realistically consider such outcomes and think about the possible consequences.

Introduction

At a time when the EU is fully absorbed with resolving its internal problems and saving the Euro, it seems that enlargement has slid down to the bottom of the EU's list of priorities. Although a number of Member States are quite open in expressing their aversion to further EU enlargement beyond Croatia and Iceland, the EU regularly and ritually confirms the European perspective of the Western Balkans and Turkey. In the meantime, the membership negotiations with two candidate countries, Turkey and FYROM, are blocked due to their bilateral disputes with Cyprus and Greece respectively. In March 2012 Serbia scored a diplomatic victory by attaining the status of candidate country; but its actual accession perspective is distant, given the unresolved Kosovo question. Whereas Montenegro might have some hopes for a successful EU integration due to its small size and the absence of ethnic tensions, the membership perspectives for Albania, Kosovo and Bosnia seem, at present, more distant than ever.



'Anti-EU painting in Pristina'. Credits: Wolfgang Koeth

This article will look in detail at the particular situation of the only two potential candidates that have so far – for particular reasons – never applied for membership: Bosnia and Kosovo. Beyond their smouldering ethnic conflicts and their lack of institutional capacity to face the challenges of membership, these two countries share another distinctive feature: they do not enjoy – to different degrees – full sovereignty. But would less-than-fully-sovereign countries technically be able to become members of the EU? What is the nature of these limitations to sovereignty? What are the conditions of these countries to become fully sovereign, and would this be a pre-condition for further progress towards EU integration? What might be the unintended consequences of full sovereignty? To which extent is the accession perspective of these potential candidates determined by political developments in Belgrade, Brussels or in other European capitals, rather than in these countries themselves?

Kosovo and Bosnia: same dilemma, in reverse

At first glance, both Kosovo and Bosnia appear to bear a degree of similarity: limited sovereignty, weak institutions and an unwillingness of a national minority (in both cases Serbian)

to integrate into a common state. Something shared by both countries is that their very own territorial integrity is granted by external factors: in each of the two cases it was the verdict of the international community after a devastating war, with the resulting arrangements overseen by an international supervisory body with executive powers (The Office of the High representative/OHR in Bosnia; The International Civilian Office/ICO and the EU Rule of Law Mission/EULEX in Kosovo).

However, the similarities end here. The Bosnian state owes its existence to a top-down initiative of the US and the international community from the 1995 Dayton conference; it was endorsed internationally but only grudgingly accepted by most of its citizens, given the lack of a common identity among its people. On the other hand, the Republic of Kosovo, self-proclaimed in 2008 on the territory of the former UN protectorate *against* the resistance of the international community, enjoys the support of the overwhelming majority of its citizens. Unlike Bosnia, Kosovo has the *ownership* of the vast majority of its people.

Limited sovereignty: self-inflicted vs. imposed from above?

Limitations of sovereignty can take three different forms: a. through the presence of international caretakers with executive powers; b. through the inability to exercise sovereign powers; and c. through non-recognition on the international stage. The first scenario applies to both Bosnia and Kosovo; the second applies to Bosnia; and the third to Kosovo.

a. Limited sovereignty through the presence of international caretakers

The international arrangements that have prompted the emergence of both Bosnia and Kosovo as distinct entities on the international map, following a devastating conflict, had put in place a number of safeguards to guarantee the survival of the new entity: the 1995 Dayton agreement that created Bosnia had foreseen an Office of the High

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Representative (OHR), mandated by the international community. The High Representative would guarantee, through his executive powers ('Bonn powers'), the respect of the Dayton agreement. The Constitution of Bosnia and Herzegovina, technically an annexe to the Dayton agreement, provides for a share of power between the different ethnically-based entities of the common state.

Kosovo, as a former Serbian province, became a UN protectorate after the withdrawal of the Serbian troops following UN Security Council Resolution 1244 that, in 1999, put an end to the Kosovo conflict. Gradually, the UN administration (UNMIK) transferred some of its powers to the newly created local institutions of self-government.

In the wake of Kosovo's unilateral declaration of independence in 2008, the residual powers of UNMIK (in particular police, justice and customs) were transferred to an EU Rule of Law mission (EULEX). Although EULEX was set up prior to the declaration of independence, it not only survived the creation of the new state – its executive role was even enshrined into the Kosovo constitution¹. Currently, around 1400 EU police, customs officials,

but of little practical impact⁶: These three municipalities account for less than 3% of the Kosovo population, and the writ of Pristina has never reached out to these municipalities, which still largely operate as de facto parts of Serbia⁷. The Kosovo government is building state institutions that are admittedly still weak, but steadily albeit slowly increasing their capacity⁸ – and this with major assistance from the EU⁹.

In both Bosnia and Kosovo, limited sovereignty stands in the way of EU integration.

judges and prosecutors with an executive mandate not only complement the work of their local colleagues, but have the power to overrule their local hosts. In addition, an International Civilian Office Exercises functions similar to those of the OHR in Bosnia.

b. Self-inflicted limitation of sovereignty

Although Bosnia's sovereignty is still technically limited through the installation of the OHR in 1995 as overseer with executive powers the OHR has gradually over the last few years taken a more hands-off approach, making the limitations to Bosnia's sovereignty at present rather symbolic. And even this might not last for long: the phasing-out of the OHR has been foreseen since 2008 and might eventually happen in the near future. But already now, if Bosnia wanted, it *could* largely function as a sovereign state. Bosnia's sovereignty is universally recognised and it has a seat at the UN. Its present limitations to the full exercise of sovereignty are largely self-inflicted. Whereas joint institutions exist, they are extremely weak and partly dysfunctional², given that ethnic Bosnians, Croats and Serbs are essentially concerned about retaining powers for their own entities. The almost complete lack of a common identity among the different communities of Bosnia and the resulting limitations for transferring further competences to the central authorities have made it difficult for the Bosnian entities to agree on the choice of legitimate representatives at the state level. In Bosnia, state sovereignty is largely lying fallow, as the constituent parts of the state cannot agree on how to make use of them.

c. Limitation of sovereignty imposed from above

After its unilateral declaration of independence in 2008, the Republic of Kosovo has been recognised by 90 UN members and by 22 out of the 27 EU Member states³. The five states that have not recognised Kosovo have not done so for reasons unrelated to Kosovo itself: Spain, Greece, Cyprus, Romania and Slovakia fear that the recognition of Kosovo could send the wrong signals to their own national minorities. Given the lack of unanimity among the EU Member States, the EU has never recognised Kosovo as a state; although, since 2005, Kosovo has the status of a potential⁴ candidate for EU accession⁵.

But this lack of international recognition does not stop Kosovo from internally assuming its state-like role. Within its borders, Kosovo's statehood is hardly contested. The refusal of the three Serbian-populated municipalities of Northern Kosovo to integrate into the state is of high political,

Limited sovereignty as an obstacle to accession

Whatever its nature, self-inflicted or imposed from above, in both Bosnia and Kosovo, limited sovereignty stands in the way of EU integration. This happens in three ways: a. through the lack of motivation and ownership such limited sovereignty entails (for both countries); b. through the impossibility to agree on a coordination structure/ a common interlocutor for the dialogue/negotiations with the EU (Bosnia); and c. through the impossibility to sign legal agreements as a result of the non-recognition (Kosovo)

a. Lack of sovereignty = lack of ownership

Where a potential candidate is not fully competent in dealing with all the aspects relevant to EU enlargement (such as the Rule of Law), it becomes very difficult to effectively measure the progress of the institutions towards meeting the accession criteria. The concept of international overseeing implies the power to overrule locally-taken decisions. Responsibilities that are normally dealt with by local institutions are given to an international body (OHR Bosnia; ICO/EULEX Kosovo). This undermines the principle of local 'ownership'. Within the EU enlargement methodology, the principle of 'ownership' (or the political will on the side of the candidate to engage in reforms, as opposed to reforms imposed from outside) is a central mantra for the EU when it comes to preparing the (potential) countries for accession. 'Ownership' is not compatible with decisions imposed from outside: why, for example, should the authorities from Republika Srpska refrain from making irresponsible and populist statements (like calling for a referendum on secession) if they can reasonably assume that these decisions will be vetoed by the international caretaker anyway? Why should the Kosovo justice institutions take risks by indicting a highly influential local politician for corruption, if this 'hot potato' can be handled by the EU Rule of Law mission?

b. Lack of coordinating powers and of a common interlocutor for the EU

In the Bosnian case, the failure of the constituent entities of state to agree on a common political vision is the biggest obstacle to making progress towards accession. Given the unwillingness to agree on the repartition of powers¹⁰ and on common interlocutors to talk with the European Commission, how could Bosnia become a credible partner to effectively negotiate its way through the 120 000 pages of *acquis*, let alone to meet the political criteria? Therefore, as long as the central government does not even have the power to effectively coordinate the action of the different entities and to ensure that they speak with one voice to Brussels, Bosnia's European perspective will remain distant¹¹.

c. Lack of legal personality due to non-recognition

Given the objection of five Member States to recognise Kosovo as a state – and thus as a subject of international law with a legal personality and treaty-making powers – the EU cannot conclude any legal agreements with Kosovo¹². It is therefore, among others, unable to sign a Stabilisation and Association Agreement (SAA) with the young state – a fundamental hurdle in Kosovo's way towards accession. Bosnia signed its SAA back in 2008, but is not politically able to fill it with substance; Kosovo, on the other hand, might arguably have sufficient substance¹³ but is not able to get the legal framework, due to external factors beyond its control.

The EU's approach: technical solutions to political problems

The EU is very much aware of these dilemmas and is trying to work around these political blockages by tackling them from a technical angle: in Bosnia, the EU accepts that the entities are free to legislate on areas that are relevant to EU integration at their level, as long as the resulting legislation is not in conflict with the *acquis*. This approach, which is in line with the BiH constitution – which regulates the internal distribution of powers – has the merit of keeping the dialogue on track at a technical level, even if progress is made at a snail's pace¹⁴.

The neo-functionalist approach of using a technical method in order to achieve political effects was also used in Serbia/Kosovo:

Is the EU barking up the wrong tree by focusing on the technical issues and ignoring the political realities?

the EU was able to use its normative power¹⁵ to coax Serbia into signing a number of technical agreements with Kosovo, given that for Serbia the conferral of the (rather symbolic^{16 17}) candidate status was of utmost political importance. These technical agreements concluded between Belgrade and Pristina since March 2011 have the potential to overcome some of the fallout from Kosovo's diplomatic isolation: both sides have agreed on modalities for policing their common borders (or administrative boundaries, as the Serbian side insists), on collecting customs fees and on the recognition of travel documents, number plates and diplomas. Finally, in February 2012, and under significant pressure from the EU, Serbia and Kosovo reached an agreement about the representation of Kosovo at regional organisations¹⁸, with the potential of overcoming Kosovo's isolation.

Whilst they have surely boosted Serbia's efforts towards EU integration, have these technical arrangements also opened the way towards Kosovo's eventual EU accession? It is true that, as an incentive for Kosovo to endorse the February 2012 agreement¹⁹, the five non-recognising Member States

agreed to allow the Commission to draft a feasibility study on the conclusion of an SAA²⁰. But even in the case that the Commission recommends entering into negotiations on such



'A Vision for the Future - Election campaign in Kosovo'.
Credits: Saskia Drude

an agreement²¹, it is unlikely that the SAA with Kosovo will be signed, given the fundamental opposition of at least some of the five objecting Member States against recognition²². Similarly, in Bosnia, any eventual progress on the technical level risks being invalidated by the inability of the entities to find a common interlocutor for the accession negotiations at state level.

The end of an illusion?

Is the EU barking up the wrong tree by focusing on the technical issues and ignoring the political realities? So far, the EU is sticking to the position that over time the different ethnic groups in Kosovo and in Bosnia will overcome their mutual distrust and animosities and that they will work together on building a multiethnic society based on the principles of democracy and rule of law²³. There is a broad consensus within the EU that the international overseeing of both Bosnia and Kosovo should be limited, thus advocating the full sovereignty of Bosnia and – implicitly – of Kosovo²⁴. However, for the EU, the idea that the people of Bosnia and Kosovo might decide otherwise and conclude that keeping the common state in its present form is not a viable option, is – at least officially – not to be considered.

But are there other options for Bosnia and Kosovo than following the path traced for them by the EU, once they become masters of their own destiny? Although there might be a degree of similarity in both cases, the potential alternative options are different for both countries; however, there are more potential choices for Kosovo than for Bosnia.

For Kosovo, Serbia's desire to enter the EU could create a windfall opportunity: Serbia knows that it has few chances to join the EU unless the fundamental question of Kosovo's status is resolved in a sustainable manner²⁵. This would amount to – given the absence of other feasible options – a full recognition of Kosovo by Belgrade.



'Bosnia: The Inter-Entity Boundary Line/IEBL'.
Credits: Julian Nitzsche

However, such a scenario would most likely involve a land swap between Serbia and Kosovo. In spite of official denials, both sides have actually been considering this option and have warmed to the idea ever since²⁶. Pristina knows that it is unlikely to ever extend its writ over the northern part, which is increasingly being felt like a millstone around its neck²⁷. And for Serbia, gaining the almost exclusively Serbian northern part in exchange for the unruly, Albanian-populated Preshevo valley seems a decent price to pay for a realistic membership perspective. International reservations about a precedence this would set for other regions in the Balkans are not necessarily justified: as this would be a mutually agreed solution between two (then) sovereign states, it could not be compared with other Balkan regions such as FYROM or Bosnia.

The partition/land swap scenario is so far abhorred by the EU, as it would highlight the failure of its previous approach towards the Western Balkans. However, it is an option which – like it or not – will definitively be on the table. However, what might be feasible for Kosovo is not at all an option for Bosnia. For Pristina, the loss of the Serbian North would hardly make any difference in practice, given that its writ never extended to the North²⁸. Bosnia, on the other hand, is unlikely to survive without the Republika Srpska²⁹, especially as there would be nothing that Bosnia could get in exchange. From a Serbian point of view, such a breakaway might seem, at first glance, as an attractive alternative to a dysfunctional state: Republika Srpska, with its rather well functioning institutions, could have the technical capacities to engage as a partner into a dialogue with the EU. But this would ignore the consequences for the Bosnian-Croat federation, where competences are dispersed in an unsustainable way among a multitude of local entities that are not able to survive on their own. It is highly likely that Bosnians would react with armed force in an effort to prevent an RS breakaway³⁰, risking a new wave of violence and chaos in the region.

Conclusions

Brussels' approach of focusing on the technical dialogue while blending out the political dimension is unlikely to bring Kosovo and Bosnia closer to the EU. Above all, full external and internal sovereignty is a necessary precondition to seriously engaging in the accession process; but whether a fully sovereign Bosnia or Kosovo will follow the roadmap traced by the EU which leads through reconciliation and the building of a multi-ethnic society based on the rule of law, cannot be taken for granted. At least for Kosovo, there are alternative ways of solving one of the fundamental obstacles – the question of the Serbian minority in the north – through a land swap. This option is, on the other hand, not open to Bosnia. Furthermore, the land swap option does not mean that all obstacles in Kosovo's way towards accession will be removed: even in case of a historical agreement between Serbia and Kosovo involving the recognition of the Republic of Kosovo by Belgrade, not all of the five resisting EU Member States are likely to automatically recognise Kosovo. For Cyprus, the Kosovo question is linked to its separatist Turkish minority³¹. Endorsing Kosovo would be – regardless of the circumstances – considered as a first step towards international recognition of the Republic of Northern Cyprus^{32 33}. Thus comes the vicious circle: without resolving the Cyprus question, there will be no recognition of Kosovo by all 27 Member States. Without recognition by all EU Member States, there is no membership perspective

for Kosovo. Without a credible perspective for Kosovo, there is no credible membership perspective for Serbia. Without a perspective for Serbia, there is no credible perspective for the rest of the Western Balkans (except for Croatia and, eventually, Montenegro). Whereas the key to unlocking Bosnia's process of EU integration lies within the country itself, the key to Kosovo's integration process lies, in the long run, in Nicosia and in Ankara.

Notes

- ¹ This was done by the fathers of the Kosovo constitution as a transitional arrangement, hoping that it would increase Kosovo's credentials and accelerate its recognition by the EU and the international community.
- ² Bosnia was without a state-level government for almost 15 months following the October 2010 elections.
- ³ Complete list of countries recognising Kosovo can be found at www.kosovothanksyou.com.
- ⁴ The EU uses the terms 'candidate countries' and 'potential candidates', but never uses the term 'potential candidate countries' as this might be considered an implicit recognition of Kosovo.
- ⁵ European Commission, A European Future for Kosovo, COM(2005) 156, 20 April 2005.
- ⁶ North Kosovo: Dual Sovereignty in Practice Crisis Group Europe Report No 211, 14 March 2011.
- ⁷ OSCE report: parallel structures in Kosovo 2006-2007. <http://www.osce.org/kosovo/24618>
- ⁸ European Commission 2011 Enlargement Strategy – Conclusions on Kosovo http://ec.europa.eu/enlargement/pdf/key_documents/2011/package/ks_conclusions_en.pdf
- ⁹ After the declaration of Independence in 2008, the European Commission alone has, under the Instrument for Pre-Accession (IPA), allocated close to €1 billion to Kosovo, mainly for institution building and infrastructure. http://ec.europa.eu/enlargement/pdf/key_documents/2009/miff/act_part1_en.pdf (p. 8).
- ¹⁰ This repartition of powers between the different levels of government is, to a degree, determined in the constitution of BiH, which is an annex to the Dayton agreement.
- ¹¹ For example, because of a lack of agreement on whether it is the state or the entities that should be in charge of veterinary and sanitary regulation, the accession of Croatia in 2013 is likely to further isolate Bosnia, as it will no longer be able to export eggs, meat and dairy produce to its neighbour. <http://www.economist.com/blogs/easternapproaches/2011/11/free-trade-and-old-grudges-balkans>.
- ¹² As the question of recognition of new states pertains to the EU's Common Foreign and Security Policy (CFSP), decisions have to be, as a matter of principle, taken in unanimity. (Article 24 TEU).
- ¹³ The 2009 Kosovo study by the European Commission is regarded as an unofficial feasibility study for the conclusion of an eventual SAA with Kosovo. Whereas this study shows a number of shortcomings, these shortcomings are not uncommon in other potential candidates which nevertheless have managed to secure such agreements with the EU. An 'official' feasibility study is currently under preparation http://ec.europa.eu/enlargement/pdf/key_documents/2009/kosovo_study_en.pdf
- ¹⁴ Interviews, DG Enlargement, March 2012.
- ¹⁵ **Manners, I.**, The Normative Ethics of the European Union, *International Affairs* 84, No 1 (2008).
- ¹⁶ This status of a EU candidate does not alter in itself the nature of EU-Serbia relations: although a precondition for opening accession negotiations, candidate status will not imply that accession negotiations will be opened. Having been conferred candidate status in 2005, FYROM was not able to start accession

- negotiations due to a veto by Greece over the name issue. Neither is there a direct link between candidate status and the amount of EU financial assistance. According to the European Commission's Multi-Annual Financial Framework, over the financial perspective 2007-2013, EU financial assistance per capita to Serbia (€185) is already three times higher than that given to Turkey (€63) – a candidate country since 1999. http://ec.europa.eu/enlargement/pdf/key_documents/2009/miff/act_part1_en.pdf (p. 8).
- ¹⁷ Ehrke, M., Serbien – Zwischen Kosovo und der EU, *Friedrich-Ebert-Stiftung Belgrade*, February 2012 p. 5. <http://library.fes.de/pdf-files/id-moe/08918.pdf>
- ¹⁸ This agreement allows Kosovo to represent itself and to speak for itself, provided that it does not display symbols of statehood and adds a footnote to its name tag containing a reference to UNSCR 1244 and to the 2010 ruling of the International Court of Justice on the legality of Kosovo's unilateral declaration of independence.
- ¹⁹ This agreement is highly controversial in Pristina as it is widely seen in Kosovo as being in conflict with its own constitution, given the banning of state symbols and the reference to UNSCR 1244.
- ²⁰ 'The proposal for a feasibility study would not have been possible without the agreement with Serbia on regional cooperation achieved in the context of the Belgrade/Pristina dialogue.' Füle, S., 16 March 2012. <http://www.egovmonitor.com/node/48042>.
- ²¹ It is assumed that such a study would note a lack of technical preparedness of Kosovo to enter into SAA negotiations.
- ²² 'Cyprus will never recognise Kosovo'. <http://www.srbija.gov.rs/vesti/vest.php?id=59832>
- ²³ The 'European Partnership' for Kosovo lists as a short-term key priority the need to 'create a climate for reconciliation, inter-ethnic tolerance and sustainable multi-ethnicity (...)' Council Decision (2008/213/EC) of 18 February 2008. The European Partnership for Bosnia mentions the need to 'pursue efforts aimed at reconciliation between citizens of the countries in the region and enhance efforts to find definitive solutions to pending bilateral issues' as a short-term key priority. (Council Decision 2008/211/EC).
- ²⁴ Should EULEX be terminated, the gap will be filled by the Kosovo authorities, as Pristina has excluded a (more than symbolic) return of UNMIK. The UN is also not willing to take on such responsibilities again.
- ²⁵ Few Member States would like the Cyprus scenario to be repeated: the Island was accepted as a full member of the EU in 2004, in spite of having failed to resolve the ethnical division of the island before that date. Having lost its leverage over the Greek Cypriot government after accession, no further progress was since made. This unresolved conflict has stymied the EU's ability to act on a number of fields, such as EU-NATO strategic cooperation or the accession talks with Turkey.
- ²⁶ 'Pristina will not accept partition but gives some hints it might consider trading the heavily Serb North for the largely Albanian-populated parts of the Preševo Valley in southern Serbia.' International Crisis Group, Kosovo and Serbia after the ICJ Opinion, August 2010 (p. 3).
- ²⁷ *ibid.*, p. 11.
- ²⁸ North Kosovo: Dual Sovereignty in Practice Crisis Group Europe Report No 211, 14 March 2011.
- ²⁹ Whereas ethnic Serbs in the Northern municipalities account for 3% of Kosovo's population, ethnic Serbs in the Republika Srpska account for almost one-third of Bosnia's citizens.
- ³⁰ For Bosniaks and many Croats, allowing RS to secede would be a reward for the ethnic cleansing that accompanied Bosnia's birth. See ICG Report: What Does Republika Srpska Want?. [www.crisisgroup.org/~media/Files/europe/balkans/bosnia-herzegovina/214%20Bosnia%20---%20What%20Does%20Republika%20SRPSKA%20Want.pdf](http://www.crisisgroup.org/~/media/Files/europe/balkans/bosnia-herzegovina/214%20Bosnia%20---%20What%20Does%20Republika%20SRPSKA%20Want.pdf)
- ³¹ 'We are on your side, not only because your case is similar to ours, but because it is a matter of principles,' Demetris Christofias, President of Cyprus, during a state visit to Belgrade, 23 February 2009. http://www.b92.net/eng/news/politics-article.php?yyyy=2009&mm=02&dd=23&nav_id=57371
- ³² 'The one thing that Kosovo and Cyprus have in common, as far as the situation in these regions is concerned, is that in both cases, the basic principles of international law and legality, as well as UN decisions, are constantly being violated!' Christofias, D., President of Cyprus, 26 August 2008. http://www.b92.net/eng/news/politics-article.php?yyyy=2008&mm=03&dd=26&nav_id=4881
- ³³ 'Cyprus has unfortunate experience with such decisions' President of the Cypriot Parliament, Karoyian, M., 8 April 2008. <http://www.srbija.gov.rs/vesti/vest.php?id=44932>



Satisfying Labour Demands in Mid- and Low-Skilled Occupations through Immigration

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The purpose of this article is to explain the importance and necessity of satisfying labour demands through the migration of less-skilled workers. It will also argue that more work is needed to anticipate labour and skill shortages and will examine ways of better identifying the role of mid- and low-skilled migration in filling such shortages.



Introduction*

The regulation of labour migration is one of the most controversial public policy issues. Although there is a general consensus on the benefits gained from highly-skilled immigrants, policies concerning the admission and stay of semi-skilled and especially low-skilled immigrants continue to provoke disagreement in the academic and political world. Subsequently, current national immigration models seem to be built around a strict distinction between attracting highly-skilled workers for eventual permanent settlement, and treating less skilled immigration as a purely temporary phenomenon.

However, in most European Union (EU) countries the majority of the migrant population is employed in low- and mid-skilled occupations. It is striking that in Spain, the percentage of third-country nationals (TCNs) in low-skilled occupations is well above 50%¹. Regarding migrants in mid-skilled occupations, Lithuania is the country with the largest share of TCNs in these types of occupations (80.5)². In absolute numbers, Germany holds the lead since 1,054,000 TCNs work in mid-skilled jobs³. In Ireland (51.9%)⁴, Malta (51.5%)⁵, Austria (46.5%)⁶, Luxembourg (49.3%)⁷, Italy (55.2%)⁸ and the Netherlands (49.7%)⁹, approximately 50% of employed TCNs hold mid-skilled occupations.

At the same time, some types of work are predominately carried out by migrant workers. In Ireland, non-Irish nationals constituted 32% of all chefs in the country and 38.6% of those working in food preparation trades in 2010¹⁰. They also made up 18.9% of all travel and flight attendants, 15.5% of plasterers, 14.8% of care assistants, and 20.9% of childcare workers¹¹. In Slovenia, almost half of all migrant workers are employed in construction (41%)¹², whereas in Greece, foreign workers accounted for almost 45% in the same sector¹³.

It is therefore clear that restrictive migration policies may contradict the actual needs of the labour market. The combined effect of demographic decline and the increased education levels of younger natives is to effectively reduce the supply of workers for lesser skilled jobs in the EU countries. Adding to the problem is the fact that many suitable native candidates no longer apply for specific occupations despite the economic crisis. Hence, receiving migrants with skills which correspond to EU needs could be a response to labour and skill shortages.

Defining skills and indentifying labour shortages

Skills are often credentialised and obtained through the national educational systems, specialised training, courses, etc. Nevertheless, credential systems vary significantly between countries, thus making the distinction between 'low' and 'semi-skilled' quite difficult.

On the one hand, there are credential systems which are organised around the skill level of the worker such as the International Standard Classification of Education (ISCED).

Nevertheless, while the classification of educational programmes by level should be based on educational content, it is clearly not possible to directly access and compare the content of the educational programmes in an internationally consistent way. On the other hand, there are systems such as the International Standard Classification of Occupations ISCO-08 which are organised around the educational level required to competently perform the tasks and duties of a specific occupation. Yet, there are cases for which data is not adequate to capture skills required for work. Thus, many jobs are falsely characterised as low-skilled while others can hardly be defined.

Although there is a general consensus on the benefits gained from highly-skilled immigrants, policies concerning the admission and stay of semi-skilled and especially low-skilled immigrants continue to provoke disagreement in the academic and political world.

The adequacy of formal qualifications to capture skill requirements is regarded with scepticism which is demonstrated in the employers' demand for experience. The 'inadequacy' becomes more apparent when one realises that 'soft' skills and other characteristics such as demeanour, accent, style and physical appearance and everything that may make a potential worker 'look and sound right' for the job are not included¹⁴. Soft skills can be transferred across occupations (instead of being specialised) and share one characteristic: there is no standard procedure for measuring or certifying proficiency¹⁵. Soft skills include problem solving and the ability to work in a team and are particularly important in sectors where social relations with clients, customers and service users are of high importance for the delivery and quality of the work. Therefore, the increasing reliance on soft skills makes it complex to draw strict lines between high-, semi- and low-skilled jobs and workers.



The lack of a sole definition of the term 'skill' make things complicated when it comes to identifying labour and skill shortages. A labour shortage means that demand for labour exceeds supply at the prevailing wages and employment conditions. Therefore, if we take into account that all types of jobs require some skill, even limited, then any kind of inability to fill that job could be described as a skill shortage¹⁶. Regulating thus labour migration becomes difficult as policy makers are divided between those who point out the need for migrant workers to fill labour and skill shortages, and those who consider immigration as a way for employers to find cheap and exploitable workers, instead of improving wages and employment conditions.

There are three basic approaches to identifying skill and labour shortages and therefore, define the demand for migrant labour:

- occupation lists,
- employer needs' analysis,
- quotas;

Most EU Member States use a mixed combination (see table).

Countries	Methods used to Identify Labour and Skill Shortages		
	Occupation Lists	Employer Needs Analysis	Quotas
Austria	X	X	X
Belgium	X	X	
Bulgaria		X	
Cyprus		X	X
Czech Republic		X	
Denmark	X		
Estonia		X	X
Finland	X		
France	X		
Germany	X	X	
Greece		X	
Hungary		X	X
Ireland	X	X	
Italy		X	X
Latvia	X		
Lithuania	X	X	
Luxembourg		X	
Malta		X	
Netherlands		X	
Poland	X	X	
Portugal			X
Romania			X
Slovakia		X	
Slovenia		X	X
Spain	X	X	X
Sweden		X	
UK	X		X

Source: EMN Report, 2011 and IOM (LINET) Country Reports, 2011

Occupation Lists

A number of countries create lists of occupations where skill shortages exist but the content and format of these lists varies significantly. In Belgium, for example, such a list is only used to grant work permits to citizens of the new EU Member States, such as Romania and Bulgaria. In France, the list is the result of cooperation among different ministries¹⁷ whereas in Spain, the Special Catalogue of Vacant Jobs is developed by employment agencies with the participation of regional governments¹⁸. In Ireland, there are two lists: 1. the list of occupations ineligible for new work permits¹⁹ and 2. the list of strategic skill shortages²⁰.

Employers needs' analysis

Labour needs can also be pointed out by the employers. In Slovenia, after an employer declares the vacancy and

specifies the working conditions, the Employment Service has to investigate if national workers are eligible. If they are, the TCN application will be rejected. In Greece, employers must each year invite TCNs personally and submit an application either to the municipality or the company's headquarters.

In each region there is a committee responsible for the approval of the applications, which considers if specific job positions cannot be covered by natives, EU citizens or TCNs already legally residing in the country. The shortage in domestic labour force is confirmed by the Manpower Employment Organisation and at the end of the year a Joint Ministerial Decision is issued listing the approved job positions in each region for the following year²¹.

Quota system

In many EU countries a quota system is in place. In Cyprus, there is a quota system for each sector and the country as a whole. For instance, there is a compulsory quota of 30% for all businesses, and a labour market test is necessary as to ensure that no Cypriot, EU national or national from the accession countries is interested in the vacancy²². In Portugal, the contingent of occupational needs for TCNs is set annually based on an analysis of the labour market needs by the Ministry of Labour and Social Security²³. In Austria, quotas are set for each Federal State. Settlement regulations established on an annual basis indicate the maximum number of work permits²⁴. Only if unskilled labour supply does not suffice, will measures be taken to include unskilled workers in the list of TCN immigrants²⁵.

Labour and skill shortages

The basic economic approach implies that in a competitive labour market, where demand and supply of labour are mostly determined by the price of labour, most shortages are temporary and are eventually eliminated by rising wages which increase supply and reduce demand. In practice, however, labour markets do not function this way and labour prices can be 'sticky', critically dependent on the reasons behind labour shortages, which may include sudden increases in demand and/or inflexible supply.

Hence, in order to fully understand and overcome labour shortages two variables must be taken into account:

- The foundations of staff shortages, including the factors affecting employer demand and labour supply in relation to the local labour markets and within a particular social context.
- Alternatives which employers may have when responding to perceived labour and skill shortages and the reasons which limit them.

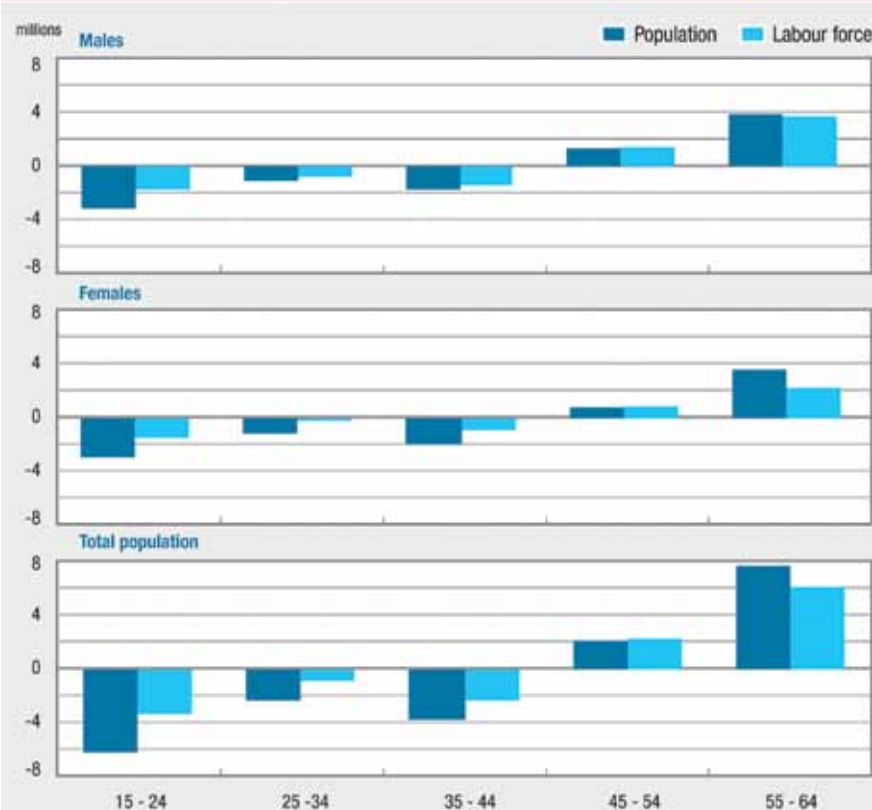
Foundations of Labour Shortages in Semi- and Low skilled Occupations

a. Demographic Developments

Demographic developments and in particular the ageing population are a major challenge for European labour markets as they will be faced with a declining or stagnating working age population, at current migration levels.

As the graph below demonstrates, in the years to come only the number of those being 45-54 and 55-64 years old is expected to increase. Of course, this does not imply a decline in the need of workers. Indeed, forecasts for selected OECD countries highlight the expected growth of some low skilled sectors including food services and preparation, retail sales and customer services, personal and home care aides, construction and transportation²⁶.

Figure 1: Changes in population force by age, 2010-2020, EU 27



Source: CEDEFOP, Skills supply and demand in Europe Medium-term forecast up to 2020 (2010, p. 39)

But even when total employment in specific sectors is expected to decrease (for example because many low-skilled jobs have moved to low-waged economies or because of computerisation), the ageing labour force could result in an increase in the demand for labour force as the number of the retired workers may be greater than the reduction in jobs.

b. Increased Access to Education

The European labour force aged 15+ with low-level or no qualifications is expected to fall by around 15 million between 2010 and 2020²⁷. Because of the increasing education levels of younger natives, the low-educated labour force is ageing rapidly and sometimes even faster than the overall labour force. Moreover, if the gender aspect is considered, the rising educational and participation level of women will lead to further labour demand in the so-called 'household production substitution activities' which among others include cleaning, childcare, food preparation and even care for the elderly²⁸.

c. Unwillingness to accept certain positions

Native workers, even when they have the required skills, are occasionally difficult to attract for a number of reasons. One cannot just simply assume that anyone will be able or would like to do any job anywhere. The factors which prohibit local labour force from taking up specific jobs mostly derive from the nature of the work, its temporal configuration, location, little opportunity for personal development and low social status²⁹.

Ways to meet Labour Shortages

The above issues raise the question of how and where the labour market demand can be satisfied. At an individual level, employers may respond to perceived labour and skill shortages in different ways. These may entail increasing wages and/or improving working conditions, investing in training and up-skilling of the domestic workforce or adopting more labour-intensive production technologies. Nevertheless, system effects that come from the institutional structure and regulatory framework of the national labour market as well as from wider welfare and public policies make employers reluctant to pursue different responses to shortages other than recruiting immigrants³⁰.

a. Improving Employment Conditions / Increasing Wages

Even though improving employment conditions or increasing wages may encourage the unemployed or the inactive to accept particular jobs, mechanisms of support may be required so as to compensate for the effects of long-term unemployment or inactivity and the constraints of caring responsibilities. Moreover, employers may avoid

this kind of response to labour shortages due to profitability concerns and in some cases about being priced out of the market.

b. Training

Training cannot provide a solution to short-term labour demands, for which employers must select from the current labour pool. Meanwhile, oversupply in short term could risk newly qualified trainees leaving, thus exacerbating longer-term shortages. In general, training is considered to be a risky investment for employers as free-riding and poaching of trained labour may become serious problems. In cases where the work is highly specialised or the training is a lengthy procedure one should question who is responsible for the training, the employers or the state?

c. New Technologies

An employer's decision to change the labour intensity depends partly on the available factor supplies. Employers who face an abundant supply of labour are expected, *ceteris paribus*, to adopt more labour-intensive production technologies than employers operating in an environment

of labour scarcity. But even in cases where employers operate in an environment of labour scarcity, one should consider that the costs of technology are fixed and borne by the employer. Therefore, if the demand is unstable, it may be more profitable to use labour as the variable factor of production since the costs of being idle are carried by the worker. Furthermore, even though mechanisation may reduce the demand for labour, the remaining jobs can be less attractive to native workers. They might also require an increased supply of skilled labour force which is not immediately available in the current national labour pool.

d. Immigration

Using the migrant labour force includes a variety of direct advantages for employers. Many times employers, because of their individual prejudices or inadequate information about the personal characteristics and attributes of individual applicants, choose employees based on a variety of criteria such as gender, age, race and nationality. This 'national stereotyping' in the recruitment of labour is affected by the workers' expectations about wages and employment conditions as well as by their 'work ethic' and productivity. Employers are aware of the economic and other trade-offs that migrants are willing to make by tolerating wages and employment conditions that are poor by the standards of their host country, but higher than those in their countries of origin. At the same time, existing studies often refer to employers' comments concerning migrants' perceived superior 'attitude' and work ethic. 'Work ethic' encompasses a range of factors related to the employers' subjective needs and job requirements. The explanations behind immigrants' higher 'work ethic' stem from migrants' frames of reference and their willingness to do the job on the employers' terms. Additionally, migrants are less likely to be trade union members and their family and social network is rather limited, thus making them able to live on-site or work anti-social and long hours.

The preference towards immigrants also has its origins in the characteristics and restrictions attached to their immigration status. Immigration policies include a range of different types of status such as work-permit holder, student, working holiday-maker, and dependent. Each of

difficult for migrants to change jobs, while enforcement of the equal treatment principle and access to state social benefits is often disregarded in the framework of seasonal employment. It is thus clear that the narrower the options for the workers are, the wider the possibilities are for the employers to apply unfair standards regarding performance, conditions and terms of work, facilities and labour security.

As supply and demand do not match, it is important to have transparent job markets so that employees and companies can make best decisions possible.

Conclusions

Changes to legal framework conditions can facilitate a welcome culture but cannot ultimately anchor it. Greater acceptance on the part of society and the integration of foreigners will be needed, which can start with countries' clear identification as migration ones. Furthermore, long-term benefits for the host society and migrants depend on the extent to which migrants can find a job in line with their educational attainment and skills equally to native workers. In a study on over qualification by the OECD it was found that regardless of the level of education, migrants face the risk of being employed in low-skilled sectors for a number of reasons³¹. These can be summarised as: a. discrimination, b. language problems, c. difficulties in the transfer of credentials, - little or no information or knowledge about the validity of academic or occupational qualifications, and d. the distrust of employers in recognising degrees obtained. In this context, the European Credit System for Vocational Education and Training (ECVET) has an added value as it

helps employers to understand qualifications achieved abroad as well as improving the credibility of international education and training experience by identifying and documenting what the learner has achieved.

As supply and demand do not match, it is important to have transparent job markets so that employees and companies can make best decisions possible. The mismatch problem can be resolved by increasing transparency and removing prioritisation in professions with skill shortages. Only workers who have access to comprehensible

information about the job markets and their opportunities can decide, for example, to undertake further training or relocate to a region where their qualifications' profiles are in demand and well rewarded.

Upskilling and facilitating the acquisition of soft skills, through lifelong learning and/or continuing vocational training is an important aim which is expected to have an effect on

Training and upskilling should be seen as an investment in a sustainable future rather than a cost to be minimised.

these types is associated with specific rights and restrictions that cannot be imposed on citizens and may give rise to a specific demand for particular types of migrant workers. Whenever faced with difficulty in finding or retaining workers in certain jobs, employers may prefer workers whose choice of employment is restricted, as it is usually the case with recent arrivals and migrants on temporary visas. Immigration requirements may make it



the adaptability of the labour force to respond to structural changes. Responsibility for skills development rests between governments, education and training providers, employers and individuals. The apprenticeship-based approach illustrates this correlation. Governments in Austria and Germany are duty-bound together with schools and companies to balance out qualification-related mismatches and adapt existing skills by bringing vocational training directly into the workplace³². The apprenticeship model cannot be a panacea, directly transferable to other national contexts, where there is a weak apprenticeship culture, aiming at low achievers or disadvantaged groups³³. However, apprenticeships can be seen as an important measure in improving labour market outcomes. Training and upskilling should be seen as an investment in a sustainable future rather than a cost to be minimised. The benefits of such an investment can provide a means to avoid skills' polarisation, equip older and migrant workers with the necessary soft and basic skills so as to remain in the labour markets and consequently enhance economic prosperity.

Notes

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* Information and data of this paper is partly based on International Organisation for Migration (IOM) country reports which were collected so as to conduct a study on the labour integration of mid- and low-skilled workers.

¹ EMN, Satisfying labour demand through migration, p. 60, 2011. This report has been produced by the European Migration Network (EMN) and was completed by the European Commission, in co-operation with the 23 EMN National Contact Points participating on this activity. This report does not necessarily reflect the opinions and views of the European Commission, or of the EMN National Contact Points, nor are they bound by its conclusions.

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ IOM (LINET) Report on Ireland, 2011, p. 18.

¹¹ *Ibid.*

¹² IOM (LINET) Report on Slovenia, p. 3.

¹³ IOM (LINET) Report on Greece, 2011, p. 8.

¹⁴ Nickson *et al.* cited in Anderson M., B. Ruhs, Who Needs Migrant Workers?, Labour Shortages, Immigration, and Public Policy, 2010, Oxford: Oxford University Press, p. 20.

¹⁵ Collett, E. and F. Zuleeg, Soft, Scarce, and Super Skills: Sourcing the Next Generation of Migrant Workers in Europe, 2008, Washington, DC: Migration Policy Institute, p. 12.

¹⁶ Anderson M. and B. Ruhs, 2010, p. 4.

¹⁷ IOM (LINET) Report on France, 2011, pp. 37, 39.

¹⁸ IOM (LINET) Report on Spain, 2011, pp. 14, 18, 21, 23.

¹⁹ IOM (LINET) Report on Ireland, 2011, pp. 20-21.

²⁰ This list is compiled by the Expert Group for Future Skills and Needs, established in 1997; <http://www.skillsireland.ie/aboutus>.

²¹ IOM (LINET) Report on Greece, 2011, p. 16.

²² IOM (LINET) Report on Cyprus, 2011, p. 18.

²³ IOM (LINET) Report on Portugal, 2011, p. 29.

²⁴ BEPA, European Commission, Opening Europe's doors to unskilled and low-skilled workers: A practical handbook, 2010, p. 14.

²⁵ IOM (LINET) Report on Austria, 2011, p. 28.

²⁶ OECD, Managing Low Skilled Migration International Migration Outlook 2008, OECD Publishing, p. 132.

²⁷ CEDEFOP, Skills supply and demand in Europe Medium-term forecast up to 2020, 2010, Luxembourg: Publications Office 2010, p. 41.

²⁸ OECD, 2008, p. 133.

²⁹ Anderson M. and B. Ruhs, 2010, p. 26.

³⁰ *Ibid.*, p. 6.

³¹ OECD, Matching Educational Background and Employment: A Challenge for Immigrants in Host Countries, 2007, p. 138.

³² European Commission, DG for Employment, Social Affairs and Equal Opportunities, New Skills for New Jobs: China and the EU – Shared Labour market experiences to inform harmonious and sustainable society of the future, July 2010, p. 42.

³³ *Ibid.*, p. 46.



Microcredit and EU Cohesion Policy

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After nearly four years of the most serious financial and economic crisis Europe has seen in 80 years, most EU Member States are facing high budget deficits, growing public debts, while most entrepreneurs are facing difficulties in accessing finance due to the credit crunch. Meanwhile there are more than 23 million unemployed in the EU and unemployment rates have reached an average of 10% and more than 20% in Greece and Spain¹. Microcredit can provide an answer to the employment challenges caused by the current economic crisis and to reach the 75% employment target rate set in the Europe 2020 strategy.

Introduction

Microcredit is receiving increasing attention from policy-makers as the financial and economic crisis advances. Several Member States have introduced it within their operational programmes while at the EU level specific schemes have been launched. This article reviews briefly the experiences of various microcredit schemes implemented so far, focusing on the specific framework of EU cohesion policy. It also highlights current challenges of implementing microcredit schemes within structural funds and comments on related proposals of the structural funds regulations for 2014-2020.

Microcredit as a response to the economic and financial crisis

Microcredit aims at micro-entrepreneurs and disadvantaged people who wish to enter into self-employment but face obstacles in accessing traditional banking services due to banks' lending conditions (significant down-payment capacity and high quality collaterals). Indeed, the prospects for many, in particular those unemployed, could be to start up a new enterprise taking into account that some of the new businesses do not require specific business skills – for example small shops and services. These issues have been studied worldwide and are well known in less developed countries as well as in EU development policy².

Although the EU is lagging behind in terms of business creation rate compared to the US, microcredit can encourage new businesses, self-employment and stimulate economic growth³. Even before the crisis, Eurostat estimated the potential demand for microcredit in the EU is at least 700 000 loans, totalling around €6 296 million⁴.

The contribution of Cohesion policy

Microcredit is not a completely new area of intervention for cohesion policy. It dates back at least to the previous 2000-2006 programming period when several initiatives were launched. Under the Community Initiative of EQUAL an initiative was run in Germany to develop microfinance institutions (MFI), and a

national microcredit campaign '*Mikrofinanzfonds Deutschland*' was launched in 2006 with ESF support⁵. Spain started using the specific of Global Grants to create cooperations between NGO sector and the banking sector in developing a specific service to provide business support measures and provision of microcredits requiring no collaterals for members of the Roma community⁶. In the region of Tuscany, experiments in regional ESF programmes have funded a network of information desk points at local level for microcredit and underlined the importance of building up a regional microcredit system (SMOAT). More locally in Brussels a scheme was launched in 2001 financed from the ERDF and ESF to provide microcredit for the would-be self-employed⁷.

For the current programming period 2007-2013 some Member States have foreseen microcredit schemes from the start; but

Microcredit aims at microentrepreneurs and disadvantaged people who wish to enter into self-employment.

others have had to introduce them following the economic and financial crisis and therefore are revising their operational programmes. In general, financial engineering has attracted interest because of its revolving character as resources can be used over and over again, whilst it helps by moving away from the one-off grant culture and therefore increasing the efficiency of cohesion policy. Financial instruments also have shorter routing time (from submission to payment), constitute less of a risk for deadweight and make more sense for projects that can have a financial return.

On the other hand, these instruments can be notoriously complicated and require specialist management teams. Thus a usual management structure involves a cascade system whereby a Managing Authority selects a holding fund manager. The fund manager is responsible for launching a 'call of interest' looking for possible financial intermediaries who will then reach beneficiaries on the ground. The EC has promoted the JEREMIE initiative (Joint European Resources for Micro to Medium Enterprise). JEREMIE taps into structural

Figure 1: Examples of national microcredit schemes financed by Structural Funds 2007-2013

Name of the fund	Member State	Fund Manager	Size of the fund	Characteristics
Széchenyi Kombínált Mikrohitel ⁸	Hungary	Magyar Vállalkozásfinanszírozási Zrt. (Venture Finance Hungary Plc.)	€150 million	It includes €85 million for microcredit: up to €17200 (with interest rate: up to 9%) and €75 million for grants (€3400-13600) to finance investments and establishing start-up businesses as well. ERDF source.
Mikrokreditfonds Deutschland ⁹	Germany	GLS bank	€100 million	ESF source Interlocking financing and consultancy services
Entrepreneurship Promotion Fund ¹⁰	Lithuania	INVEGA	€15.5 million	ESF-based it focuses on the unemployed, disabled, young people and older people (over 50) 5.5% interest rate. State guarantee for 80% credit and interest rate rebates from ERDF measures.
Microcredit Initiative	Spain	INCYDE (Instituto Cameral para la Creación y Desarrollo de la Empresa) Founded as a Chamber of Commerce initiative	€10 million (planned allocation)	JEREMIE ERDF

funds to promote the use of financial engineering instruments and improve access to finance for SMEs.

Several Member States and regions have also taken this opportunity to launch microcredit schemes at national and regional level within their operational programmes by fitting them at their own specific territorial needs (Figure 1 and 2). All have followed different organisational models and more than 10 Managing Authorities have called upon the expertise of the EIF to manage these instruments.

Figure 2: Examples of Italian regional microcredit schemes financed by ESF 2007-2013

Member State/Region	Fund Manager	Size of the fund
Region Sicily	EIF	€15 million
Region Basilicata	Sviluppo Basilicata	€15 million
Region Sardegna	SFIRS ¹¹	€41 million
Region Puglia	Puglia Sviluppo S.p.A.	€30 million
Region Lombardy	Finlombarda Spa	€20 million
Region Calabria	Fincalabra	€37 million
Region Abruzzo	Abruzzo Sviluppo Spa	€14 million
Region Marche	Unicredit	€1.5 million

The EU has added further tools to the Member States' initiatives to support and increase the availability of microcredit.

The Joint Action to support Micro Finance Institution (JASMINE) managed by the EIF/EIF has been aiming since 2010 to enhance the capacity of non-bank microcredit providers/microfinance institutions in various fields such as institutional governance, information systems, risk management and strategic planning. Technical assistance (evaluation and training) is used to help them become sustainable and viable operators in the market. JASMINE works on a competitive basis and has so far concentrated its projects in Romania (7), Bulgaria (4), Hungary and the UK (3 each), Italy (2), Spain, Belgium and the Netherlands. JASMINE and DG Enterprise have also published a flexible European Code of Good Conduct for microcredit provision in order to support the microcredit sector itself in increasing quality and moving towards sustainability. The code is not a mandatory requirement but rather a voluntary endorsement by providers.

Besides JASMINE, the EC and EIB have launched the European Progress Microfinance Facility (EPMF) to reach particular at-risk groups. The Facility also works on a competitive basis with no pre-allocation of funds to specific Member States or regions in order to respond to specific emerging needs. Hence, the facility must ensure coherence and compatibility with cohesion policy regions, for instance when microcredit is provided to people living in rural areas (e.g. for Roma population through *Mikrofond Bulgaria*). The Facility operates in a cascade system from the EU level to 18 microfinance institutions selected in 12 Member States so far. A successful example is a microcredit scheme operating in deprived communities of Brussels (Saint-Gilles, Schaerbeek) where the unemployment rate reaches

30%¹². The scheme is geared towards the unemployed and independent workers. Its success factors lie both in the proximity approach, links to growing immigrant communities and reduced formalities in line.

Challenges for development of microcredit within cohesion policy

Compliance with EU rules

The process of selecting the manager of the holding fund has raised legal questions since many schemes have opted to entrust the management to an in-house body. This option requires thorough checks and has led to the revision of statutes in some cases in order to adhere to EU public procurement rules. The following step concerns the agreements between the Managing Authority and the holding fund manager. Fund managers also have to be monitored thoroughly to ensure bank culture converges on respecting EU rules. A proper territorial coverage, adequate information and publicity as well as justified management costs are among the requirements.

Eligibility of expenditures within microcredit schemes imply adhering to detailed rules on the EU definition of microenterprises¹³, *de minimis*, the possibility of financing working capital in early stages or as part of the expansion of a business activity, and spending before the end of 2015¹⁴. Firms in difficulty and firms supported by other EU funds should be excluded, as well as in certain sectors such as lotteries. The amending regulation on 'durability' of investments clarified that the obligation to keep SME investments for three years does not apply in cases of non-fraudulent bankruptcy or to financial engineering¹⁵.

Some Member States had initially opted to introduce a bonus element within the loan provision. This premium-based system would have permitted a discount on the loan in case the beneficiary maintained workforce for at least two more years. However, this kind of mixed model has been withdrawn as repayable investments need to be distinguished from non-repayable assistance or grants¹⁶.

Finally, microcredit schemes need to comply with proper monitoring and evaluation requirements, and not to underestimate the required reporting and administrative burden.

N+2/N+3

Managing Authorities could be tempted to make oversized allocations to financial instruments for the purpose of increasing 'absorption' and avoiding N+2/N+3 automatic decommitments. The risk is that there might not be enough capacity on the ground, which would lead to difficulties of absorption later on. Hence, fund size should neither be overproportionate nor below critical mass. Thorough gap assessment needs to be carried out based on knowledge of the demand of the market and supported by a proper *ex ante* evaluation of the SMEs' financing needs.

To increase absorption, microcredit should be strongly connected to local development policies¹⁷ and must not suffer from competition due to a large availability of non-



refundable grants. Indeed, competition could arise between grants and loans, or between loans at market rates or at reduced interest rates, thereby pushing beneficiaries to 'shop around' for different types of funding. Generally, a mix of non-reimbursable grants and financial instruments is welcome, but coordination between different funding sources and programmes must mitigate any distortions.

Case study: In Hungary, both the Central Hungarian and the Economic Development Operational Programmes are supporting microenterprises which represent 85% of Hungarian enterprises, although the Central Hungarian OP has already been overwhelmed by high demand. The most popular scheme is a microcredit scheme (**Széchenyi Combined MicroLoan**) which has favourable conditions and is also open for start-up businesses. Microenterprises are asked to submit in a single application process a request for receiving both, a grant as well as a loan – the latter is meant to cover the co-financing required by the grant. The Hungarian state contributes to the financing of the microloan under the *de minimis* principle. Decisions on financing are taken within 30 days; the amount can then be used to buy equipment, ICT tools and basic infrastructure for start-up businesses¹⁸. Applying for a loan is a mandatory part of the scheme even if microenterprises have enough of their own resources to cover the amount of the co-financing. Therefore, in combining a refundable microloan and a non-refundable grant, this feature makes it a unique structure for providing microcredits.



Hungary and Spain have specialised in the integration of the Roma community, as self-employment fits better with the lifestyle of the Roma community rather than the prospects as salaried workers. In Hungary, microcredit has helped bring activities from the non-formal to the formal sector by financing small businesses, for examples mobile vendor business of clothing, plastic items and groceries, second-hand shops, flower shops, or even wood processing. The Hungarian *Kiut* programme – financed directly by the European Commission in 2009 – has also underlined how complex microcredit to Roma communities can be if there is insufficient integration with government policies, or weak links with operational programmes; meanwhile, the need for training of these specific communities is constant²⁰.

Finally, networking among EU countries is crucial since good practices should be shared and exchanged from other countries as well as from previous programming periods²¹. Therefore the European Commission is supporting a network among Managing Authorities and stakeholders through a Community of Practice on Inclusive entrepreneurship (Copie). Exchanges of experience should extend further to EARDF funds when supporting small-scale farmers or to the EFF fund for young fishermen. The EPMF facility and structural funds should integrate further for interest rates rebates, training and coaching as well as further promotion through Public Employment Services. Finally, we should link to successes achieved outside cohesion policy by EU mobility programmes such as 'Erasmus for young entrepreneurs'.

The added value of microfinance lies in tackling specific target groups.

EU added value and leverage effect

Microcredit schemes need to deliver high added value and this can be measured in terms of leverage from the private sector. The European Court of Auditors (ECA) highlights weaknesses and inefficiency in leveraging private investments, as structural funds do not stipulate any requirements as per leverage ratio, frequency and reutilisation of legacy funding¹⁹. In their audit, the ECA found that for loan instruments the leverage ratio ranged from 1.33 in Hungary to 1.67 in the UK; but for guarantee instruments it ranged from 4.16 in Hungary to 171 in Portugal. For the next programming period a suggestion could be that the European Commission requires contractually binding minimum leverage ratios, minimum revolving periods and data for calculation of leverage indicators.

Added value is not only to be found in the leverage effect, but by tackling specific target groups and taking into account that both ESF and ERDF funds have their own specific objectives and focus when investing in microcredit. Integrated projects in the Region Emilia Romagna tapped into the potential of female entrepreneurship in the *Datcredit* project; while in Sicily the JEREMIE pilot scheme focuses on helping to find alternatives to the long-standing problem of usury.

Training and business support

While the finance function is central to microcredit, it is however, not sufficient. Other functions such as capacity building and business support need to be integrated to accompany the financing, in particular for groups with little alphabetisation. In some cases the individual legal coaching is provided for free by charity workers, but in other cases structural funds can subsidise the business support measures that precede or accompany microcredit. Training and business support need to be result-oriented as requested by the new regulations.

In its Entrepreneurship Promotion Fund, Lithuania integrated in a one-stop-shop both the provision of trainings, individual consultations and the possibility to apply for a microcredit, thereby providing a simplification for the entrepreneur. In Spain, the regional and local network of Chambers of Commerce will provide microcredit alongside trainings and will give access to its incubator network for entrepreneurs to find the ideal place for business start-ups²².

A role can also be played by cities and local authorities to develop a more favourable environment, especially for micro-finance – not merely for local banks but open to any financier actor who engages in new approaches to finance entrepreneurship²³. Local authorities should ensure that a proper business environment is in place that allows companies to be set up within three days and for less than €100 as requested in the *ex ante* conditionality principle.

Conclusions

Microcredit answers a growing need for self-employment in the EU. Cohesion policy has contributed to its development and will continue to provide support within the cohesion package for the 2014-2020 programming period. The EC envisages a new Programme for Social Change and Innovation (PSCI) with an axis on Microfinance and Social Entrepreneurship (€191 million), which plans to set up a one-stop-shop for EU micro-finance support (financing and capacity-building) – with a focus on vulnerable groups – to improve access to finance for social enterprises.

Furthermore, the EC proposals for the future ERDF and ESF funds emphasise additional financial engineering instruments. The possibility to have multi-fund operational programmes in the next programming period, rather than mono-fund ones as is currently the case, may also open future possibilities for microcredit schemes to cover a wider range of beneficiaries and to create more synergies between funds. A further opportunity is the explicit reference to social enterprises in order to combat poverty in the proposed future ERDF regulation²⁴.

While preparing their future operational programmes, Member States need to think about how to build up microfinance schemes. A greater use of financial instruments should be

Finance is central, but microcredit requires training.

accompanied by quality assessments of SME financing gaps, reinforced attention to ensure added value and requirements for leverage from the private sector, more synergies between structural funds, as well as proper systems that allow compliance with EU rules. Training and business support must also be foreseen to complement the financing function for beneficiaries in order to fully maximise success in business ventures. Finally, enhancing of microcredit will also rely on both the simplification of the rules for financial instruments and increasing legal certainty for all parties through proper and timely guidance by the European Commission.

Notes

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¹ Source: Eurostat.

² EU manages the Microfinance Programmes within the 9th European Development Fund (EDF) in ACP (African, Caribbean and Pacific), worth €15 million. Between 2005 and 2010 as the number of clients increased by 150% to 775 000, several MFIs grew in strength, and training and technical assistance was provided. A further investment of €15 million is foreseen in the 10th EDF.

³ Microcredit is defined as a loan of up to €25 000; but in reality many businesses need even smaller amounts of capital in some cases as little as €1 000 to set up their business, with the majority being around €5 000. See Commission Staff Working Paper, 'Microcredit for European small businesses', 2004, p. 5

⁴ Report on Implementation of the European Progress Microfinance Facility, COM/2011/0195 final

⁵ A cooperative model was developed with a network of partners to economise on existing public promotion functions, to support local MFIs and link the functions of financing and consultancy in a sophisticated incentive system. Microfinance in Germany and Europe, *KfW Bankengruppe*, April 2007, p. 73.

⁶ See results in Report 2000-2006, Acceder Promoting Roma Employment, Fundacion Secretariado Gitano (FSG). The banking partner Caixa Catalunya developed a specialised unit microcredit branch Un Mon Sol.

⁷ Providing microcredits from €1250 to €25 000 for economic revitalisation of neighbourhoods in the Priority Intervention Zone of the Brussels-Capital Region, www.srib.be

⁸ www.mvzrt.hu

⁹ The Ministry of Labour and Social Affairs assigned in 2010 the GLS Bank to establish an agency network through which more than 15,000 loans will be disbursed until 2015.

¹⁰ The Lithuanian Ministry of Finance, Ministry of Social Security and Labour, and a guarantee institution, INVEGA, selected the Lithuanian Central Credit Unions and the consortium of 57 credit unions to allocate 50 million Litass by 2015. The objective is to create 1000 new jobs, grant 1200 loans to individuals or SMEs and to deliver business training for 5000 people.

¹¹ www.sfrs.it

¹² MicroStart was launched to support buying inventory, equipment, treasury or a second-hand vehicle with a loan from €500 to a maximum of €10 000, www.microstart.be

¹³ Commission Recommendation 2003/361/EC of 6 May 2003.

¹⁴ Article 45, Commission Regulation (EC) No 1828/2006 of 8 December 2006.

¹⁵ Article 1(8)(b) Regulation (EU) No 539/2010 of 16 June 2010 amending Council Regulation (EC) No 1083/2006.

¹⁶ Guidance Note on Financial Engineering Instruments under Article 44 of Council Regulation (EC) No 1083/2006, COCOF version 21 February 2011.

¹⁷ The Italian National Committee for Microcredit (ENM) is working on a national Italian ESF project to integrate microcredit, active labour market policies and local productive systems. www.microcreditoitalia.org

¹⁸ www.nfu.hu (Description of tenders under GOP-2011-2.1.1/M and KMOP-2011-1.2.1/M)

¹⁹ Financial Instruments for SMEs co-financed by ERDF, European Court of Auditors Special Report No 2, p. 41-44.

²⁰ Third progress report, www.kiutprogram.hu

²¹ Proceedings from EIPA seminar 'Better Access to Finance: Using the EU Microcredit Initiatives', 29-30 March 2012, Regione Molise, Brussels

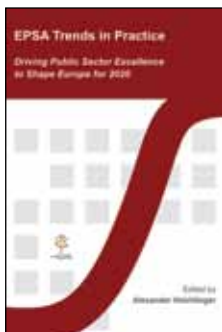
²² www.incyde.org

²³ See Leipzig Action Plan <http://urbact.eu/en/projects/human-capital-entrepreneurship/fin-urb-act/our-partners/>

²⁴ Article 5, Proposal for a Regulation of the European Parliament and of the Council on specific provisions concerning the European Regional Development Fund and the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, COM(2011) 614 final.

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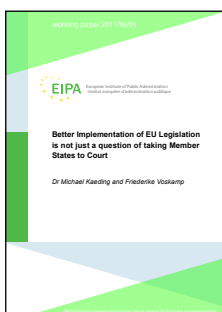
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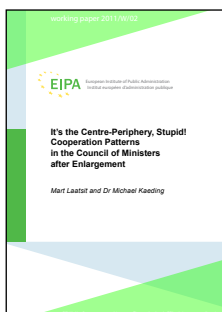


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The single market is one of the most wide-ranging and significant symbols of European integration. While it brings great opportunities to European citizens in theory, in practice, delayed and incorrect implementation of single market rules leave EU citizens with a highly fragmented 'regulatory patchwork', deterring citizens and businesses from exercising their rights. One way to solve such a problem is to turn to formal proceedings such as to the European Commission and its role as 'Guardian of the Treaties' and Treaty articles 258-260 TFEU, i.e. the infringement procedure or to a national court. An alternative way to guarantee street-level EU law enforcement is through SOLVIT; an out-of-court dispute settlement mechanism providing quicker solutions to problems of cross-border nature. This article provides a timely analysis of the reinforced infringement procedure and SOLVIT centres, how the system works and how we will be able to strengthen its strategic role to address the citizens 'integration fatigue'.



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She worked for two years as a researcher at the Linguamón-UOC Chair in Multilingualism, where she developed several projects on linguistic engineering, among which were the design and implementation of a multilingual virtual learning environment. During her academic years she specialised in the role of local and regional authorities in the EU decision-making process, dealing mainly with the lobbying strategies of the European regions. She joined EIPA in September 2010 to assist in the organisation and development of the EPSA 2011 edition, and more recently, in the organisation of its Knowledge-Transfer Activities. She also supports a range of projects at EIPA's Antenna in Barcelona, primarily focusing on European economic strategies, institutional capacity building of the European territories, territorial positioning, e-Government initiatives, and the Common European Framework of Reference for Languages.



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Since his entry as a career civil servant into the autonomous Government of Catalonia in 1983, he has occupied several management positions. In the field of training and vocational education for the public sector, he was Deputy-Director of the Catalonia Public Administration School and Director of the Centre of Studies and Specialised Training attached to the Catalan Ministry of Justice. His areas of interest and professional specialisation cover topics related to public administration modernisation and human resources, change management, training, as well as justice modernisation and Court management. In these thematic fields, he has several articles published under his name.



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