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In this issue >>

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Table of Contents

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The European Grouping of Territorial Cooperation (EGTC): New Spaces and Contracts for European Integration?

Gianluca Spinaci* and Gracia Vara-Arribas**

The European Union is becoming one undivided continent, where territories are faced with borderless economic, social and environmental challenges while still being governed through traditional institutional boundaries. Integration raises the question of cohesion among different territories, and territorial cohesion is a new objective for the Union according to the Lisbon Treaty. Cooperation between territories, beyond frontiers and across different institutional layers, is becoming crucial to provide multi-level governance to new functional regions. The European Grouping of Territorial Cooperation (EGTC), a new legal and governance tool established by Regulation 1082/2006, was conceived as a substantial upgrade for this multi-level governance and "beyond-the-border" cooperation. Three years after its adoption, a number of EGTCs have been set up, and new ones are in the pipeline. Despite their early stage, these new ventures are generating interesting dynamics, revamping inter-institutional cross-border partnerships and establishing a new cooperation geography. However, promoting best practice partnerships would require a broader European policy. This article considers possible institutional incentives such as the "contractualisation" of the cooperation between the European Commission and the EGTCs. These Groupings truly are new governance "contracts" of multilevel cross-border cooperation, which can become creative engines for local development and deeper European integration. This provides food for thought for the EU policy and budgetary package after 2013.

Introduction

EU integration is progressing thanks to several mechanisms, including cross-border actions. The latter are increasingly relevant since land and maritime borders multiply with every enlargement. Economic, social and environmental problems in Europe require joint policies. In order to be effective, cooperative responses must focus on certain territories (e.g. the Mediterranean basin) and engage selected groups of municipalities, regions or countries facing the same challenges, which may pool their resources to achieve shared, even cross-border solutions. Since the late 1980s, the European Union has funded this cooperation through the INTERREG programmes, whose management has been partially hampered by different national laws and procedures. To solve this, the European Grouping of Territorial Cooperation (EGTC) was introduced to bring both uniformity and legal stability to cooperation.

This article presents the EGTC as a new legal tool and analyses its constitutive elements, the state of play, the political context and the policy agenda behind it. By reviewing established EGTCs, in particular their Conventions and Statutes, three major issues are considered. Firstly, how do new EGTCs enhance territorial cohesion across Europe? Secondly, do established EGTCs tend to stretch the Regulation beyond its original scope of purely operational cooperation (e.g. project management) by

fostering political cooperation (e.g. policy making, external relations and lobbying)? Thirdly, which action on the ground and institutional incentives can make the EGTC a better lever for EU integration?

The EGTC, constitutive elements and the state of play

The concept of the European Grouping of Territorial Cooperation (EGTC) was set out in 2006 (Regulation 1082/2006), under the pressure of border regions in particular, who were calling for a stronger legal foundation for their cooperation, often based on certain civil law agreements, differing widely across Europe. The EGTC Regulation offers them a European law-based tool for the first time, endowed with both EU-wide scope and of a potentially indefinite duration.

Unlike its predecessors (such as Euroregions and working communities), EGTCs allow, within the same cooperative structure, the interaction of different institutional levels in a new form of multilevel governance, where more stakeholders can participate than before: regional and local authorities, Member States, and all those public or private entities (universities, chambers of commerce, foundations, etc.) that are subject to public procurement rules.[1] It allows them to interact on a regional (not only cross-border) basis. It establishes a legal personality, with binding decisions in potentially remarkably large territories over a wide range of cooperation areas. The legal personality enables it to have a budget and its own managing organs, the capacity of employing staff, holding property, to actively participate in legal proceedings, as well as the "EU legitimation" to promote cross-border, transnational and interregional cooperation. This legal stability reinforces decision-making among the partners, their position in interaction with the EU institutions, their possibilities for launching or improving their international position and the effective management of cooperation programs and projects.

In fact, the EGTC was designed to facilitate the implementation of programmes and projects co-financed by the structural funds. But it can also develop other forms of territorial cooperation without Community funding or carry out actions relating to Community policies other than structural policy.[2] Member States may decide on regime applicable to these groupings (either public or private), the notification procedures for setting up or joining an EGTC, as well as, to a certain extent, the cooperation tasks potentially accessible to EGTC members.

The Regulation triggered a lively debate, since the EU was for the first time "legislating" on the governance and legal structures of regional policy, rather than on usual (and important) business such as the provision of a multi-annual plan and financial framework.[3]

Implementation is slowly taking off. Most Member States adopted the implementing legislative and/or administrative provisions after the given deadline, whereas a few others are still not complying.[4] However, the commitment of regions and local authorities is ensuring progress in the field. Two years after the full application of the Regulation (1/8/2007), a number of EGTCs have been set-up.

The first EGTC, Eurometropole Lille-Kortrijk-Tournai (FR/BE), was set up on 21 January 2008, half a year after the Regulation entered into force. This early establishment, prior also to the adoption of national provisions, was possible thanks to strong political commitment. Apart from this case, the setting up of EGTCs suffered from the delayed adoption of national rules. The second establishment was in October 2008 and five others took place before March 2009. Those to be established during 2009 include two large Euroregions, Pyrenees-Mediterranean and Alps-Mediterranean, and the Eurodistrict Strasbourg-Ortenau.

So-far, EGTCs tend to emerge on the same borders (France-Belgium, Spain-Portugal, Hungary-Slovak Republic) and often in adjacent or overlapping areas, probably because of the adoption of EGTC national provisions on both of the bordering countries, the pre-existence of bilateral cooperation agreement(s), as well as the stimulating local competitive effect of neighbour EGTCs.

The Annex provides a list of formally established EGTCs, those expected to be established, and those under consideration (non-exhaustive list), at the time of writing of this article (June 2009).

The political context and the policy agenda behind the EGTC Regulation

During the last decade, territorial cooperation has been gaining political prominence and an operational upgrade. The need for an appropriate organizational "legal" structure emerged and the Committee of the Regions[5] prompted the Commission to present a proposal in 2004, which became Regulation 1082/2006 establishing the EGTC. In order to understand its emergence and aims, it is essential to consider the policy agenda and political context behind it, which essentially are the following:

1. the emergence of territorially-based EU policies under the new Treaty objective: territorial cohesion;
2. the increasing involvement of sub-national government in EU policy-making and the evolving Commission agenda around it;
3. the consolidation of territorial cooperation as an element of EU integration.

The latest enlargements of the Union have given it a certain spatial unity, in line with our continent's geography. Europe has consequently started to think about its territory (spatial development) and the Lisbon Treaty sets the new objective of ensuring territorial, in addition to economic and social cohesion within the EU.[6]

So far economic and social cohesion has been ensured through EU actions aimed at filling development gaps in terms of income per capita and employment rate or unemployment rate. Territorial cohesion would additionally mean addressing the diversity of our territories (e.g. natural specificities, population distribution, degree of connectivity, etc.) in order to ensure EU sustainable development. For example, one could channel resources into high-potential territories to ensure better interconnection

between the strongest and the weakest territorial spots. This would require a closer inter-institutional coordination of thematic policies in a given territory as well as a possible upgrade of spatial planning for Community policies, with an enhanced role for the EU and the regions compared to the current inter-governmental practice.[7] Appropriate set-ups for shared territorial governance are thus clearly in demand. On this the EGTC Regulation, as the first-ever EU piece of legislation explicitly addressing territor,[8] is a forerunner in supporting territorial cohesion through an innovative multi-level governance format. We will therefore consider how EGTCs will enhance territorial cohesion across Europe.

Furthermore, the EGTC Regulation must be read in conjunction with the increased involvement of sub-national government in EU policy-making. This development, albeit slow, is progressive and is based on regionalisation and decentralisation trends at national level, the increased allocation of competences and resources to the sub-state level,[9] as well as on major EU policies which, like cohesion policy, require implementation at sub-state level.

Efforts have been made to enhance the role of the regions in Europe. The European Commission, through the White Paper on European Governance (2001) and the subsequent Mandelkern report on Better Regulation, highlighted the importance of coordination between the local, regional and EU levels in order to ensure Europe-wide regulation of the highest possible quality. Governance stands for the diffusion of control and cooperation across levels and sectors. The "regionalist" agenda was also driven by the large and often legislatively powerful regions, which did not want to sit on the bench in EU decision-making, while a number of new small-sized Member States were gaining access to enlarged EU Institutions. The adoption of the EGTC Regulation is itself a case of local and regional powers achieving, through EU policy-making, their claim for a greater legitimacy to be ascribed to their cooperation. Therefore this article investigates whether the established EGTCs are stretching the Regulation beyond its original scope of purely project-based cooperation, aiming at gaining higher legitimacy for political cooperation.

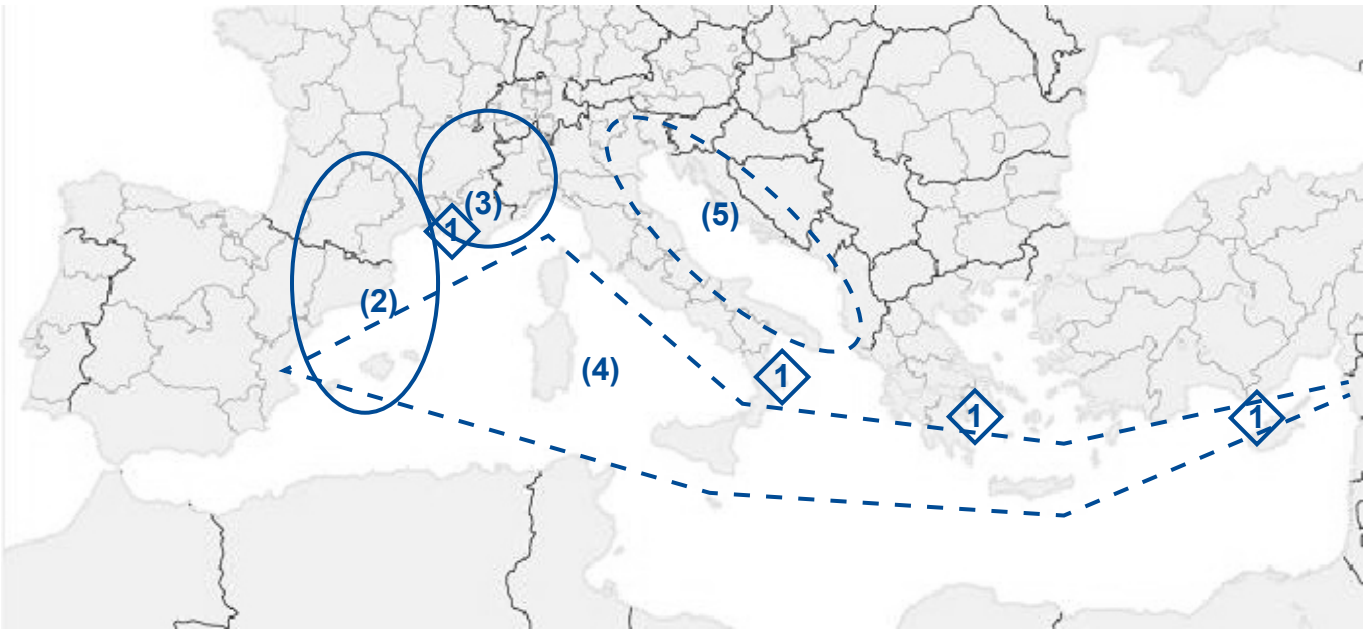
The two forces of territorial cohesion and the rise of sub-national governments, build on the consolidation of territorial cooperation as more effective vehicle to develop real cross-border regional initiatives, compared to intergovernmental cooperation. "International recognition" of this phenomenon came already in the 1980s through the Council of Europe's Madrid Convention, opening the path for cross-border cooperation and for innovative structures.[10] But this process has partially been hampered by dependence on intergovernmental deliberations and the emergence of a strong EU policy for territorial cooperation, via the INTERREG Community Initiative. Negotiation on the 2007-13 financial package confirmed cohesion policy as a main pillar of EU action, and consolidated the INTERREG Initiative (20 years old in 2009) into one of its three main Objectives.

We are now at a turning point. New institutional mandates and a new agenda for Europe 2020 are currently being shaped. The Lisbon Treaty and the EU budget revision will open the way to reform the whole EU policy framework. Key to it are the question of how place-based policies[11] can be combined with sectoral policies and how different levels of governments should interact to reinforce the European integration process at both local and European level. As the third issue, the article identifies some actions on the ground and EU incentives to make EGTC better fit for this purpose.

How do EGTCs enhance territorial cohesion across Europe?

Although the definition of "territorial cohesion" is being debated,[12] some objectives are not controversial: boosting territorial cooperation through new functional macro-regions; ensuring territorial cohesion both within the strongest territories of Europe as well as between these territories and the continent's weakest areas; and focusing policies according to different territorial formats. Early established EGTCs seem to meet these three objectives.

Figure1: EGTCs under establishment in the Mediterranean basin



Note: Established: 1) Amphictyony; Expected to be established: 2) Euroregion Pyrenees-Mediterranean, 3) Euroregion Alps-Mediterranean; Envisaged: 4) EURIMED – Mediterranean Islands, 5) Adriatic Euroregion; 6) network of small islands.

Firstly, through the EGTC, a new territorial cooperation scale is emerging: the functional macro-region. This goes beyond the traditional cross-border neighbourhood (150 km from border as ruled within structural funds) and is more focused than large transnational cooperation basins (e.g. the whole North-West Europe), as negotiated between national governments. These functional macro-regions are rather defined bottom-up on the basis of common needs, assets and a dense agglomeration of shared policy making. For example, the Mediterranean basin is experiencing such an emergence of EGTCs as new functional cooperation hubs, aimed at better structuring the specific territories and, contemporaneously, the larger basin. The current EU experimentation of integrated basin strategies (e.g. Baltic Sea Region, Danube River Basin, and to a certain extent the Union for the Mediterranean) and their concrete action plans could serve indeed to map out those areas where EGTCs can contribute substantially.

Through the EGTC, a new territorial cooperation scale is emerging: the functional macro-region.

Secondly, the emerging "EGTC geography" looks conducive to a more balanced development of the EU territory. Taking the well-known "Blue Banana"[13] as reference for the territorial backbone of Europe, we find (projects of) EGTCs which potentially can:[14]

1. bring coordination to its core territories, e.g. Grande Region, Strasbourg-Ortenau;
2. enhance the European position and the urban-rural interconnection of its internal weakest spots, e.g. West Vlandereen/Flandres-Dunquerque-Côte d'Opale and Eurometropole Lille-Kortrijk-Tournai versus the London-Paris-Brussels triangle;
3. extend its reach, e.g. towards the Mediterranean Arc, see Euroregion Alps-Mediterranean, Euroregion Pyrenees-Mediterranean;
4. pool the distinctive and dispersed territorial resources available at the periphery, e.g. Galicia-Norte Portugal, Duero-Douro, Amphictyony, Ister-Granum, Karst-Bodva.

Thirdly, EGTCs are applicable to a variety of territorial formats, e.g.:

1. large-scale Euroregions (Galicia-Norte Portugal, Pyrenees-Mediterranean, Alps-Mediterranean), of between 50,000 and 100,000 km^2, with 5 to over 15 million inhabitants;
2. medium-scale inter-provincial regions (Eurometropole Lille-Kortrijk-Tournai, Eurodistrict Strasbourg-Ortenau, Ister-Granum, West Vlandereen/Flandres-Dunquerque-Côte d'Opale, Duero-Douro), of between 2,000 and 10,000 km^2 with up to 2 million people;
3. small-scale cross-border or inter-municipal cooperation (Karst-Bodva, 53 km^2 with around 2,000 people, or Amphictyony).

Are established EGTCs stretching the Regulation beyond its original scope of purely operational cooperation, fostering political cooperation?

Although the evidence is not conclusive, some early signals indicate a positive answer.

The Regulation itself makes a wide range of tasks potentially available to EGTCs, despite its wording may appear somehow "timid" on this point. The legislator's main concern was to keep functional cooperation, in particular structural funds management, as the main raison d'être of the new tool.[15]

However, because of existing cooperation arrangements, amongst others, local and regional authorities are moving to a different agenda. The first EGTCs are marked by a higher level of political engagement and ambition, which are perceived as constituting a substantial shift in terms of EU recognition and international positioning of "local" cooperation, providing an opportunity to enhance territorial governance (organisation of relationships among policy-makers and stakeholders) at large.

Table 1 illustrates the horizontal objectives and co-operation themes as emerging from EGTC Conventions.

At first sight, Conventions appear to confirm that EGTCs are vehicles for operational cooperation in key themes for territorial development and for structural funds' management. However, as broad partnership "contracts", they also reveal a willingness to enhance political cooperation and multilevel governance across borders and beyond, promoting the external representation of shared interests, rather than purely adopting a project-oriented logic.

This is clear from some of the Conventions: they state as objectives the reinforcement of internal political cohesion and the promotion of interests within EU and national institutions. This is not called for by the Regulation; they foresee the figure of a President, and of a Bureau which is not expressly indicated in the Regulation;[16] some of them profile the role of their representative (office) in Brussels;[17] some decide to sign their EGTC Convention in Brussels within a high-level institutional and political context.[18]

This level of ambition is more evident in the multi-purpose EGTCs set-up so far. However one should also consider monothematic EGTCs, where operational cooperation is likely to prevail and which could become valid interfaces to deliver major EU policies. There are EGTCs under preparation which would deal with cross-border health (Hôpital de Cerdagne) or with cross-border protected natural areas (joint alpine park Italy-France: Parc National Mercantour and Parco Regionale Alpi Marittime). In this regards, EGTCs can effectively implement EU thematic programmes (transport, energy, research, innovation, climate, environment, learning, etc.).[19]

Which actions on the ground and institutional incentives can make EGTC a better lever for EU integration?

If the EGTC is to bring added value to EU integration, it should succeed in creating the right conditions for sustainable territorial cooperation which delivers results beyond short-term planning. Long-term EGTC cooperation implies setting up an ongoing cost-benefit analysis on establishment

Table 1: EGCT Conventions

EGTC	Horizontal objectives	Cooperation themes
Eurometropole Lille-Kortrijk-Tournai	• Dialogue and political debate • Cross-border cohesion • Project development • Ease daily life of inhabitants	• Transport • Urban ecology • Highways
Ister-Granum	• Regional development • Economic and social cohesion	• Territorial cooperation programmes/ projects
Galicia-Norte Portugal	• Territorial cooperation • Economic and social cohesion • Sustainability	• Transport and cross-worder accessibility • Maritime sector • Competitiveness (SMEs) • Environmental protection, urban sustainable development
Amphictyony	• Territorial cooperation • Freedom, democracy, justice, security and protection of the environment • Economic and social cohesion • Exchange of information and knowledge	• Programmes funded by EU or not • Scientific cooperation • Data banks, ICT • Cultural heritage • Participation of social and local entities
Karst-Bodva	• Territorial cooperation • Economic and social cohesion • Infrastructure development	• Programmes funded by EU • Competitiveness (SMEs) • Tourism and cultural heritage • Environmental protection, communal and rural areas • Transports, ICT, water supply, energy systems, communal and industrial waste management
Duero-Douro	• Territorial cooperation • Economic and social cohesion	• Programmes co-financed by EU • Public works • Rural employment, environmental protection • Social infrastructure • Communication and IT, competitiveness • Research, innovation and development • Tourism, common cultural heritage
West-Flanderen - Dunquerque-Côte d'Opale	• Territorial cooperation • Political representation • Representation in other fora	Not specified
Euroregion Pyrenees – Mediterranean*	• Territorial cooperation • Common projects and others beyond territorial boundaries • Economic and social cohesion • Sustainability	• Technological innovation, research, training, culture, tourism • Admin, judicial, economic cooperation
Euroregion Alps-Mediterranean*	• Horizontal politics • Institutional coordination • Sustainability	• Transport, research, innovation • Environmental protection • Culture, tourism, education, training
Eurodistrict Strasbourg-Ortenau*	• Policy impulsion and lobbying • Project management • Political representation • Sustainability	• Spatial planning • Bilingualism, cross-border cultural space • Common infrastructures, public services • Support to socio-economic networking • Promotion of Strasbourg as EU capital

* EGTCs close to being established
Source: Authors' analysis of EGTCs' (draft) Conventions

and future development options, a clear definition of the governance system within the articulated set of EGTC bodies and between constituting members, a successful operational launch,[20] an effective planning and programme/ project implementation.

In our view, EGTC members should aim to increase the level of cohesion, effectiveness and efficiency of their cooperation, through some fundamental actions:

1. integrated territorial planning and the targeting of relevant basins of intervention, including interconnection with those territories neighbouring the cooperation area;[21]
2. focusing on policies with a clear impact on citizens and for which the constituting members have substantial competences, e.g. infrastructure and provision of services of general interest;
3. rationalisation and the pooling of initiatives, human and financial resources;

4. a sustainable financial framework, through adequate modelling of a mix of members' fees, service revenues, loans, fund-raising, and public-private partnerships;
5. proper "association" of economic and social partners;
6. interaction with other (EGTC) cooperation initiatives within the same territory or in the neighbourhood.[22]

Assuming that the EGTC (partnership) works properly at local level, institutional incentives at higher level can only reinforce it. EU and national Institutions, which decided to adopt the EGTC Regulation, are now expected to fully leverage it. How? Firstly, by acknowledging the political commitment of local and regional actors to legally bind their cooperation within an EU context. Secondly, by setting a proper policy offer, including innovative proposals for EGTC applications and financial incentives to fully promote the EGTC potential, under cohesion policy[23] as well as in fields like the environment, energy, rural development, transport, innovation, health, civil protection, etc.

We could envisage the "contractualisation" of the cooperation between the European Commission and the EGTCs.

In line with the above, and in order to promote a clear territorial impact of the EU law provisions, the idea of target-based contracts could be revamped. This idea takes us back to the White Paper on European Governance (2001) and the Commission's proposal on target-based tripartite contracts between the Commission, the States and the regional or local authorities as a flexible means of considering specific contexts when drawing up and implementing Community policies.[24]

Why a "contract" between the European Commission and an EGTC?

One could envisage the "contractualisation" of the cooperation between the European Commission and the EGTCs for achieving certain objectives, with higher targets agreed, a tighter timetable set or experimental actions foreseen.[25] An example could be the "enhanced" compliance of EU law (e.g. a Directive) or experimentation of EU policy (e.g. local strategy for growth and jobs, "low-carbon" cities and regions, integrated labour markets, etc.) at the level of the macro-region, cross-border conurbation or cross-border natural area, aiming at a more coherent and timely implementation on both sides of the border, also through experimental actions.[26]

Contractualising this cooperation would take the idea of tri-partite contracts back to the initial bilateral approach, without challenging the principle of Member State responsibility for implementing Community policies. This could address some of the difficulties experienced and shape a more feasible contract with a very specific purpose and well-defined agenda.[28] Such a contractualisation would legitimise and boost the role of the sub-state level in "beyond-the-border" policymaking and finally help to overcome those difficulties still existing in a given cross-border cooperation.

Cohesion policy could provide another incentive, fostering the macro-regional EGTC cooperation within the existing regulatory framework. This could be done through several means. Existing management authorities (under the convergence, competitiveness or cooperation objectives), could delegate (sub)-programmes to EGTCs; or territorial authorities could co-finance EGTC cooperation through funds allocated to their national or regional programmes (Art. 37(6) of the general Structural Funds Regulation No. 1083/2006).[29]

Assuming that this vision is agreed upon, what lies ahead? The European Commission is expected to report on the EGTC Regulation (ex. Art. 17) to the European Parliament and Council by 2011 at the latest. At that time, it will first report on the state of play of established EGTCs and eventually formulate proposals for revising the Regulation in those areas where shortcomings have been detected. Possible improvements include streamlining EGTC establishment procedures, which are still too heavily affected by a scattered panorama among Member States; thereby facilitating the participation of partners from Third countries and of private actors.

The EGTC cannot solve all the issues related to the administrative asymmetry between and within Member States, however it can be a valuable common playing field to start tackling these issues from the ground, especially when a critical mass of EGTCs will be reached. To achieve that, the EU and national institutions should provide better information on the range of applications available. In particular, the European Commission could submit a comprehensive roadmap for the further exploitation of territorial cooperation through the EGTC, bridging the existing experience with a forward-looking EU policy offer.[30]

Conclusions

At this early stage of its implementation, the EGTC has shown more potential than achievements, creating a new dynamism which could be beneficial both for territorial cooperation and European integration.

EGTCs are slowly drawing up a new legally stable cooperation geography, which could help achieve greater territorial cohesion across Europe. Thanks to their differentiated geographical scope, EGTCs can better interconnect the strongest and weakest spots within core areas of Europe, as well as link up the core backbones of European territory and better agglomerate the most peripheral areas. Moreover some EGTCs are about to shape new functional macro-regions, going beyond traditional cross-border cooperation.

It is too early for conclusive evidence, however the first EGTCs indicate that stable cooperation requires putting strong political commitment and institutional recognition, at all levels, before a project or programme-driven agenda. In this sense a number of EGTCs are likely to profile themselves as new inter-institutional governance platforms, besides acting as project-delivery vehicles.

Some actions seem opportune to make the EGTC fit the purpose of improving EU multilevel integration. At local level, the cooperation should be orientated to inclusive and operational partnerships rather than purely institutional gatherings. The participation of economic and social partners, as well as of national authorities, when relevant, should be actively promoted. At EU level, a clear set of policy offer , including institutional and financial incentives, should be put in place: result-oriented contractualisation between the European Commission and EGTCs could be an avenue to explore.

Last but not least, the first generation of EGTCs are likely not only to present challenges, but also to provide a set of "local solutions", tackling legal and administrative uncertainties and disparities. This knowledge/expertise could be managed at EU level to improve the "usability" of the tool and spread its leverage effects across applications: EU project or program management, large infrastructures, cross-border services, cooperation with third countries, etc.[31]

The EGTC can represent a significant development in the political landscape at local and regional level. It could bring a sense of European neighbourhood to citizens as well as provide local political classes with a substantial European perspective. A new vision for a generation of politicians, no longer divided by post-war borders, who would rather have the shared challenge of jointly projecting their borderless territory within, and beyond, our continent - Europe.

Annex: State of play in the establishment of EGTCs – at editorial closure, June 2009

a. EGTCs formally established[32]

EGTC name	Law nature	Countries of members*	No. of members	Nature of members	Reference Territory (km2)	Reference Population 1000 inhab.	Date of establishment
Eurometropole Lille-Kortrijk-Tournai www.lillemetropole.fr	Public	BE, FR	14	Mix level of government	3.544	2.000	21/01/08
Galicia-Norte Portugal (GNP)	Public	ES, PT	2	Regional	50.852	6.817	23/10/08
Ister-Granum EGTC Limited www.istergranum.hu	Private	HU, SK	85	Municipal	2.000	2.000	12/11/08
Amphictyony www.amphictyony.gr	Private	CY, FR, EL,IT	50	Municipal	n.a.	n.a	01/12/08
Karst-Bodva EGTC Limited	Private	HU, SK	3	Municipal	53	2	11/02/09
Duero-Douro www.duero-douro.com	Public	ES, PT	175	Municipal	8.785	103	11/02/09
West-Flanderen / Flandre-Dunquerque-Côte d'Opale www.cud.fr	Public	BE, FR	13	Mix level of government	7.808	2.079	25/03/09

* Underlined countries host the registered seat of the EGTC.

b. EGTCs expected to be established[33]

EGTC name	Law nature	Countries of members*	No. of members	Nature of members	Reference Territory (km2)	Reference Population 1000 inhab.
Euroregion Pyrenees-Mediterranean www.euregio.eu	Public	ES, FR	4	Regional	109.666	13.550
Euroregion Alps-Mediterranean www.euroregion-alpes-mediterranee.eu	Public	FR, IT	5	Regional	109.179	16.880
Eurodistrict Strasbourg-Ortenau www.eurodistrict.eu	Public	FR, DE	7	Municipal and inter-municipal	2.176	868

* Underlined countries host the registered seat of the EGTC.

c. EGTCs whose establishment is under consideration (not exhaustive list)

Cooperation name	Countries of partners	Focus of cooperation
Cerdany Joint Cross-border Hospital www.hcerdanya.eu	ES, FR	Cross-border health
La Grande Région www.granderegion.net	BE, DE, FR, LU	Integrated territorial development of large area
Parc Mercantour – Parc Alpes Maritimes www.mercantour.eu www.parcoalpimarittime.it	FR, IT	Natural areas preservation and valorisation
Espace Catalan Transfrontalier	ES, FR	Interprovincial cooperation
Alzette-Belval 2015	FR, LU	Urban and territorial requalification of a carbon basin
EURIMED	CY, EL, ES, FR, IT, MT	Network of Mediterranean main Islands
UTTS Ung-Tisza- Túr -Sajó (or UTT Ung-Tisza-Túr)	HU, RO, SK, UA	n.a.
Eurocidade Chaves-Verin	ES, PT	Cross-border urban development
Alpe Adria Working Community www.alpeadria.org	AT, HR, HU, IT, SI	Integrated territorial development of large area
Adriatic Euroregion www.adriaticeuroregion.org	AL, EL HR, IT, ME, SI,	Sustainable development of sea basin

NOTES

* Gianluca Spinaci, Committee of the Regions, Cellule de Prospective, Administrator. Writing in a personal capacity.

** Gracia Vara-Arribas, Senior Lecturer, European Centre for the Regions, EIPA Barcelona.

1 Contracting authorities as defined by Art. 1 of Directive 18/2004/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30 March 2004.

2 There is a general preclusion to the exercise of powers conferred by public law to safeguard the general interest of the state or other public authorities. See Art. 7 of Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC) OJ L 210, 31 July 2006.

3 Gianluca, S. (2008).

4 EGTC Regulation, Art. 16/18, "Member States shall make such provisions as are appropriate to ensure the effective application of this regulation", which "should apply by 1 August 2007, with exception of Art. 16, which shall apply from 1 August 2007". 18 Member States have adopted EGTC legislation: Belgium (federal level, Flanders), Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Greece, Hungary, Italy, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom. Process close to finalization in: Austria, Germany, Ireland, Malta, The Netherlands. Process underway in: Finland, Latvia, Poland, Sweden.

5 Opinion CoR 181/2000 fin of 13 March 2002 on Strategies for promoting cross-border and inter-regional cooperation in an enlarged EU - a basic document setting out guidelines for the future.

6 The Union "shall promote economic, social and territorial cohesion…" (Art. 3 of the modified Treaty on EU).

7 Faludi, A. (2004).

8 Exception: Regulations defining common classification of territorial units for statistics (NUTS).

9 These represent: 16% of EU27 GDP; 1/3 of public spending; 2/3 of all public investment expenditure; 56% of public employment. DEXIA, 2009.

10 European Framework Convention on Transfrontier Cooperation, (Madrid 21 May 1980), Additional Protocol, 9 November 1995 and Protocol No. 2, 5 May 1998 concerning inter-territorial cooperation, paved the way to cross-border institutional settings, like Euroregions and working communities.

11 Barca, F. (2009).

12 The consultation on the European Commission's Green Paper on Territorial cohesion (COM(2008) 616 final of 6 October 2008) produced a wide range of replies with different understandings on the definition of territorial cohesion and the role of the Communities.

13 It is a discontinuous corridor of urbanisation in Western Europe, which stretches approximately from London down to Milan, through Brussels, Amsterdam, Cologne, Frankfurt am Main. It covers one of the world's highest concentrations of people, money, and industry.

14 EGTCs under preparation are written in italics.

15 "… The tasks of an EGTC shall be limited primarily to the implementation of territorial cooperation programmes or projects co-financed by the Community". Art. 7(3)

16 Art. 10 EGTC Regulation: "An EGTC shall have at least the following organs: (a) an Assembly, (…) (b) a director (…)".

17 Euroregion Alps-Mediterranean, Art. 4 draft Convention; Euroregion Pyrenees-Mediterranean, Art. 8/13 draft Statute; Ister-Granum EGTC, Art. 2 Statutes.

18 Euroregion Pyrenees-Mediterranean at the European Parliament, 3 December 2008.

19 Ref. : TEN-T, TEN-E, FP RTD, CIP, Climate Action, Intelligent Energy, etc.

20 Illustrative check-list: constitution of running bodies, establishment of (pluri-)annual work-plan and budget, nomination of director(s), staff hiring and establishment, launch of operational projects; communication on the field and at EU level.

21 EGTC Eurometropole Lille-Kortrijk-Tournai, Art. 4, Convention: "Territories, towns and municipalities, placed outside the reference territory, however bordering or close to it, could be associated to the works of the Eurometropole".

22 e.g.: Euroregion Alps-Mediterranean/Parc Mercantour-Parco Alpi Marittime; Euroregion Pyrenees-Mediterranean/Espace Transfrontalier Catalan/Hôpital Cerdagne;Grande Region/Euroregio Maas-Rhine/Alzette-Belval.

NOTES

[23] European Territorial Cooperation currently counts 7.75 billion euros (2.5% of cohesion policy' allocation), hence less than 1% of EU budget, less than 0.01% of EU Gross National Income.

[24] The tripartite contracts were left aside in 2006 when the pilot projects were evaluated as lacking political commitment and financial support.

[25] Ref.: Gianluca, S. (2009).

[26] The authors will soon publish a follow-up article, presenting the operational solutions available for contracts between the European Commission and EGTCs.

[27] Working Group 2c, Preparatory works for the WBEG, European Commission.

[28] Vara-Arribas, G., Bourdin, D. (2006).

[29] Gianluca, S. (2006).

[30] In the RTD field, the new legal tool European Research Infrastructures Consortium (ERIC) is backed by a European Roadmap on Research Infrastructures.

[31] This is among the objectives of the EGTC Expert Group, established by the CoR, www.cor.europa.eu/egtc.htm.

[32] "The EGTC shall acquire legal personality on the day of registration or publication, whichever occurs first", Art. 5(1) Reg. 1082/2006. OJEU notices of establishment are at www.ted.europa.eu. EGTC Conventions and Statutes are at www.cor.europa.eu/egtc.htm.

[33] Convention and Statutes are already agreed (or signed). Procedures of approval by national authorities are underway.

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Training and Human Resource Development in the European Union Member States: New Practices and Innovative Trends

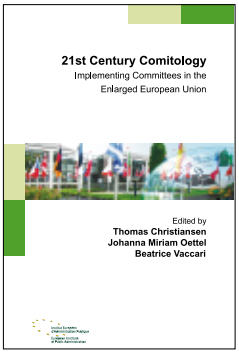
Danielle Bossaert
ISBN 978-90-6779-210-3
Price € 45.00 (including postage and packing in Europe)
EIPA 2009, 166 Pages, 2008/05

In an age characterised by rapid economic, political and technological change, training has become a key element in the development of a more professional human resource management (HRM) as well as an important lever for facilitating cultural change at the workplace.

During the last decade, many European countries have reviewed their training approach in the context of the reform processes in the public sector and of the introduction of a more professional HRM. Although these processes vary in scope and ambition in the different countries, it is interesting to analyse whether there have been any common developments in the field of training during the last decade and what impact modernisation of the public sector has had on training in general.

One major objective of this publication is to take a closer look at some modern practices in the field of training, by focusing on questions to determine who the main actors in the field of training and what their competences are, how training is organised, how it is linked to the other elements of HRM (selection procedures, career development, promotion etc.) and what the prerequisites of an effective evaluation methodology are.

This publication will be of interest to practitioners who have to muddle through sometimes difficult reform processes as well as academics studying recent developments and trends in the field of public sector training.



21st Century Comitology: Implementing Committees in the Enlarged European Union

Thomas Christiansen, Johanna Miriam Oettel and Beatrice Vaccari (eds)
ISBN 978-90-6779-212-7
Price € 60.00 (including postage and packing in Europe)
EIPA 2009, 390 pages, 2009/01

21st Century Comitology brings together an international group of experts, from scientific scholars to policy makers, who provide an up-to-date and comprehensive account of comitology today. The book looks at comitology – the system of committees working with the European Commission to implement EU legislation – from a range of different perspectives; examining the theoretical foundations, the past evolution, the current practice and the future challenges of the system.

Individual chapters are devoted to recent developments in key sectors (such as financial services regulation or the authorisation of genetically modified organisms), whilst other authors address the respective roles of the European Parliament and the European Court of Justice in developing the rules of the system. A major theme of the book is recent changes to comitology; with authors addressing the outcome of the 2006 legislative reform, the debates about comitology in the context of the current round of Treaty reform, and the impact that enlargement with the arrival of 12 new Member States has had on the system. With respect to comitology reform, the book also contains contributions from insiders providing accounts from the perspective of the Parliament, Council and Commission.

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Marga Pröhl & Alexander Heichlinger
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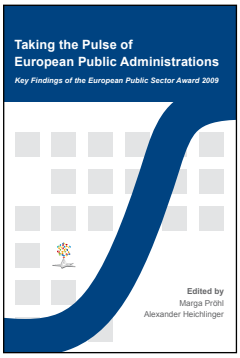

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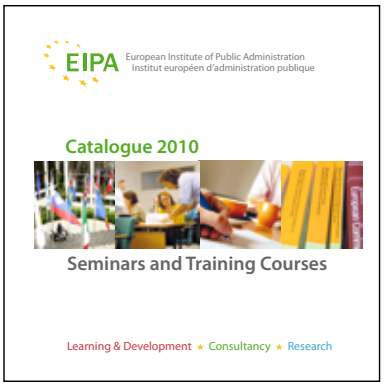

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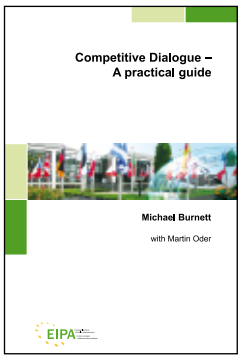

Competitive Dialogue – A practical guide

Michael Burnett with Martin Oder
ISBN 978-90-6779-214-1
Price to be determined
EIPA 2010, 197 Pages, 2009/02

Competitive Dialogue was created by the 2004 Public Procurement Directives as a new and more flexible solution for public authorities wanting to award contracts for complex infrastructure projects.

Some predicted that it might be used only rarely and others saw problems in applying it effectively to obtain value for money for the public sector. But it is now firmly established in Europe as a means of awarding public contracts, with more than 3000 award procedures launched.

Yet objective advice for decision makers on when and how to use Competitive Dialogue effectively is hard to find. Cutting through the jargon and the misconceptions, this book is an independent guide for those at all levels in Europe facing these challenges.

Different approaches have been used in applying Competitive Dialogue, in particular for the conduct of the dialogue phase and in the interpretation of what can be done in the post tender phase. But not all methods have proved to be equally effective in promoting value for money for the public sector. After assessing the different approaches used so far, the authors now conclude there are clear benefits to standardising the approach to the implementation of Competitive Dialogue.

Written from a public sector perspective, this book has two main audiences in mind, i.e.:

- European decision makers responsible for creating and implementing an appropriate legal framework at EU level for Competitive Dialogue
- Politicians, public officials and their professional advisers in EU Member States currently facing choices about when and how to use Competitive Dialogue in a way which provides both legal certainty and maximises the likelihood of achieving value for money.

After an explanation and analysis of legal framework for Competitive Dialogue, the book sets out how Competitive Dialogue emerged, how it compares to the Negotiated Procedure, the legal challenges in applying Competitive Dialogue, when it is appropriate to use it and where it is being used in the EU. Successive chapters then analyse the key issues arising in the implementation of Competitive Dialogue at each stage of the process and how they should be addressed.

Finally, the book draws together the key conclusions for the future use of Competitive Dialogue and the actions needed to implement them at EU and national level. Taken together, they add up to an agenda for the future effective use of Competitive Dialogue.

The stakes in terms of the need to improve Europe's infrastructure and the effective implementation of key European policies, such as compliance with environmental legislation and the completion of the Internal Market, at an affordable cost are too high for it to fail.

Using Competitive Dialogue in EU Public Procurement – Early Trends and Future Developments

Michael Burnett*

Affordable and timely implementation of complex infrastructure projects is crucial to the completion of the EU Internal Market and meeting deadlines for the implementation of EU environmental legislation. Competitive Dialogue was created by the 2004 Public Procurement Directives as a new and more flexible solution for public authorities wanting to award contracts for such projects. But some predicted that it might be used only rarely and others saw problems in applying it effectively to obtain value for money for the public sector. Yet it is now firmly established in Europe as a means of awarding public contracts, with more than 3000 award procedures launched. This article assesses how and where the procedure has been used so far and the challenges at European and national level for using it effectively in future.

What is Competitive Dialogue and why does its effective use matter?

Competitive Dialogue is a new procedure for awarding public contracts, introduced by the latest EU Public Procurement Directives[1] (the Public Procurement Directives).[2]

It is meant to allow a public entity which knows what outcome it wants to achieve in awarding a public contract but does not know how best to achieve it to discuss, in confidence, possible solutions in the dialogue phase of the tender process with short listed bidders before calling for final bids.[3] This can often occur in the case of complex and high value infrastructure projects.

To achieve this aim, Art. 1(11)(c), Directive 2004/18 defines Competitive Dialogue as "a procedure in which any economic operator may request to participate and whereby the Contracting Authority conducts a dialogue with the candidates admitted to that procedure, with the aim of developing one or more suitable alternatives capable of meeting its requirements, and on the basis of which the candidates chosen are invited to tender".

The use of the Competitive Dialogue procedure by public authorities[4] wishing to award "particularly complex" contracts[5] is very explicitly (though not exclusively) linked with the implementation of Public Private Partnerships (PPP).[6]

The importance of the effective application of PPP in meeting the infrastructure needs and service delivery objectives of the public administrations across Europe, and the implementation of key EU policies, can hardly be overstated.

There are strong pressures both in old and new EU Member States driving public authorities to use PPP as a means of delivering public services e.g. budgetary pressures (whether in or out of the euro zone) leading to the need

for cost reduction, better revenue collection and financing of infrastructure investment and pressures from citizens as consumers with ever higher service expectations. In some cases public entities seek also to use PPP as a way of introducing private sector management skills for different methods of service delivery and use public assets more effectively.

One consequence of the budgetary pressures facing EU Member States is a "funding gap" between the financing needed to implement the policies and the public funds available e.g. by completing the Trans-European Networks (TENs), and enabling Member States, and particularly the new Member States, to comply with EU environmental legislation, which often have specific deadlines for implementation.

Why was the Competitive Dialogue procedure needed?

Prior to the introduction of the Competitive Dialogue procedure, Contracting Authorities faced a dilemma in determining how to conduct a contract award for complex contracts.

Even if Contracting Authorities had a good idea in advance of the award process of the precise shape of the key features and the strengths and weaknesses of potential solutions to their needs, and often they did not, there were practical difficulties in enabling them to remain open to the development of their ideas to improve those solutions.

Competitive Dialogue aims to make it easier for the public sector to avoid legal challenges in awarding complex infrastructure contracts.

They faced the choice between the Restricted Procedure and the Negotiated Procedure but:

- The Restricted Procedure constrained competitive innovation between suppliers and prohibited negotiations once the award process had started, in essence by requiring the Contracting Authority to have defined the service specification (what was to be done, how and to what standards) and the contractual terms and conditions in advance of the process. This was restrictive, particularly for PPP contracts, even if the Contracting Authority prepared an outcome-based specification, because the Authority may not have incorporated the most innovative solutions into the specification and, even if it had, the Restricted Procedure, though permitting clarification and supplementing of information in tenders, does not allow post offer negotiations.[7]
- The Negotiated Procedure, while allowing such competitive innovation, and in particular allowing post offer negotiations, was intended to be an exceptional procedure designed to be very difficult to justify under the former EU Public Procurement Directives.[8]

In reality the boundaries of both were stretched - in the Restricted Procedure post-offer clarification became quasi-negotiation and, prior to the issue of the Invitation to Tender it was possible for a Contracting Authority to consult the short list on the draft contract documentation, whereas Contracting Authorities often hid behind legal opinions justifying the Negotiated Procedure which were far from robust. Neither of these types of action was widely challenged because:

- Losing bidders moved on to the next opportunity and/or were often reluctant to be seen to be aggrieved lest they prejudice their chances for future opportunities either with the Contracting Authority or more widely in the market.
- The variability of independent national scrutiny and ease of securing redress meant that the practices did not come to light in a consistent way.
- The Commission focused its resources and energies on challenging the use of the Negotiated Procedure without prior publication rather than the use, per se, of the Negotiated Procedure where the Contracting Authority had at least published a notice in the OJEU.

This situation was nevertheless unsatisfactory, forcing Contracting Authorities to choose between the need for flexibility and the need for legal certainty, because they could not be certain that the Commission would not change its focus and start to challenge more regularly the use of the Negotiated Procedure with prior publication or a broader interpretation of what was permitted after the receipt of tenders by Restricted Procedure.

The Commission recognised this situation but did not want to widen the scope of the use of the Negotiated Procedure with notice and thus proposed a new procedure, Competitive Dialogue, "in response to the finding that the "old" Directives, Directives 92/50/EEC, 93/36/EEC and 93/37/EEC, do not offer sufficient flexibility with certain particularly complex projects due to the fact that the use of negotiated procedures with publication... is limited solely to the cases exhaustively listed in those Directives".[9]

Early trends in the use of Competitive Dialogue in the EU

Extent of use of Competitive Dialogue

Competitive Dialogue has started to be used widely within the EU, following the transposition of the Public Procurement Directives into national law, which was due to be completed by 31 January 2006.

As of 19 June 2009, 3027 contract notices relating to Competitive Dialogue procedures had been published in the Official Journal of the European Union.[10] This appears to have allayed the concerns expressed by some early commentators[11] that Contracting Authorities may be unwilling to use the procedure on the grounds that it does not provide sufficient flexibility as compared to the Negotiated Procedure.

The use of Competitive Dialogue is nevertheless very uneven to date as between EU Member States, with 80.4% of the cases where Competitive Dialogue has been used being in France (40.9%) and the United Kingdom (39.5%). A further three Member States, Germany, Poland and the Netherlands, account for 9.3% of the number of contract notices, with the remaining 22 Member States and other bodies, including European institutions and agencies, accounting for slightly more than 10% of the total number of notices.

Methods of application of Competitive Dialogue[12]

The legal provisions of Art. 29, Directive 2004/18 for the dialogue phase of the Competitive Dialogue Procedure may be summarised as follows i.e. that:

- "Contracting Authorities shall open, with the candidates selected... a dialogue... to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue".
- "During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. In particular, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. Contracting Authorities may not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without his/her agreement".
- "Contracting Authorities may provide for the procedure to take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice or the descriptive document. The contract notice or the descriptive document shall indicate that recourse may be had to this option".
- "The Contracting Authority shall continue such dialogue until it can identify the solution or solutions, if necessary after comparing them, which are capable of meeting its needs".
- "Having declared that the dialogue is concluded and having so informed the participants, Contracting Authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. These tenders shall contain all the elements required and necessary for the performance of the project".

As regards the post tender phase, Directive 2004/18 provides that:

- "(The final tenders received) may be clarified, specified and fine-tuned at the request of the Contracting Authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for tender, variations in which are likely to distort competition or have a discriminatory effect".[13]
- "At the request of the Contracting Authority, the tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender or confirm commitments contained in the tender provided this does not have the effect of modifying substantial aspects of the tender or of the call for tender and does not risk distorting competition or causing discrimination".[14]

But both of these sets of provisions in Directive 2004/18 leave Contracting Authorities with significant discretion in the implementation of the Competitive Dialogue Procedure, though subject to the need to comply with EU Treaty principles enshrined in the Public Procurement Directives of equality of treatment and non-discrimination, and different approaches to the dialogue phase and the post tender phase are starting to emerge.

The conduct of the dialogue phase

The emerging evidence of practice to date in the dialogue phase is that different decisions are being made about the number of phases in the dialogue, the objectives of the dialogue sub-phases, how the phases are conducted, the time to be allowed for the dialogue phase, the information to be requested from bidders in the dialogue sub-phases, whether or not elimination of solutions should occur during the dialogue phase and, crucially, the position which the Contracting Authority needs to arrive at by the end of the dialogue phase.

Competitive Dialogue is now firmly established in Europe as a means of awarding public contracts, with more than 3000 award procedures launched.

The current methods of conducting the dialogue phase may be summarised as follows:

- Inviting several solutions, then narrowing the differences between them towards a single merged solution i.e. to use the early part of the dialogue phase to develop a hybrid solution (one based on the best features of the solutions proposed by the different participants).[15]
- Inviting outline solutions and then one or more progressively more detailed solutions.
- A consecutive approach i.e. dialogue first on technical/operational aspects and then on financial aspects of the offer.
- Starting from a provisionally preferred solution of the Contracting Authority and inviting bidders to comment on it by marking up the solution as the basis of the dialogue.

All of the approaches described here are compatible with the legal requirements for the Competitive Dialogue procedure in general and the dialogue phase in particular. But the fact that they are legally permissible does not mean that, in terms of the likelihood of securing value for money for the public sector, they are necessarily equally effective.

The main conclusions emerging from these different approaches are that:

- Most of the approaches have, in practice, led to at least two sub-phases within the dialogue phase.
- There has not always been sufficient clarity about the objectives of each sub-phase i.e. what the Contracting Authority needs to have achieved at the end of each sub-phase.
- The methods used in the dialogue phase have converged towards written submissions by bidders, regular one to one discussions between the parties, presentations by bidders, availability of information through extranets, access by bidders to relevant personnel of the Contracting Authority and submission of interim solutions by bidders.
- The time allocated in practice by Contracting Authorities for the dialogue phase has varied widely, with the observed range being between one and eight months.
- There are practical difficulties associated with the approach of inviting outline, then detailed solutions because of the pressure that it creates on the Contracting Authority if it has failed to devote sufficient resources

to understand the issues associated with the project in detail and to work out its approach to them in advance of discussions with bidders, thus placing it at a disadvantage in the dialogue.
- It is difficult in practice to separate out the technical/ operational and financial aspects of a bid because of the links between the cost of project and its scope, duration and performance standards.

The conduct of the post tender phase

In the conduct of the post tender phase there are different interpretations of the terms "clarifying", "specifying" and "fine-tuning" tenders, and, following the selection of the winning bidder, where there are different interpretations of the terms and "clarify aspects of (the winning) tender" and "confirm commitments in (the winning) tender".

Where these terms are interpreted restrictively, the post tender phase can be completed quickly, in contrast to the post-offer phase in the Negotiated Procedure which in many cases has lasted between 12 and 18 months.

Challenges for the future

An experimental period in the use of the Competitive Dialogue procedure has, broadly, been beneficial. Diversity of practice to date has created an opportunity to assess different emerging practice in the application of Competitive Dialogue and to blend it with existing good practice in the Negotiated Procedure.

But, having had the opportunity to experiment with different approaches, it raises several questions about the development of future practice in the application of Competitive Dialogue.

Are all the emerging approaches equally valid? And how should their fit with the key criterion of achieving value for money through transparent and competitive procurement be assessed?

Most importantly, are there now clear benefits to standardising the approach to the application of Competitive Dialogue and clear pointers to aid the development of an optimal methodology, i.e. one which will promote value for money for the public sector?

These questions mainly centre on two areas i.e:
- The extent to which the core approach to the dialogue phase should be consultative or investigative.
- The extent to which the terms "clarifying", "specifying" and "fine-tuning" tenders, and, in the phase following the selection of the winning bidder, "clarifying aspects of (the winning) tender" and "confirm commitments in (the winning) tender" should be permissive or restrictive.

A consultative or investigative approach to the dialogue phase?

These approaches may be distinguished as follows:
- A consultative approach to the dialogue phase is one, in essence, based on the Contracting Authority's solution(s) i.e. a solution or solutions developed by the Contracting Authority as its provisionally preferred solution(s) and launched by it at the opening of the dialogue phase. In practice, this means that the dialogue phase will start with the marking up (proposed amendments/comments) by bidders of the Contracting Authority's preferred solution(s).

This enables the Contracting Authority to manage the dialogue phase with reference to its own provisionally preferred solution(s), basing it on variations to its own solution.

Put simply, the consultative approach defines the dialogue phase as, in principle, a dialogue about a single solution - that of the Contracting Authority - and variations about implementing that solution rather than competition between different solutions of different bidders:
- An investigative approach to the dialogue phase is one based on bidder-driven solutions. This starts from a definition by the Contracting Authority of its objectives and desired outcomes but less definition of the elements of the preferred solution(s). In this method, the dialogue phase will typically start with the submission of outline solutions by the bidders which subsequently become more refined during the course of the dialogue.

A permissive or restrictive approach to the post-tender phase?

Competitive Dialogue has been applied in several different ways so far but not all of them are equally effective in achieving value for money.

What may be termed a permissive approach to the post tender phase may be characterised as an attempt to base the approach to that stage of the award process on the approach often applied in the Negotiated Procedure, i.e. with the fast track selection of a "preferred bidder" on the basis of heavily conditional offers, or, in some cases, indicative offers. This was then followed by lengthy post-tender negotiations with the "preferred bidder" after competition had been eliminated, often on significant elements of the contract.[16]

In a restrictive approach, the extent to which changes are made to the contract after tenders have been submitted and even more so after the selection of the winning tender are minimised by:
- A wide definition of what constitutes the "basic features of a tender" and "substantial aspects of the winning tender".
- A wide definition of what might be regarded as an actual or potential distortion of competition or what might have a discriminatory effect at that stage.
- Consequently, a narrow definition of how much and what type of variation to tenders can be permitted in the process "clarifying", "specifying" and "fine-tuning" the final tenders and of "clarifying aspects of (the winning) tender" and "confirming commitments in (the winning) tender".

In such a restrictive approach, it also means that the process of "clarifying", "specifying" and "fine-tuning"

tenders and "clarifying aspects of (the winning) tender" and "confirming commitments in (the winning) tender" refers solely to actions taken by the Contracting Authority and does not include the right of bidders to re-open issues resolved at an earlier stage in the process or to amend their tender.

Conclusions

The author's view is that it would be desirable in the context of securing value for money for the public sector if a consultative approach to the dialogue phase were to emerge as good practice, though, using such an approach, the dialogue phase can only be launched when the Contracting Authority has a clear prior understanding of the possible technical solutions, the strengths and weaknesses of those solutions, the optimal allocation of risks, and the approximate cost of the solutions.

Ultimately, a Contracting Authority will, in any event, as part of the process of determining the final form of the contract and of evaluating the tenders, have to form judgments on these matters, so this approach is likely to represent a shift in the timing of work by the Contracting Authority (and thus the timetable for different phases of the procedure) rather than an increase in its overall workload or increase in the overall elapsed time for the procedure.

If properly applied, Competitive Dialogue leads to the detailed planning necessary for effective procurement of infrastructure.

Furthermore, developing a prior understanding of the potential solutions is not only desirable but should be a logical next step for a Contracting Authority if it has conducted a rigorous market assessment before launching the opportunity, supplemented, if necessary by pre-dialogue discussions with the short list. Such pre-dialogue discussions are not forbidden by Directive 2004/18, to the extent that they do not distort competition, i.e. that such discussions do not give one or more economic operators an unfair advantage over others (because of, for example, having received more or more detailed information). They will also have to do so to develop outline and final business cases, where this forms part of the process of investment appraisal of projects, for subsequently seeking approval for their inclusion in capital expenditure programmes and launching the procurement.

Put simply, it enables the Contracting Authority to stay in control of the process of arriving at the ultimate optimal means for delivering the project which is the subject of the award procedure.

It is also worth noting that, following the inclusion in Directive 2004/18 of provisions[17] requiring the disclosure of the award criteria and their weighting,[18] recent court judgments, both in the ECJ and national courts, have marked a trend towards a requirement for more detailed disclosure of the basis on which contracts are awarded i.e. not merely of the main evaluation criteria and their weighting but also of the award sub-criteria.[19] This is in order to fulfil the obligation of Contracting Authorities to ensure that tenderers should be aware of all elements to be taken into account in evaluating tenders, including their relative importance.

The fact that there is now likely to be greater disclosure of the basis on which contract are awarded (and thus closer scrutiny and potential challenge) is another reason why Contracting Authorities should tend towards the consultative approach to the dialogue phase. Put simply, the greater the detailed understanding by a Contracting Authority of how its needs might be met, the greater will be its ability to refine the evaluation criteria and their weighting in a way which enables them to meet the demands of this additional scrutiny.

Similarly, the author considers that the emergence of a restrictive approach to the post-tender phase as being desirable, as well as being, in the author's view, implicit in the wording of the legislation.

The main weaknesses of the permissive approach to the post-tender phase in a Competitive Dialogue Procedure are already evident from its application in the Negotiated Procedure i.e.:

- It leaves the Contracting Authority in a weak negotiating position and that, therefore, there is a risk that the terms of the contract finally agreed will become significantly less favourable to the public sector than those envisaged at the time the preferred bidder was selected. This is because the preferred bidder may subsequently seek to introduce qualifications and conditions associated with the matters included in the initial offer which are stated to be guaranteed and which were relied upon by the Contracting Authority in selecting the preferred bidder. In the case of PPP contracts this frequently occurred because of the demands of lenders not sufficiently engaged with the process until the winning bidder was selected.[20] In practice, it is then difficult for a Contracting Authority to resist pressure arising from the momentum of the negotiations and the time invested in the process to date to strike a deal which may no longer then represent value for money as compared to alternative service delivery methods originally considered in the options appraisal and/or the terms offered by the second placed bidder.
- The consequent risk is that, if the final contract signed is one which, in the view of the nearest contender to the preferred bidder, could have been negotiated with them on terms as favourable as those ultimately agreed with the preferred bidder, there may be a challenge from nearest contender which could be embarrassing, time consuming and expensive to respond to.

The arguments for a restrictive approach thus rest on both value for money grounds i.e. of the benefits of substantially fixing the terms of the contract while bidders are subject to competitive pressures, and on legal grounds i.e. to minimise the risk of breaching the principles of transparency, equality of treatment and non-discrimination.

In the case of Competitive Dialogue, the argument for a restrictive approach is enhanced by the provisions of Directive 2004/18, since there is also the explicit freedom

to opportunity to resolve uncertainties during the dialogue phase because all aspects of the contract may be discussed and by the requirement in Art. 29(6) of Directive 2004/18 that the final tenders "shall contain all the elements required and necessary for the performance of the project".

The use of a restrictive approach is not, however, solely for the benefit of the Contracting Authority – it can also act as protection to bidders from attempts by the Contracting Authority to re-negotiate the contract in its own favour as part of the post tender process.[21]

But the emergence of an optimal methodology for the application of the Competitive Dialogue Procedure remains in the balance – there is, for example, no case law to date relating to the Competitive Dialogue Procedure in the ECJ and very little in national courts. Lack of legal certainty might thus lead Contracting Authorities to refrain from using this new procedure and lead them to use instead the Negotiated Procedure with which they are much more familiar, despite the legal risks associated with that route.

Similarly, such guidance from the European Commission and at national level as exists[22] for the practical application of the Competitive Dialogue Procedure does not fully address many of the key questions faced by Contracting Authorities aiming to ensure that the public sector optimises the likelihood that it will obtain value for money in the award of long-term high value contracts such as PPP.

The need to improve Europe's infrastructure and the effective implementation of key European policies, such as compliance with environmental legislation and the completion of the Internal Market, at an affordable cost is pressing and thus, therefore, in the author's contention is the emergence of guidance on the effective practical application of the Competitive Dialogue Procedure.

NOTES

* Michael Burnett, Expert, European Institute of Public Administration, EIPA Maastricht.

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1 "Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the co-ordination of procedures for the award of public works contracts, public supply contracts and public service contracts" and "Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector". This article deals with the issues arising in the Directive relating to public contracts (Directive 2004/18) since the option to use the Competitive Dialogue is not provided for in Directive 2004/17 and is not needed because there is the freedom in the Directive to use the Negotiated Procedure without the need for special justification.

2 In Directive 2004/18 the transposition of the Competitive Dialogue was left to the option of Member States, though in practice all have chosen to exercise this option.

3 One example cited in the "Explanatory Note on Competitive Dialogue in the Classic Sector", European Commission, January 2006, p.p. 2-3 is that of a Contracting Authority which wants to provide for a river crossing but does not know if a bridge or a tunnel, or which construction methods for either, would be would be best suited to satisfying its needs.

4 The term widely used in the EU context (including in Directive 2004/18), and thus subsequently in this article, " Contracting Authority".

5 See Art. 29 and Recital 31, Directive 2004/18.

6 There is no universally agreed definition of what constitutes a PPP. The key features, described by the author elsewhere, (see Michael Burnett, *PPP – A decision maker's guide*, European Institute of Public Administration, 2007, p. 9) may be summarised as being that of a single contract embracing both the construction of infrastructure and its availability for, or use in, the provision of services. PPP contracts are typically longer term than normal service contracts, of higher value and often complex and high profile. Remuneration for the private party derives from the provision of the service, or making the asset available for use, rather than from the construction of the asset.

7 See the joint Commission and Council of Ministers' statement issued in 1989 on what constituted "clarification" in the context of the Restricted Procedure, OJ L 210, 21 July 1989.

8 This was clear from Art. 11, Directive 92/50, which set out the specific circumstances in which the Negotiated Procedure could be used and then said that "in all other cases, Contracting Authorities shall award their public service contracts by the Open Procedure or by the Restricted Procedure". At Art. 11(2)(b) it referred to "exceptional cases, when the nature of the services or the risks involved do not permit prior overall pricing" Similar wording existed in Art. 7(2)(c), Directive 93/37, which regulated the award of public works contracts.

9 As subsequently expressed in the Explanatory Note on Competitive Dialogue in the Classic Sector, p. 1.

10 Tenders Electronic Daily, 1 January 2004 to 19 June 2009.

11 See, for example, Adrian Brown, "The impact of the new Procurement Directive on large public infrastructure projects: Competitive Dialogue or better the devil you know?", *Public Procurement Law Review*, Sweet and Maxwell, Issue 4, 2004, p. 160 et seq.

12 The focus in this article is on the issues arising in the dialogue phase and the post-tender phase, because of the fact that the dialogue phase is new aspect introduced by Directive 2004/18 and the specific legislative provisions for the post tender phase in a Competitive Dialogue Procedure which are not set out for other award procedures. There is, of course, no intention to suggest that the proper conduct of other aspects of the contract award process is any less important in a Competitive Dialogue Procedure than in other award procedures.

13 See Art. 29(6), Directive 2004/18.

14 See Art. 29(7), Directive 2004/18.

15 This, of course, would require their agreement in the light of the confidentiality provisions in Directive 2004/18. See Art. 6 and Art. 29(3), Directive 2004/18.

16 For example, the appointment of preferred bidders at an early stage in the tender procedure has been long standing common practice in many UK PPP projects. See Sue Arrowsmith, "Law of Public and Utilities Procurement", Sweet and Maxwell, 2006, paras 8.42 et seq and Ciara Kennedy-Loest, "What can be done at the preferred bidder stage in Competitive Dialogue", *Public Procurement Law Review*, Sweet and Maxwell, Issue 6, 2006, p. 316 et seq.

17 See Art. 53(2), Directive 2004/18.

18 The weighting can be replaced by the listing of the award criteria in descending order of importance when, in the opinion of the Contracting Authority, weighting is not possible for demonstrable reasons.

19 See, for example, ECJ Case C-532/06, Lianakis and Others v the Municipality of Alexandroupolis.

20 See Ciara Kennedy-Loest, op. cit., p.p. 316 and 319 and "Explanatory Note on Competitive Dialogue in the Classic Sector", European Commission, January 2006, Note 35. There is also the suspicion, not entirely unjustified in the experience of the author, that this approach has been used as a substitute for the Contracting Authority's willingness to undertake the key planning and preparation tasks prior to the publication of a contract notice which form the key to the successful implementation of any complex procurement procedure.

21 There is, of course, the possible risk that a restrictive approach could be used by Contracting Authorities more readily to cancel award procedures which look unlikely to result in the award of the contract to their pre-favoured tenderer and then relaunch it in a way which achieves the desired result. However, it is the settled case law of the ECJ that a decision to cancel an award procedure is a decision capable of being challenged through review procedures (Case C-92/00, *Hospital Ingenieure Krankenhaustechnik Planungs GmbH v Stadt Wien and C-15/04, Koppensteiner GmbH v Bundesimmobiliengesellschaft mbH*), so that this risk is capable of being managed.

22 See for example, the Commission's "Explanatory Note on Competitive Dialogue in the Classic Sector" referred to above and "Competitive Dialogue in 2008 – Joint guidance from HM Treasury and OGC", June 2008, from the UK Government.

EIPA Calendar of Events *2010*

January

11-12	Writing for the Internet and Beyond: New Approaches to Producing Concise and Attractive Texts	Maastricht
28–29	Leadership for Change: A strategic approach Shop new ideas from the nominees of the European Public Sector Award (EPSA) 2009	Maastricht

February

04-05	The REACH Regulatory Framework: First Lessons from the Implementation Process and Steps Ahead - Practical Guidance to Actors	Luxembourg
08-09	Tutorial: EU Law for Non-Lawyers	Luxembourg
08-09	Social Protection and Social Inclusion: European Directives, Programmes and Funding Opportunities	Maastricht
11-12	State Aid for Environmental Protection	Maastricht
11-12	Developing the Evaluation of Public Policies: Comparative Experiences	Barcelona Brussels
18-19	Corruption in the Public Sector: A Practical Guide to Designing and Implementing an Anti-Corruption Strategy	Warsaw
22-23	Comitology and Financial Services Lamfalussy and the Evolving European Financial Architecture	Brussels
22-23	Fashion or Necessity? EU Agencies between EU Institutions and Member States	Maastricht
22-23	Buffering the Impact of European Policies: Strategies for Regional and Local Players	Barcelona
22-24	European Agricultural Policy in a Regional Changing Context: Key Factors and New Challenges for the Future of the CAP	Barcelona
23-25	European Public Procurement Rules, Policy and Practice	Maastricht
25-26	Performance Budgeting: A Practical Guide	Warsaw
25-26	Public Sector Reform in a Context of Tighter Budgets: How to Ensure an Effective Implementation at National Level	Maastricht
25-26	EU Funding Opportunities for Migration	Maastricht

March

01-02	The CAF feedback and label: Training on the delivery of external feedback	Maastricht
01-03	The Judiciary and the Media: Media relations for courts, Magistrates and Lawyers	Luxembourg
03-04	Transparency and Data Protection: Cooperating or Conflicting Elements of Good Governance?	Maastricht
04	EU Decision-Making after the Lisbon Treaty	Brussels Maastricht
04-05	Financial Management and Programme Closure of Structural Funds	Maastricht
04-05	How to Set-up and Implement a Successful Twinning Project in EU Candidate, Potential Candidate and Neighbouring Countries	Warsaw

March

08-09	Europe on the Internet - Finding your Way through the European Information Jungle	Maastricht
15-16	Better Regulation in the EU Today; Key Principles, Concepts and Practices	Brussels Maastricht
15-17	Cost-Benefit Analysis (CBA) of EU Financed Projects: Why and How?	Barcelona
16-17	Complying with Europe? Public Procurement Today	Barcelona
29-31	European Negotiations I - Representation and Negotiations in the Council of the EU	Brussels Maastricht
18-19	Financial Statements and Audit in the Public Sector	Warsaw
18-19	Understanding EU Decision-Making: Principles, Procedure, Practice	Maastricht
22-23	Improving Quality and Reducing Costs: A Mission Possible	Maastricht
22-23	The Presidency Challenge - The Practicalities of Chairing Council Working Parties	Maastricht
23-24	State Aid Policy and Practice in the European Community: An Integrative and Interactive Approach	Maastricht
25-26	Supporting the Programme Monitoring Committees in EU Structural Funds	Maastricht
25-26	European Commission funding opportunities in the field of Environment Policies, programme and technical tools to present proposal and manage projects	Maastricht
25-26	ICT - Security: Making eGovernment and the Internet Safer for All	Maastricht
25-26	The External Relations of the EU after Lisbon: Challenges and Opportunities Ahead	Maastricht
29-30	From Project Proposal to Final Report: Formal Writing in English for Public Officials	Maastricht Luxembourg
29-30	Working with Impact Assessment in the European Union	Brussels Maastricht

April

12	EU Decision-Making after the Lisbon Treaty	Brussels Maastricht
12-13	Tools for National Implementation: Implementation of EU Policies at National Level	Maastricht Luxembourg
12-13	The CAF External Feedback and Label	Maastricht
12-14	Project Cycle Management: A Technical Guide	Maastricht
15-16	State Aid Procedures, Enforcement & the SANI System	Maastricht
15-16	Corruption in the Public Sector: How to Identify Threats and Design and Implement Anti-Corruption Measures in the Area of Human Resources and Public Procurement?	Warsaw
15-16	Seminar für Übersetzer/innen mit Deutsch als Arbeitssprache: Neue Institutionelle Entwicklungen und Informationquellen in der EU	Maastricht
19-20	The Services Directive: The Challenge of Implementation and Mangement at Sub-State Level	Barcelona
19-20	The Making of Environmental and Climate Policies in Brussels	Maastricht
21-23	How to Develop a Convincing Project Strategie for EU Funding: Do's & Dont's for Local and Regional Actors	Barcelona

April

22-23	21st Century Comitology: The Principles and Practice of EU Implementing Acts	Maastricht
22-23	European Negotiations II - Interpersonal and Intercultural Dimensions	Maastricht
23-24	Internal Audit: Principles, Procedures and Practice	Warsaw
26-27	Writing for the Internet and Beyond: New Approaches to Producing Concise and Attractive Texts	Maastricht
26-27	EU Enlargement: How and Why?	Maastricht
26-27	The New Renewable Energy Directive	Maastricht
26-27	A Practical Guide to the European Neighbourhood Policy	Maastricht
27-28	Your Voice in Brussels: How to Position Your Region in Order to be Influential in EU Affairs	Barcelona
28-29	A Practical Guide to EC Instruments of Financial Assistance: IPA/ENPI	Maastricht
29-30	How to Implement European Law at Regional and Local Level: Local Governments' Involvement in EU Integration with Regard to Implementation	Barcelona

May

03-04	Budgetary Decision-making After Lisbon: Actors, Procedures and Dynamics	Maastricht
03-04	European Defence Procurement	Maastricht
03-04	Fighting Missing Trader/Carousel VAT Fraud in the European Union	Luxembourg
06-07	Integrity Management in the Public Sector: How to Really Make a Difference?	Maastricht
06-07	Delivering the European Social Fund (ESF) in 2007-2013	Maastricht
06-07	Preliminary Rulings Procedure: A Practical Approach	Luxembourg
13-14	Repercussions of the Financial Crisis on Euro-Zone Enlargement: Practical Aspects of the Adoption of the Euro	Warsaw
17-19	Critical Success Factors for High Absorption Capacity of Pre-accession Assistance	Barcelona
19-21	Developing the Project Pipeline for EU Structural Funds	Maastricht
20-21	Performance Improvement in Public Services	Maastricht
20-21	Understanding EU Decision-Making: Principles, Procedure, Practice	Maastricht
20-21	European Negotiations III - Managing Negotiations under Codecision	Maastricht Brussels
26	The Regulation of Genetically Modified Organisms in the EU - The Role of Comitology	Brussels
27-28	Performance Budgeting: Practical Aspects of the Planning, Implementation and Monitoring Process	Warsaw
27-28	State Aid in Land Transport	Maastricht
27-28	Technical Mechanisms for Climate Change Policies	Maastricht
30-01	Europe and Developing Countries: The Making of Technical Cooperation in Brussels	Maastricht

June

02-03	International Public e-Procurement	Barcelona
03-04	EU Banking and Financial Law: Response to the Financial Turmoil	Maastricht
03-04	The Presidency Challenge: The Practicalities of Chairing Council Working Parties	Maastricht
07-08	The European Emission Trading System	Maastricht
07-08	Building Healthier Nations: From Health Strategy to Health Investments and Programmes	Maastricht
07-08	Asset Forfeiture: Who Does What and How?	Luxembourg
09-11	How to Influence EU Decision-Making	Brussels Maastricht
10-11	Supporting SME and Enterprise Development through EU Programmes and Policies	Maastricht
10-11	Recent Developments in European Public Procurement and Case Law	Maastricht
10-11	How to Set-up and Implement a Successful Twinning Project in EU Candidate, Potential Candidate and Neighbouring Countries	Warsaw
10-11	Reform of Financial Supervision as a Consequence of the Financial Crisis: The New Legislative Packages	Luxembourg
14-15	Europe on the Internet: Finding your Way through the European Information Jungle	Maastricht
14-15	Managing Employees' Competencies: A European Perspective	Maastricht
14-16	How to Strengthen Research in the European Territories	Barcelona
16-18	European Negotiations I - Representation and Negotiations in the Council of the EU	Brussels Maastricht
16-18	CAF (Common Assessment Framework) and BSC (Balanced Score Card)	Maastricht
17	EU Decision-Making after the Lisbon Treaty	Brussels Maastricht
17-18	Corruption in the Public Sector: A Practical Guide to Designing and Implementing an Anti-Corruption Strategy	Warsaw
21-22	European Commission Funding Opportunities in the Field of Culture: Policies, Programme and Technical Tools to Present Proposals and Manage Projects	Maastricht
24-25	Advanced State Aid Seminar and Maastricht Forum on State Aid	Maastricht
24-25	Change Management	Maastricht
24-25	Complex Negotiations in EU Foreign Policy	Brussels
28-29	A Practical Guide to EU Accession Negotiations	Maastricht
28-01	Managing the EU Policy Cycle: A Comprehensive One –Week Course on EU Decision Making in Practice	Maastricht
28-02	Preparing for EPSO Competitions: The Road to the European Institutions	Luxembourg

July

01-02	State Aid Master Class and Case Analysis	Maastricht
01-02	Financial Management of EU Structural Funds	Maastricht

July

05-09	Summer School for Diplomats on EU External Relations	Maastricht
05-16	Master programme on European Integration and Regionalism (MEIR) Master course on the law of the European Union	Luxembourg
08-09	Managing Diversity: Challenges, Risk and Possible Solutions - The Value of the Strategy in the Struggle for Non-Discrimination	Maastricht

September

13-14-15	Evaluation and Monitoring of EU Structural Funds	Maastricht
16-17	Recent Developments in European Environmental Policy	Maastricht
20-21	The Infringement Procedure under Article 226 TEC: A Practical Overview	Luxembourg
20-21	Developing the Evaluation of Public Policies: Comparative Experiences	Barcelona Brussels
20-21	From e-Health to i-Health: Innovation, Implementation and Transferability	Maastricht
20-21	Improving Quality and Reducing Costs: A Mission Possible	Maastricht
22-24	European Public Procurement Rules, Policy and Practice	Maastricht
23-24	Performance Budgeting: A Practical Guide	Warsaw
27-28	Tools for National Implementation: Implementation of EU Policies at National Level	Maastricht Luxembourg
27-28	Data Protection in Europe	Maastricht
29-01	Project Cycle Management: A Technical Guide	Maastricht
29-01	Delivering the European Social Fund (ESF) in 2007-2013	Maastricht
30-01	21st Century Comitology: The Principles and Practice of EU Implementing Acts	Maastricht
*	Master of European Legal Studies 2010-2012	Luxembourg
*	Cost-Benefit Analysis (CBA) of EU Financed Projects: Why and How?	Barcelona

* to be determined

October

04	Formal and Informal Consultation in the EU	Brussels
04-05	Practitioners' Workshop: PPP in the Health Sector - Delivering Value for Money	Maastricht
04-06	EU Energy Policy: Green, Efficient and Secure	Maastricht
07-08	The Presidency Challenge: The Practicalities of Chairing Council Working Parties	Maastricht
07-08	Optimising your Working Relations with European Commission Delegations	Maastricht
07-08	Corruption in the Public Sector: How to Identify Threats and Design and Implement Anti-Corruption Measures in the Area of Human Resources and Public Procurement?	Warsaw
07-08	Quality Management in the Public Sector: The Common Assessment Framework in Action	Barcelona

October

11-12	Monitoring, Evaluation and Auditing for European Commission Direct Funded Projects	Maastricht
14-15	State Aid Policy and Practice in the European Community: An Integrative and Interactive Approach	Maastricht
14-15	Understanding EU Decision-Making: Principles, Procedure, Practice	Maastricht
14-15	Work-Life Balance and Working Time Arrangements, Also for (Top) Managers: Need or Nice to Have?	Maastricht
14-15	Internal Market and Liberalisation: The Proposal for a Community Patent	Luxembourg
18-19	Better Regulation in the EU Today - Key Principles, Concepts and Practices	Brussels Maastricht
18-20	How to Litigate before the European Courts	Luxembourg
20-21	European Negotiations I - Representation and Negotiations in the Council of the EU	Brussels Maastricht
21	Comitology and EU Transport Policies	Brussels
21-22	Performance Improvement in Public Services	Maastricht
21-22	Implementing the Structural Funds Regulations 2007-2013	Maastricht
25-26	Integrity Management in the Public Sector: How to Really Make a Difference?	Maastricht
25-26	Environmental Law	Luxembourg
28-29	How to Prepare a Budget: A Technical Guide	Maastricht
28-29	Financial Statements and Audit in the Public Sector	Warsaw
28-29	Financial Services and Competition Issues in the EU: Competition and Regulation in Financial Services – From State Aid to More Rigorous Regulation	Maastricht
28-29	The Services Directive: The Challenge of Implementation and Management at Sub-State Level	Barcelona
28-29	Europe on the Internet: Finding your Way through the European Information Jungle	Maastricht
*	Master of European Legal Studies 2010-2012	Luxembourg
*	How to Build a Successful European Partnership for Better Use of EU Funds?	Barcelona

* to be determined

November

01-02	Successful Programming of EC Assistance for Accession and Neighbouring Countries	Maastricht
04-05	Change Management	Maastricht
08-09	EU Funding Opportunities in the Fields of Tourism, Culture & Environment	Maastricht
10-11	Complying with Europe? Public Procurement Today	Barcelona
11-12	European Food Law	Luxembourg
15-16	The Challenge of Leadership in Times of Demographic Change	Maastricht
15-16	European Defence Procurement	Maastricht

November

15-16	PPP Audit: How to Ensure that Value for Money Really Happens	Warsaw
18-19	European Negotiations III - Managing Negotiations under Codecision	Maastricht Brussels
18-19	Practitioners' Workshop: Using EU Structural and Cohesion Funds Effectively in PPP - Challenges and Opportunities	Maastricht
22-23	HR and Management Systems in the EU Member States: Successful Practices in Times of Limited Budgets and Demographic Changes	Maastricht
22-23	E-Justice: Electronic Technology in the Justice Sector	Luxembourg
23-24	State Aid Procedures, Enforcement & the SANI System	Maastricht
25-26	Working with Impact Assessment in the European Union	Brussels Maastricht
25-26	Internal Audit: Principles, Procedures and Practice	Warsaw
25-26	European Negotiations II - Interpersonal and Intercultural Dimensions	Maastricht
29-30	The Key to Successful Twinning Proposals	Warsaw
29-30	Keep Ahead with EU Information and Communication	Maastricht
*	Developing the Evaluation of Public Policies: Comparative Experiences	Barcelona Brussels

* to be determined

December

01-03	How to Influence EU Decision-Making	Brussels Maastricht
01-03	Process Management in the Context of Total Quality Management: CAF and the Relationship with ISO, Business Process Re-Engineering and Lean	Maastricht
02-03	Financial Management of EU Structural Funds	Maastricht
02-03	Recent Trends in the Case Law of the European Courts: What Directions for the Future?	Luxembourg
06-07	Fashion or Necessity? EU Agencies between EU Institutions and Member States	Maastricht
06-07	State Aid Master Class and Case Analysis	Maastricht
06-08	Preparing for EPSO Competitions: The Road to the European Institutions	Luxembourg
09-10	Performance Budgeting: Practical Aspects of the Planning, Implementation and Monitoring Process	Warsaw
09-10	Understanding EU Decision-Making: Principles, Procedure, Practice	Maastricht
13-14	Policy Seminar: Public-Private Partnerships - Future Directions	Maastricht
13-15	Project Cycle Management: A Technical Guide	Maastricht

Supporting Enterprise Development and SME in Europe

Marco Lopriore*

Small and Medium Enterprises (SME) are the backbone of Europe's economy: there are 23 million SMEs in Europe representing around 99% of all undertakings, and 57% of them are sole proprietorships. They provide two thirds of total private-sector employment, represent 80% of the total job creation and produce more than half of the EU added value. This article examines the main as well as the latest elements of EU policy and programmes in favour of supporting enterprises and SMEs in particular. It starts by looking at the SME policy framework and then focuses on the financial aid within the EU financial perspectives in 2007-2013 such as the research budget or the structural funds. The article describes the different measures for SMEs in terms of financial instruments and support programmes and services, addressing in each case strengths, weaknesses, trends and possibilities. It also looks at the changes to policies and programmes following the financial and economic crisis.

Introduction

Between 2002 and 2007, the number of SMEs has increased by over 2 million; the number of large enterprises by only 2000.[1] The new Member States show higher birth and death rates of enterprises than the old Member States, probably due to the fact that they are still catching up.

Germany has more employment in SME, but Italy and Greece have the highest number of SMEs and enterprises as well as the highest number of employees in micro-companies. Italy is also an interesting case where, if it were not for immigrant and ethnic entrepreneurs setting up businesses, the business demography in 2008 would have been negative according to the business register held by the chambers of commerce.

The British economist Schumacher[2] coined the phrase "small is beautiful" during the energy crisis of the 1970s, but the same cannot be said of SMEs. According to a 2008 study by the European Commission, most difficulties encountered by SMEs are related to the amount of administrative burden[3], the access to sufficient finance, the level of taxation and access to public procurement. Indeed, this is reflected in their performance, which raises concerns as their productivity and growth is lower than in the USA, where productivity levels are on average 30 to 40% higher.[4]

Table 1:
Enterprise demography, birth and death EU 27, 2003-2005*

	2003	2004	2005	average 2003/2005
enterprise birth				
1,000	1,472	1,625	1,585	1,560
% of population	9	9	9	9
enterprise death				
1,000	1,259	1,325	1,368	1,317
% of population	7	8	8	8
net enterprise birth				
1,000	213	300	217	243
% of population	1	2	1	1

* Estimates based on available data for Bulgaria, Czech Republic, Germany, Estonia, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden and the United Kingdom.
Source: EIM

Performance of SMEs in Europe is affected mainly by structural difficulties such as lack of skills and labour market rigidities, which affects matching of demand and supply of labour, market failures in research, training[5] and innovation, as well as a general lack of entrepreneurial spirit, which has been described by the Austrian economist Schumpeter as "Unternehmergeist".[6] Entrepreneurs and their willingness to take risks are fundamental in determining economic cycles, as they bring about innovation, create new companies and drive non-competitive ones aside in a process of "creative destruction". In the area of finance there are certain segments of SME which face financing gaps such as micro-companies or sole proprietorships, companies which have to be transferred or passed on from one generation to the next and start-ups without credit history.[7]

Traditional market failure justification is one recurrent idea, but EU policy also relies on the presence of network externalities and standardisation in the internal market (when the value of a good or technology depends on the number of users), strategic trade and technology issues to support, for instance, infant industries. More recently the theoretical basis for the EU intervention has been inspired by the systemic approach developed by Michael Porter, which emphasises the importance of the microeconomic business environment and of linking business, universities/research and public actors into the "triple helix" of innovation.[8]

This new emphasis in EU policy can be seen in the work done by the European Commission in favouring innovation and clustering among companies, as well as inter-cluster cooperation, including cross-border cooperation. In this regard, the Pro-Inno initiative of the European Commission has launched the European Cluster Memorandum headed by Professor and Senator Pierre Lafitte and is supporting the development of a European Cluster Observatory[9] that permits extensive cluster mapping in Europe according to dimension, specialisation and focus. It also identifies national cluster programmes and benchmark cluster policies, and develops a voluntary excellence path for cluster organisations.

The new EU policy strategy looks very much to the regional innovation systems and clusters as the main factor of competiveness.[10] The aim is to build world-class clusters with the necessary dimensional strength, since too many clusters are too small in size to compete globally. Indeed, the main problems of clusters are normally lack of resources, lack of infrastructure and lack of training for cluster managers.

EU policies to support SME development

Ensuring a more business-friendly environment

The first contribution of the European Commission has been to better define what an SME is. The definition of an SME, as laid down in the Recommendation which came into force in 2005,[11] classifies an SME according to two cumulative criteria: staff headcount and turnover and/or balance sheet. This recommendation has important implications when linked to the exclusive competences of the EU, such as competition policy as discussed below.

The EU response has been the Small Business Act for Europe (SBA), adopted by the Commission in June 2008, which reflects the Commission's political will to support SMEs and aims to improve the overall approach to entrepreneurship by anchoring the "think small first" principle in policy making. The SBA has an important function to coordinate actions of Member States, to look for good practices, to follow up on Members States' performance, to ensure EU polices are SME friendly (better regulation) and to provide support to SMEs.

The SBA builds on the European Charter for Small Enterprises launched at the Lisbon Summit in March 2000, which failed in the delivery process since it was based on an open method of coordination, lacked strength and relied on a weak system of measuring results. One of the areas where more results were expected is the establishment of a one-stop-shop with reduced time and cost for registering companies: so far only Belgium, Denmark, Estonia, France, Hungary, Portugal, Romania, Slovenia and the UK fully comply with the EU objectives.

Compared with the European Charter, the SBA is monitored more stringently through an annual SME performance report in the Growth and Jobs strategy. Keeping the item on the agenda of European councils is also a good way to anchor it to highly political moments such as the "Europe 2020" document and to give it better visibility and more weight. This should ensure that SBA does not become another "paper tiger". Another suggested way forward is to increase the pressure in the monitoring process by "naming, blaming and shaming". Furthermore, could we not extend the monitoring more effectively at other levels such as regional and local levels of administrations as well as at the level of business organisations?

> We need greater simplification of SMEs at the EU and Member State level.

Specific areas for SME

In specific areas, there are also a few EU legislative measures, such as the General Block Exemption Regulation on State Aid (GBER), the Regulation providing for a Statute for a European Private Company (SPE), the Directive on reduced VAT rates (locally supplied services), the legislative proposal to simplify rules on VAT invoicing, accepting E-invoicing as an equivalent to paper invoicing and the revision of the Late Payments Directive.[12]

A cornerstone for better regulation is surely better attention for SME issues, firstly inside the European Commission and secondly better consultation with SME and business representatives.

The first currently takes place through the appointment within the Commission of an SME Envoy to defend the SMEs at EU level by providing input to a vast range of policies from education to internal market,[13] to social to fiscal, to trade, to name just a few. But could the SME issue not also be raised at the Commissioner's level in the next European Commission? We not only need to break down internal administrative barriers, but also in particular to bridge the different cultures' approaches when dealing with SMEs within our administrations at all levels: could Member States

themselves also improve the coordination across different national Ministries (Ministry of Economy, Ministry of Education, Ministry of Science, etc) to better integrate SME issues?

External consultation takes place through SME panels, SME feedback mechanisms and regular involvement of stakeholders and business representatives such as Eurochambres, Business Europe, or UEAPME for European crafts. We should expand more on programmes such as Enterprise Experience Programme, under which civil servants of the European Commission were sent on duty to SMEs, as these programmes help break down barriers between business and administrations.

There are good results of cooperation so far, where the EU has adapted its legislative frameworks to take SMEs into account and to make them more SME-friendly by developing specific SME practical toolkits. Among the non-legislative measures, the European Commission has developed an "SME test" to analyse the impact of legislation on SMEs and specific measures for SMEs, improved access to standards through NORMAPME (in collaboration with UEAPME), a code of best practices on SMEs access to Public Procurement, the spread of the SME Week since Spring 2009,[14] the EU network of female entrepreneurs and mechanisms to facilitate access to markets including EU Business Centres in China and India, as well as a practical tool called the Market Access Database. Finally, in the field of environment the EU Eco-management and audit scheme (EMAS) has been adapted to the needs of SME with EMAS EASY; it is also possible to register as a cluster of companies in order to reduce costs. The scheme is SME-friendly and voluntary, has been welcomed by business representatives and can be used through a practical toolkit.[15]

Reorganising financial support for SMEs in EU programmes

EU support programmes such as the research and development programme or the Competiveness and Innovation Programme (CIP) are currently used to support SMEs (see Chart 1). The EU is running the Seventh Framework Programme Research and Technological Development (FP7) to complement actions taken at national and regional level, and each individual work programme of the FP7 has identified specific measures of interest to SME:[16]

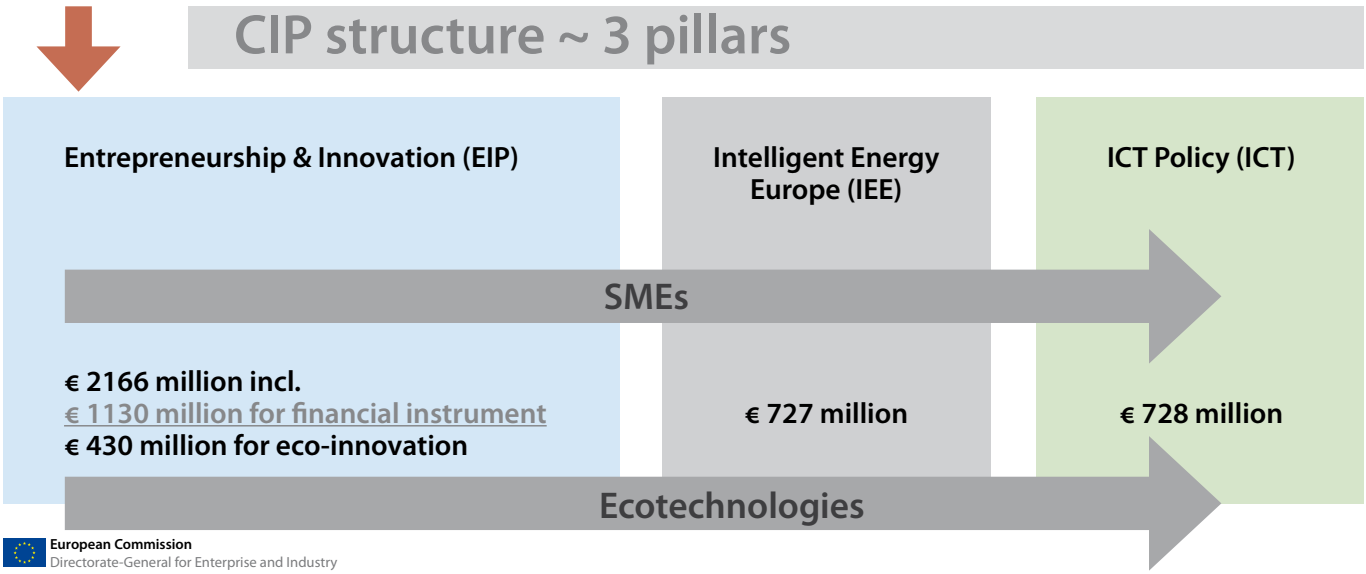
- The "people programme" of FP7 supports temporary hosting of experienced researchers into SME and staff secondment between academia and industry.
- SMEs that carry out R&D are encouraged by the European Commission to participate in collaborative research projects within the "cooperation" programme of FP 7.
- The "capacities" programme supports SMEs by covering part of the total investment when outsourcing research to RTD performers for two target groups. The first target group is low and medium technology SMEs with maximum 10 partners and with little research capacity, as well as research-intensive SMEs that need to outsource their research to complement their core research capacity. The second target group is SME associations with a maximum of 15 partners representing their members and their common technical problems.[17]

The CIP on the other hand provides for extensive exchange of best practices among Members States, finances the European Entrepreneurship Awards for the best performing public authority that promotes entrepreneurship and SMEs, maintains the Enterprise Europe Network (EEN) that offers high quality services to SMEs, and delivers financial support together with the EIB through the European Investment Fund (EIF).

While resources for SMEs within the future EU financial perspectives post-2014 should be increased, there is a need to look into how the current EU financial support to SMEs could be reorganised and its delivery improved.

One crucial issue for SME participation concerns results and IPR issues. So far this has worked well since the results and IPR remain for the SME or the SME association. A good example is the Freshlabel project run by the European meat processing industry[18] with the help of several universities to enable traceability of the cold chain of fresh chilled meat and fish products by means of tailor-made time/temperature indicators. But more communication, awareness and information on these issues is important and to invite more

Chart 1: Composition of the CIP - Source: European Commission



SME and associations to follow this example and overcome the initial hurdles or distrust towards EU programmes.

We should also look into making SMEs more aware of the lead markets concept of the EU, which identifies lead markets such as renewable energies and biotechnology and which become a priority for the whole European Commission in the different Directorate Generals from DG Research to DG Employment. How can SMEs better participate in these lead markets initiatives or the European Technology Platforms?

Finally, one has to evaluate the impact of the simplified financial and administrative procedures that have been established, in particular the 75% funding rate for SMEs, and which reduce the requirements for audit certificates in EU research funding. A target of 15% of SME participation has been set and should amount to 5 billion euros until 2013. So far, 12.3% was achieved by 2007/2008, with 60% of SMEs involved having less than 50 employees and 31% having between 50 and 249 employees. How can we improve this further?

Linking EU direct management to shared managed funds such as structural ones

SMEs are also targeted by other EU programmes such as structural funds and the rural development and fisheries funds. These funds support activities such as individual business investments, investments in tourism and environment, training and entrepreneurship support, financing schemes and incubators.

Under the structural funds 2007-2013, around 27 billion euros will go towards supporting SMEs in technology and innovation, eco-friendly SMEs, ICT in SMEs and start-ups. Denmark, Finland, Slovenia, Austria, Sweden and the UK are among the Member States which will allocate above 20% of their structural funds budgets to SMEs (see Figure 1).

The European Investment Bank and the European Commission have launched the JEREMIE initiative (Joint European Resources for Micro to Medium Enterprises) to use the European Regional Development Funds to enhance SME access to finance through financial instruments. Regions and Members States have to opt for this instrument in their operational programmes (see Table 2).[19] Aid is delivered through revolving funds to support SMEs in their start-up, early stage and expansion through a range of instruments such as equity, debt, quasi-equity and technology transfer funds. The difference between these funds and grants is that the funds can be reinvested in the same geographical area, but in other SMEs after repayment by the initial beneficiary.

Figure 1: Percentage of structural funds allocated to SMEs in 2007-2013 - Source: European Commission

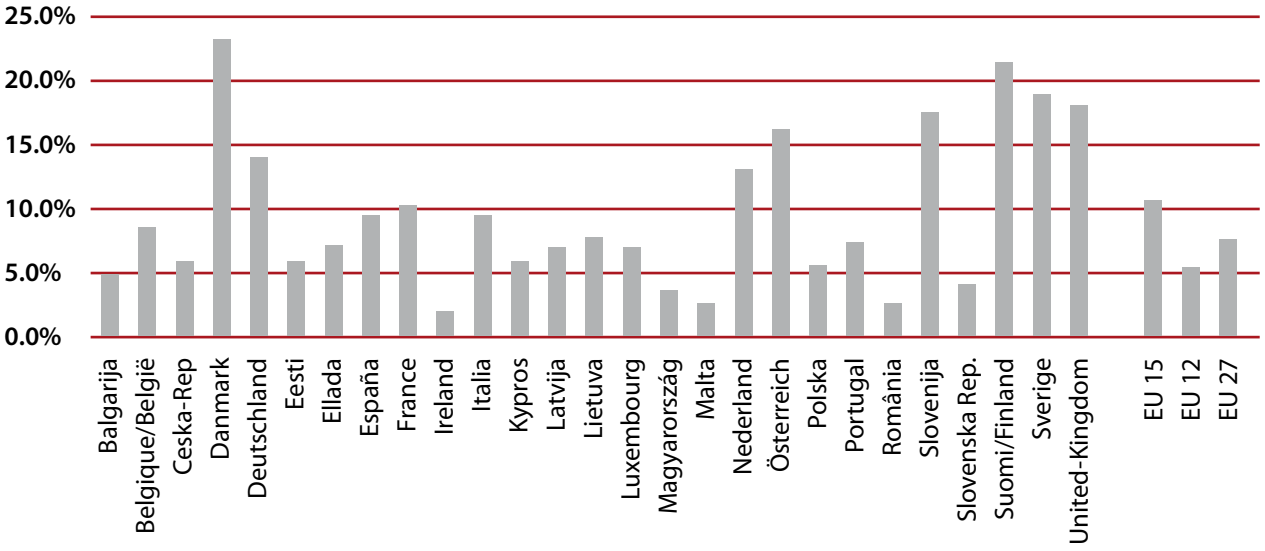


Table 2: Status of JEREMIE implementation, May 2009 - Source: EIF

Country	Date	Amount in EUR m		Country	Date	Amount in EUR m
Greece	June 2007	100		Campania (I)	December 2008	90
Romania	February 2008	100		Slovakia	December 2008	121.2
Latvia	July 2008	91.5		Cyprus	April 2009	20
Lithuania	October 2008	290		Bulgaria	May 2009	200
Languedoc-Roussillon (F)	October 2008	30			**TOTAL**	**1042.7**

There are some good examples of SME oriented and demand-led programmes in past programming periods:

- In 1994-1999 and 2000-2006 Italy supported the development of business services to SME in remote regions through global grants such as LETE (Lecce Teramo) and SEPRI (Servizi promozionali per le imprese) which co-financed technology advisors within the SME sector. Lombardy has facilitated generational transfer of SME through specialised consulting, mentoring and coaching using a voucher system.[20]
- Spain has co-financed a strong export promotion programme called PIPE (Plan de Initiacion a la Exportacion) with the help of ERDF funds.[21] Results of the PIPE programme can be measures in terms of increased exports and increased participation in trade fairs, as well as in the creation of permanent trade/export departments in the SME.
- Integrated innovation strategies were developed between ERDF (1994-2006) and Framework Programme No. 5 through the initiative to stimulate innovation (RIS/RITTS) or information society (RISI).[22]

However, most of the structural investments in the area of SMEs and innovation are still guided by a technology push conception of technological change. This concept focuses more on knowledge production but fails to take into account knowledge transfer and diffusion. Consequently, up to now structural funds support to SMEs remains an underexploited potential.[23]

Concerning the European Social Fund, it should be more fitted and linked to the needs of the labour market and the requests of professional profiles such as shown by the Excelsior Global Grant:

- ESF could invest more in training and educating the new generation of entrepreneurs and stimulating youth to start their own business in a more sustainable way – financially, socially and environmentally.[24]
- ESF can also be used to improve access to finance for migrant and ethnic businessmen, women, young entrepreneurs. Under the last programming period 2000-2006 this was allowed through measures of "Social Risk Capital"; while under the current programming period one can call upon Art. 44 of Reg. 1083/2006. Some regions such as Lombardy have made provisions to use financial instruments in their ESF programming.
- Other recent initiatives worth mentioning are the JASMINE managed by the European Investment Fund (EIF) to support microfinance institutions (MFI). Yet instruments such as micro credits should be further examined as to their limited gross profitability margin and high handling costs.

The ESF and directly managed programmes should exchange experiences such as the "Erasmus for young entrepreneurs and for apprentices" programme funded by the CIP programme or initiatives such as the virtual mini-company in schools to promote homo oeconomicus in children and early education in business matters. A practical guide for training in SMEs has been published by the Commission to provide a systematic overview of solutions in preparing, implementing and managing training in SMEs.[25]

SMEs and the economic crisis

The European Economy Recovery Plan (ERRP) of the European Commission builds on the Small Business Act and provides further help to SMEs.[26] It recognises SBA as key to economic recovery and includes proposals such as cost-free registration of businesses within three days, one-stop-shops for the hiring of first employees, micro-companies' exemption from annual accounts, public authorities' commitment to pay invoices to SMEs within one month, the reduction of patent fees and maintenance by 75% and halving the cost of an EU trademark. There is also a supplementary package of loans to SMEs prepared by the EIB, one of which is a microcredit programme worth 100 million euros coming from the PROGRESS budget line.

In the current financial and economic crisis, a temporary framework for state aid measures to tackle the credit squeeze was adopted at the end of 2008. Adjustments were introduced in February 2009. Under this framework, Member States can, under certain conditions, grant individual aid to SMEs to address the exceptional difficulty of obtaining finance. The framework does not replace the different instruments that Member States can use to support SMEs and that are not considered state aid. These relate in particular to the financial support for SMEs under the "de minimis", the state guarantees and the risk capital aid and the different schemes possible for aid to support growth and development of SME (R&D, female entrepreneurship, disadvantaged and disabled workers, restructuring and recovery of firms in difficulty, consultancy aid and aid for participation in fairs, regional aid, aid for environmental protection).[27] A useful and updated handbook on community state aid rules for SME has been published online.[28]

The economic crisis has also led to the revision of operational programmes financed by the structural funds in several Member States.[29] Poland has for instance adapted its Human Capital ESF operational programme to help workers made redundant by SMEs, provide loans for start-ups, etc.

Alongside structural support, Member States also have the European Globalisation Fund (EGF) to tap into. The EGF, set up at the end of 2006, reintegrates workers into the labour market, who have been made redundant due to changing global trade patterns and are called upon more and more frequently since the economic crisis.[30] Although SMEs are not considered or recognised by the rules of the EGF as such, the fund has supported the small textile sector in Italy, where 6,000 workers at 800 small companies in Piedmont, Sardinia, Tuscany and Lombardy have been affected by the crisis. The rules for tapping into the EGF have been somewhat simplified: it can be called upon for redundancy cases linked to the economic crisis, the minimum number of redundancies has been lowered from 1,000 to 500, the funding rate has been increased from 50% to 75% and the duration of the support extended from 1 to 2 years.[31] Nevertheless, for the next budgetary period post-2014, the EGF would need to be further revised if it is to respond more quickly to urgent disruptions on the labour markets.

Conclusions

EU policies and programmes continue evolving to become more SME-friendly in the complete lifecycle of enterprises, from birth to development and growth, and further innovation to final transfer. With the current financial and economic crisis, there is however a need and opportunity to speed up the delivery of support to SMEs in the Member States and at regional level, as well as within the European Commission.

An important part of improving delivery would be to examine for instance how to better coordinate the European, national, regional levels in their strategies, policies and funding to SMEs. In the longer term, this links to the debate about shaping the budget of the future for post-2014, where we surely need better links between directly funded programmes and shared management.

For instance, structural funding support to SMEs through operational programmes should integrate achievements of pilot projects and programmes launched by CIP or FP 7 and vice versa. Additionally, we could join efforts in areas such as information and communication to facilitate access of SMEs to the FP7 or the CIP, mainly through the National Contact Points for research and the EEN network. But more importantly we could share tools such as networks like EEN, communities of practice and peer reviews across the different EU programmes.

One clear area which could benefit from this is the cluster development which receives transversal attention from most EU programmes and policies. We could learn lessons from EU pilot projects funded under the CIP or FP 7 to bring inspiration to the measures of the competitiveness ERDF Operational Programmes in several Member States, such as Romania and Greece.

Finally, we should integrate the external dimension of the EU into this debate in order for the candidate countries to benefit from the transfer of experiences on SME issues with a particular view to clusters within the IPA programmes (Instrument for Pre Accession) of the Balkan area.[32]

NOTES

* Marco Lopriore, Senior Lecturer, European Institute of Public Administration, EIPA Maastricht.

1 Audretsch & Van der Horst. & Kwaak, & Thurik (2009). First Section of the Annual Report on EU Small and Medium-sized Enterprises, EIM.

2 Schumacher (1973) Small is Beautiful: Economics as if People Mattered.

3 Since 2000 administrative burdens have amounted to 1000 billion euros according to Eurochambres.

4 Commission staff working document, Accompanying document to the Communication from the Commission, Raising productivity growth: key messages from the European Competitiveness Report 2007, SEC (2007) 1444.

5 Training is another field where SMEs are lagging behind. The annual ESF-funded survey Excelsior has highlighted the lack of training in micro-companies with less than 10 employees and in regions such as Tuscany, the islands and the south of Italy.

6 Schumpeter, J. (1942). Capitalism, Socialism and democracy.

7 One concern for business representatives is the impact of the Basel II regulation upon SME sector.

8 Navarro (2003) Industrial policy in the economic literature, Enterprises Papers No.12, European Commission.

9 www.clusterobservatory.eu

10 Europe has a variety of experiences, both bottom-up and top-down, of clustering: the "distretti industriali e filiere" in Italian regions such as Emilia Romagna (www.distretti.it) or meta-districts in Lombardy, the French "poles de compétitivité", the automotive clusters in Western Hungary, the research driven and local clusters of Scandinavian countries, or the incubators of Germany.

11 European Commission Recommendation No. 361/2003.

12 Some Members States such as Ireland and the UK are even more stringent with 10 days.

13 http://ec.europa.eu/youreurope/business

14 Seminar Supporting SME and enterprise development through EU programmes and policies, Maastricht (NL), EIPA, June 2009.

15 http://ec.europa.eu/environment/emas/index_en.htm

16 http://cordis.europa.eu/fp7

17 Projects for SMEs and SME associations should involve SMEs and RTD performers as well as end users. Both target groups have to present in their projects a clear potential for exploitation or economic benefits for the SMEs involved in terms of turnover, disclosure of new markets, growth in personnel, etc.

18 CLITRAVI, the EU Liaison Centre for the Meat Processing Industry in the EU has managed an EU research project to ensure that meat remains cold during its transportation cycle. http://www.freshlabel.net

19 Transforming structural fund grants into financial instruments for SMEs might also reduce the distortive impact of grants while ensuring that the local holding fund has a revolving character.

20 www.saturno.it

21 PIPE is delivered by the Spanish Chambers together with the national trade agency (ICEX) and the individual autonomous Regions. The companies will count on a financial support of an 80% of the total expenses, with a maximum of 34,843 euros. These incentives include the advisory services and the foreign promotion performances, such as markets research, advertising, trade fairs, business and research trips, patent registration, representatives' and advisers' expenses, etc.

22 Around 10 billion euros were allocated to RTDI with structural funds 2000-2006.

23 Study, Moving towards a territorialisation of European R&D and innovation policies, European Parliament, 2009.

24 See also the EC campaign "your world, your business" launched together with the Junior Achievement Young Enterprise Europe

25 European Commission "Guide for training in SME" http://ec.europa.eu/restructuringand jobs.

26 Communication from the Commission to the European Council, A European Economic Recovery Plan, COM(2008) 800.

27 Kekelekis, State Aid and SME. EIPA open seminar, Maastricht, June 2009.

28 http://ec.europa.eu/competition/state_aid/studies_reports/studies_reports.html

29 http://www.seminariofsetivoli.info/index.php

30 ACFCI (2005). Delocalisations: la peur n'est pas une solution. Enquete auprès de 100 entreprises moyennes.

31 It has an allocation of up to 500 million euros a year and was called upon 12 times in the 2007-2008 period by 8 Member States: Finland, France, Germany, Italy, Lithuania, Malta, Portugal and Spain.

32 For instance Croatia is supporting development of clusters through IPA.

Combating the Financing of Terrorism: EU Policies, Polity and Politics

Miriam Allam* and Damian Gadzinowski**

This article discusses the activities and initiatives undertaken by the European Union in Combating the Financing of Terrorism (CFT). The introduction of programmes to counter the financing of terrorism are derived from pre-existing anti-money laundering programmes and were the first step taken by the US in its "war on terror" following 11 September 2001. As such, CFT has been the subject of considerable attention, and has given rise to new EU legislation and regulatory guidance to stop the flow of money to terrorist groups and to use the intelligence gathered from financial surveillance to identify and prosecute terrorists. The proposed counter-terrorism measures not only tighten controls on money transfers but also touch upon the highly sensitive issues of preventing the misuse of non-profit organisations by terrorists and the exchange of personal data. This article analyses the EU initiatives adopted (policies), the institutional framework for implementing the activities at the EU level (polity) and the wider consequences of this regulatory guidance on civil liberties (politics). While the European contribution to the "war on terror" is conventionally described as a matter of law enforcement and the execution of civilian and soft power, the article argues that the EU has gone beyond the international policy guidance, as revealed by the case of Kadi and al Barakaat. The article concludes that it is important to engage the public in a dialogue on liberty/security in order to reach a compromise on what is *acceptable to manage the unease* in the face of terrorist threats.

Introduction

Money trails are like financial fingerprints. One reason why the focus after the 9/11 attacks was shifted quickly to measures to combat the financing of terrorism (CFT) was precisely because the money trails of the hijackers revealed blueprints for the architecture of the terrorist organisation. Yet, they also "served to expose all too clearly the vulnerabilities of the international banking system to terrorist fund generation, money laundering and general financial logistics" (Navias 2002: 57). CFT programmes were introduced to address these vulnerabilities and were the first step taken by the US in its "war on terror" following 11 September 2001. As such, they have been the subject of considerable attention and led to new EU legislation and regulatory guidance to stop the flow of money to terrorist groups and to use the intelligence gathered from financial surveillance to identify and prosecute terrorists. The methods used to combat terrorist financing are related to those initially developed for anti-money laundering (AML).

The aim of this article is first to disentangle terrorist financing from money laundering and to describe the techniques used by terrorist organisations to raise and distribute funds. The article then analyses the EU initiatives (policies) developed for CFT, the EU institutional framework (polity) involved to cooperate on CFT and the politics involved in the struggle to strike a balance between liberty and security.

Defining and disentangling Terrorist Financing and Money Laundering

In its broadest sense, money laundering is defined as "the processing of […] criminal proceeds to disguise their illegal origin" (Financial Action Task Force 2009: 57). The objective of money laundering is to "clean" and "legitimatise" the ill-gotten proceeds of criminal activity. Thus, the process starts with dirty (illegal) money and ends with clean (legal) money.

In turn, terrorist financing is defined in the EU's Third Money Laundering Directive as "the provision or collection of funds, by any means directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part in order to carry out any of the offences that have been defined as terrorism".[1]

As the definition underlines, the focus is on the purpose for using the funds and not on the cleaning process of money. In fact, funding to support terrorism may rely on both legitimate sources and criminal activities. Some scholars therefore argue that terrorist financing is reverse money laundering because the process may start with "clean" money; however, the purpose for which the money is used is illegal (Roberge 2007). Certainly, the dirty/clean money divide is not rigid but overlaps given that there are terrorist organisations that receive most of their funds through illegal sources such as drug trafficking, kidnapping, political corruption, smuggling, robbery and exploitation of human beings.[2]

Yet, the most important difference between money-laundering and terrorist financing is the very different purpose for committing a crime. Generally speaking, criminal activity is driven by profit while terrorism is driven by political ends. Related to the immense profit that can be derived from criminal activities are the massive amounts of funds laundered yearly. According to the IMF, 2-5% of global GDP is laundered each year, representing 600 billion – 1.5 trillion US dollar (Camdessus 1998). Since profit is at the core of criminal behaviour, some scholars argue that organised crime acts like any multinational business that is driven by material interests to maximise income and wealth (Robinson 2003). Terrorist organisations, on the contrary, aim to accomplish specific political objectives and need the financing to fund their acts. In addition, terrorist financial requirements can often be relatively small compared to the deadly disruption caused. For example, according to the Financial Action Task Force (FATF), the direct costs required for the London bombing in July 2005 are estimated to amount to 8,000 GBP and the Madrid bombing in March 2004 to 10,000 euros (Financial Action Task Force 2008: 7). Yet, these figures are direct costs for the bombings and disguise the fact that the logistical support for coordinating the terrorist groups may involve a much larger sum of money. Another problem with terrorist financing is related to the definition of terrorism itself. The EU defines acts of terrorism as offences which may "seriously damage a country or an international organisation [which are] committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation".[3]

The EU definition has been widely criticised as being too vague, inasmuch as it is open for interpretation what constitutes, for example, an act that "seriously intimidates a population".[4] Indeed, the definition of terrorism has long been an issue for contestation in international law. Depending on the criteria used to define terrorism, a group may be classified by one state as a terrorist organisation but not by other states. For example, the Hezbollah is blacklisted as a terrorist organisation by the US State Department but not recognised as such by the EU.

> The adoption of the Treaty of Lisbon may substantially improve the cooperation in the field of CFT because the new Treaty abolishes the EU pillar structure and creates a single legal framework.

Such differences may shape evaluations of the various sources of financing that do not involve crime (Navias 2002: 68-69):

- first, state (financial) sponsorship of terrorist organisations. For example, Al-Qaida received support from the Government of Sudan and the former Taliban Government of Afghanistan (Navias 2002: 68);
- second, private (financial) sponsorship. Terrorist organisations receive private donations from political sympathisers. For example, terrorist organisations may receive support through charity organisations or a political arm such as Batasuna in Spain (Europol 2009);
- third, legitimate business activities. For example, the legitimate construction and development corporations of the Bin Laden family funded Al-Qaida network activities.

Given the fundamental differences between money laundering and terrorist financing, it is therefore questionable whether AML measures are suitable for CFT. Effective pre-emptive measures for CFT can hardly rely on the same AML policy response if the funds for financing terrorism originate from legitimate sources. The following sections discuss how the EU has responded to the peculiarities of terrorist financing and how it has addressed the different logics of AML and CFT in its initiatives.

Policies – The EU initiatives to combat terrorist financing

The EU's effort to combat the financing of terrorism has taken a two-tier, complementary approach. On the one hand, the financial freezing measures were implemented following the adoption of UN Security Council (UNSC) Resolutions 1267 and 1373, thus establishing an EU system for targeting and sanctioning individuals and groups suspected of providing assistance, financial or otherwise, to any terrorist organisation. This has been complemented by money laundering legislation in the form of the three EU money laundering directives and regulations on controls on cash entering and leaving the EU and on information on the payer accompanying transfers of funds.

Financial freezing measures

In the aftermath of the bombings of American embassies in Kenya and Tanzania in 1998 the UNSC adopted Resolution 1267/1999. This was later extended and modified by Resolutions 1333/2001, 1390/2002, establishing a system for freezing funds and other financial assets or economic resources, as well as the listing of individuals and organisations linked to or part of the Taliban regime of Afghanistan and Al-Qaida (United Nations 2009). At the EU level the implementation of 1267/1999, and the subsequent resolutions, took several legislative steps (for a chronological development of the sanctions regime see Heupel 2009).

The meagre results of Resolution 1267/1999 to extradite Bin Laden and neutralise Al-Qaida's activities, together with the 9/11 attacks, prompted the UNSC to pass Resolution 1373/2001. The key differences between 1373 and 1267 is the option given to UN Member States to establish autonomous lists of suspects, subject only to scrutiny by the Security Council Counter-Terrorism Committee. Secondly, 1373 extended its scope beyond individuals and organisations affiliated to the Taliban and Al-Qaida to encompass all terrorist suspects. The EU promptly established an autonomous system without precedent by adopting measures[5] providing the legal ground for listing terrorist suspects, freezing their assets and enabling police and judicial cooperation to prevent and combat terrorist acts. The EU has also tried to use its weight to include a counter-terrorism clause in existing and new development assistance instruments with third countries. The clause provides for cooperation in the prevention and suppression of terrorist acts in the framework of Resolution 1373/2001 by exchanging information, know-how and experiences.[6]

Given that the identification of suspects may be based on classified evidence, which may not stand as sufficient at a regular court proceeding, and that the ordered sanctions must be executed swiftly to prevent the assets from being transferred or hidden (Vlcek 2009: 7), financial sanctions have become a powerful tool in the counter-terrorism box. However, as shown below, they are not necessarily the most effective one.

This new mechanism marked a significant change in the EU's role and position in combating terrorism. Until 2001 the EU had focused on the adoption of traditional and general framework legislation to be implemented individually by the Member States. In addition, the balance has shifted from setting standards for the legal fight against terrorism to taking measures that undoubtedly approach enforcement (Eling 2007: 109). The potency of the new mechanism becomes clearer if one takes into consideration that the EU accounts for a high proportion of global financial transactions. However, closer examination of the system's effectiveness reveals that since the initial surge in 2002 of the amounts frozen (as reported to the UNSC) there has been little increase in that quantity. This may indicate that the terrorists have found other means to finance their activities or at least to move their money (Vlcek 2009: 8).

The immediate impact and ex-ante nature of the financial sanctions, along with the virtual impossibility for suspects to defend themselves against the measures, have raised some concerns and doubts about due process in the listing action. They have also triggered a number of court cases, notably the al Barakaat International Foundation/Yassin Abdullah Kadi case.[7]

The al Barakaat network was believed by the US to support financially Al-Qaida and in consequence its name was put on the blacklist and transposed by the UN Security Council Sanctions Committee into international law. As a result all financial assets and operations of three Swedish citizens of Somali origin who operated money transfers via al Barakaat financial network were blocked on European territory. Third parties were forbidden to support financially the affected citizens. In addition, in the case of sanctions, the burden of proving a suspect guilty is reversed. It is now for the suspect to prove his or her innocence, which those listed in the al Barakaat case did by starting proceedings at the EU's Court of First Instance. Despite the fact that the US itself withdrew legal proceedings against al Barakaat, and the suspected Swedish citizens were delisted by the Security Council Sanctions Committee, the European Court of First Instance ruled against their petition (de Goede 2008: 173). The complaint of Mr. Yassin Abdullah Kadi (a Saudi businessman who allegedly had links with Al-Qaida), was joined to the case of al Barakaat.

To protect fundamental rights and the principle of legal redress, the ECJ issued a ruling establishing the principle of review of EU laws that implement UN Security Council resolutions (Labayle and Long 2009: 4). In September 2008, the European Court of Justice (ECJ) thus annulled the EU Council regulation related to Kadi and al Barakaat. Heupel (2009: 315) concludes that, "as this ruling can be used by other listed parties as a precedent, the EU is under heavy pressure to reform the way in which targeted UN sanctions are implemented in EU member states". The pressure resulting from the court's rulings has already prompted the Commission to put forward a proposal to amend the Council Regulation 881/2002 and thus to change the process of imposing restrictive measures on terrorist suspects.

Money laundering legislation

The other approach to combat the financing of terrorism has its roots in anti-money laundering legislation. These measures have focused on preventive actions as opposed to the more repressive practice of listing suspects and freezing their assets.

The most significant impetus for legislative action against money laundering has come from the Financial Action Task Force (FATF), established by the G-7 Summit in Paris in 1989 to develop a co-ordinated international response to the problem. One of the first tasks of FATF was to develop the 40 Recommendations, which set out a framework for effective anti-money laundering programmes. This standard-setting international forum has gained increased importance after 9/11. To limit the possibilities for terrorist organisations to use the international financial system to transfer funds the FATF has elaborated and recommended 9 Special Recommendations (FATF 2004). The main push for legislative action to implement the FATF Recommendations has been peer reviews and peer pressure exerted on the EU members of FATF - the European Commission and 15 Member States.[8]

The First and Second Money Laundering Directives (MLD) , approved in 1991 and 2001 respectively, imposed anti-money laundering obligations first on credit and financial institutions and then in 2001 on the so-called Designated Non-Financial Professional Bodies (DNFPBs) including accountants, lawyers, notaries, real estate agents, casinos and dealers in high-value goods. The legislation made them subject to the obligations of the Directive as regards to customer identification, record keeping and the reporting of suspicious transactions. The Directives also required the Member States to establish Financial Intelligence Units (FIUs) - central national agencies responsible for receiving, analysing, and transmitting reports on suspicious transactions to the competent law enforcement authorities.

While the first anti-money laundering initiatives concentrated on the laundering of profits generated through drug trafficking, the current Third MLD goes well beyond illegal drugs and targets any money generated by criminal activity.[9] The Third MLD, adopted in 2005, is also the first anti-money laundering legislation to include the measures to combat the financing of terrorism. It has implemented most of the revised 40 FATF Recommendations (2003) and the 9 Special Recommendations against terrorist financing (Financial Action Task Force 2003). The Directive reinforces the oversight regime applicable to transactions in the financial sector, as well as to DNFPBs. In addition, it broadens the scope of offences by including tax fraud and encourages the FIUs to work together more effectively. The Directive has applied an extended version of the "KYC" (Know your Customer) principle, which follows the FATF Recommendation No. 5. It obliges banks and financial institutions not to open accounts in cases where the holder is not identified or identifiable, to notify the competent authority of any suspicious transactions and to keep all supporting documents for a minimum length of time (5 years in the case of the United Nations Convention) (Labayle and Long 2009: 25). Some of the Special Recommendations have been covered by EU Regulations and Directives.[10] Recommendation No. 9 on the use of cash couriers, for example, is covered by Regulation 2005/1889/EC[11] on controls of cash entering or leaving the Community requiring individuals crossing a state border to declare cash amounts equal or higher than 10,000 euros. Yet, it should be noted at this point that the Regulation 2005/1889/EC (Art. 2) contains a considerable loophole since the legislation does not relate to gold or other precious commodities with a value lower, equal or higher than 10,000 euros. (Labayle and Long 2009: 25).

However, as discussed below, despite the adopted measures there still remains a significant disparity in the transmission of statements between the different DNFPB professions and, in particular, quite insufficient cooperation of lawyers with the FIUs (Labayle and Long 2009: 26).

Polity – The institutional framework to combat terrorist financing

The key to successful and effective measures for CFT is close cooperation and co-ordination. This involves first and foremost intelligence sharing, which together with special operations constitutes the basis for a successful fight against terrorism (Howell 2007: 35). As discussed above, given the peculiarities of terrorist financing, the emphasis on the intelligence sharing seems to be even more important with CFT.

However, despite the call for better co-ordination, transparency and flexibility across different agencies, at national and European level,[12] the EU institutions and agencies have not become the focal points for all intelligence cooperation in Europe. EU Member States says they agree that there should be a common European approach to a common threat of terrorism due to its cross-border nature. The European Security Strategy reads: "Europe is both a target and a base for [...] terrorism [...] Concerted European action is indispensable".[13] On the other hand, the governments are hesitant to give the EU extra resources and powers. This may stem from the fact that collaboration, from the point of view of Member States' security agencies, is primarily driven by their national security agenda (Lander 2004). As Bossong (2008: 25) puts it: "the EU's counterterrorism policy has become more and more limited to technical and supportive policies, whereas the main responsibility of the member states has been underlined."

Other reasons for reluctance in intelligence-sharing include the lack of trust among the agencies, which follows the logic that the larger the number of actors involved, the greater the probability that the sensitive information will leak. Furthermore, since security, including the protection of citizens and infrastructure, is at the core of national sovereignty, the Member State governments are primarily held accountable and responsible for countering terrorism. Therefore, the national security agencies are tasked to produce and provide national enforcement services with complete intelligence. This is especially true for the assessment and dissemination of operational and tactical counter-terrorism intelligence (Müller-Wille 2008).

The lack of – and the need for – operational collaboration was made clear by the European Counter-Terrorism Coordinator – Gilles de Kerchove, who stated that: "not all cases of prosecution or investigation are sent to Europol or Eurojust, respectively. So it is important for me to remind Member States of this obligation" (de Kerchove 2008).

This point of view was supported by the Opinion of the European Economic and Social Committee, which pointed out that: "the roles of the Member States, EU institutions, Europol, Eurojust, etc. are well defined, but it is above all the operational nature of cooperation within intelligence agencies and investigations which requires constant improvement."[14]

Despite the adoption of Council Decision 2000/642/JHA on cooperation between FIUs, which was intended to harmonise and improve the exchange of intelligence between them, Member States do not cooperate with each other in the same way, nor do they contribute to the same extent to the relevant Europol Analysis Work Files on terrorist financing. The lack of cooperation is also evident between the FIUs and Europol. The FIU.net project has not yet achieved its original ambitions. It consists of a secure system through which the FIUs involved in the project can share financial intelligence. This platform, initiated in 2000 by the Netherlands in cooperation with the UK and Belgium, is still not being used by all

EU Member States, despite its endorsement by the European Counter-Terrorism Coordinator (Labayle and Long 2009: 20). It seems that for the time-being the only type of intelligence which is produced and shared at the EU level is the one to support decision-making at the strategic level.

A slightly better picture appears from the experience of the EU's Situation Centre (SitCen) located in the Council's General Secretariat and reporting to the High Representative for the CFSP/Secretary-General of the Council of the European Union. It provides the High Representative and the European Council with strategic analyses of the terrorist menace. It relies on and combines the intelligence assessments provided by the Member States, the EU's own information channels and open sources. In consequence, SitCen produces original intelligence that either no national agency is willing/able to produce or where a single country's report would not be acceptable from the political point of view.

The internal structure of SitCen is also particular in that the Civilian Intelligence Cell and the Counter Terrorism Cell cluster seconded national experts from foreign and domestic intelligence services. It is worth noting that the initiative followed the Madrid bombings and the adoption of the "Solidarity Clause" by the European Council. However, not all Member States were able to delegate their national experts. Therefore it appears to be a sort of an insiders' club composed of those Member States who have necessary intelligence and analysis capacities and who had already established good working relationships outside the EU's framework (Müller-Wille 2008: 62).

It is important to engage the public in a dialogue on liberty/security in order to reach a compromise on what is acceptable to manage the unease.

It is thus unsurprising that the bulk of counter-terrorism cooperation at the operational level takes place outside of the formal EU framework on a bi- and multi-lateral basis. As an example, there are the cooperation agreements between France and Spain, signed in 2004, which created a combined counter-terrorism unit, or the agreement between the UK and Ireland in 2005, which expanded their long-standing cooperation. Some groups of Member States have decided to deepen their collaboration on sharing personal data and operational counter-terrorism intelligence as in the case with the signatories of the Treaty of Prüm or the members of the G6 (France, Germany, Italy, Poland, Spain and the UK).[15]

The early detection, prevention and investigation of terrorism depend on a combination of signals and pieces of evidence from many different sources. As stated in the Independent Scrutiny on the EU's Efforts in the Fight Against Terrorist Financing: "it is the art of sourcing and combining data and finding meaningful relationships and clues leading to individuals or groups that adds value to CFT (and CT) measures" (Howell 2007: 39).

In short, smart cooperation at the EU institutional level could add value and contribute more effectively to counter terrorism and terrorist financing which seems to be politically unfeasible for the time-being. However, the adoption of the Treaty of Lisbon may substantially improve the cooperation in the field of CFT because the new Treaty abolishes the EU pillar structure and creates a single legal framework.

Politics – The European contribution to the "war on terror"

As discussed above, one reason why it is so difficult for the EU to cooperate on CFT is because security policy belongs to hard politics. At the heart of the matter are therefore issues of state sovereignty. The term "war on terror", first coined by President George W. Bush shortly after the 9/11 attacks, illustrates well that the discourse around the politics of CFT has quickly concentrated on survival.[16] The European contribution to the "war on terror" or the "fight against terrorism", to use the arguably more neutral terms employed by the EU, cannot be underestimated and is critical for the following three reasons (Wright 2006). First, Europe was and is a target for considerable terrorist activity. Second, from the geopolitical point of view, Europe is well placed to support third countries in their efforts for CFT. In this regards, it should be mentioned that the EU and the Council of Europe have financially and technically supported blacklisted countries, such as Ukraine (blacklisted by the FATF in Autumn 2001), to build up their capacity and institutional infrastructure (e.g. FIU) for AML and CFT. Third, the European contribution is important because, unlike the US, Europe has longstanding experience with fighting terrorism, specifically the UK with paramilitary organisations in Northern Ireland, Germany with the left-wing Red Army Faction, Italy with the Red Brigades and Spain with the terrorists of ETA. The valuable experience gained in fighting terrorism remains highly relevant to counter "new terrorism".[17]

All the preceding points show that Europe – despite the current challenges at the co-operational level – could make an even more valuable contribution and why the war on terror serves Europe's own security interest. Yet, the European contribution also has revealed "a division of labour in the international system that has been apparent, if not universally endorsed for some time with the United States providing military power and the Europeans providing 'civilian' power" (Wright 2006: 282).

Europe is widely portrayed as a civilian power that favours law enforcement and policing while the US is a military power that uses pre-emptive military means to fight against terrorism. Associated with this perception is an image of Europe as being the "weak link in the international campaign" (Wright 2006: 281). However, the juxtaposition of Europe providing "civilian power" and the US of providing military power overlooks the fact that the EU in some respects has gone beyond the international policy guidance to combat terrorist financing. In fact, as the cases of Kadi and al Barakaat show, the EU has not been merely a reluctant follower of US-driven (Taylor 2007: 12-18), UN and FATF guidance.

The US strategy for the war on terror is, indeed, above all a doctrine of pre-emption (cf White House 2002: 6). The problems generated by the related precautionary security practices are evident (for an interrogation of the arguments related to the risk and precautionary procedures see Heng 2006; Heng and McDonagh 2008; Williams 2008). The doctrine has raised a strong discussion on the questions of accountability and legitimacy as it empowers non-elected officials and private agents such as private banks and airlines, to implement surveillance measures. It has had a considerable bearing on the EU Member States' approach to terrorism as well. As the cases of Kadi and al Barakaat demonstrate, the decision and policy-making on the basis of imagined catastrophes bear the high potential risk of wrongful arrests and assets freezing (de Goede 2008: 179). As soon as a security dimension is attached to the debate, it quickly becomes a "life or death" discourse that gives leverage to perceived terrorist threats and increased surveillance at the costs of strong restrictions on individual privacy and accepting wrongful decision-making. In addition, the logic of precautionary security principles justifies disastrous incidences like the London Metropolitan Police shooting of Jean-Charles de Menezes in 2005. It is also this "state of permanent fear" that legitimises the erosion of civil liberties (Buzan 2006; Vlcek 2007). However, fears and threats are not determined in relation to measurable risks but to perceived risks; they are patently subjective and relative. To design effective CFT policies without impinging too much on civil liberties, policy- and decision-makers should therefore take into account the concerns expressed by the citizens. It is thus important to engage the public more successfully in a dialogue on liberty/security to reach a compromise on what is acceptable to reduce terrorist threats.

To conclude, given the inherent complex structure and different phenomena of terrorism, it is no surprise that financial surveillance has delivered mixed results to counter terrorist financing. Much of the difficulties are related to the fact that funding for terrorist acts may be generated from legal sources and second, as the Madrid and London bombings demonstrated, that it does not require large sums in order to cause deadly disruptions. In addition, terrorists are quick in adjusting to the new environment of financial surveillance and adopting counter-measures. The real challenge for the international community is therefore to put terrorism into perspective and judge appropriately on the risks of threats without impinging too much on civil liberties. A step into this direction is to create a public dialogue to reach a compromise on what is acceptable to manage the unease.

NOTES

* Miriam Allam, former Researcher, European Centre for Public Financial Management, EIPA Warsaw.

** Damian Gadzinowski, European Commision, DG JLS, former Research Assistant, European Centre for Public Financial Management, EIPA Warsaw.

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1 "Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing." OJ L 309, 25 November 2005, p. 15-36.

2 For example, the Northern Irish IRA and UVF or the Colombian FARC and the Peruvian Sendero Luminoso financed their activities partly through drug trafficking, kidnapping for ransom and bank robbery.

3 Art. 1, "Council Framework Decision" of 13 June 2002 on combating terrorism, OJ L 164, 22 June 2002, p. 3.

4 On the basis of this definition, for instance, a Greenpeace protest in Denmark in 2003, was charged under EU anti-terror laws (Statewatch Observatory 2005).

5 The Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, OJ L 344. and Council Regulation (EC) No. 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ L 344, 28 December 2001.

6 "EU Counter-Terrorism Clauses: Assessment." 14458/2/04.

7 Case C-415/05P, "Al Barakaat International Foundation / Council and Commission", Yassin Abdullah Kadi and Al Barakaat International Foundation, ECR 2008 p. I-06351.

8 Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Luxembourg, Portugal, Spain, Sweden, the UK.

9 "Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing." OJ L 309, 25 November 2005, p. 15-36.

10 However, the Third Directive did not address the Special Recommendation 6 concerning alternative remittance systems (informal value transfer services) and Special Recommendation 7 concerning wire transfers. Recommendation No. 6 has been covered by the Payment Services Directive 2007/64/EC (PSD) and the issue of wire transfer was addressed by the Regulation on Information on the Payer Accompanying Transfers of Funds 2006/1781/EC.

11 "Regulation (EC) No. 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community." OJ L 309, 25 November 2005, p. 9-12.

12 "Report on the Implementation of the European Security Strategy: Providing Security in a Changing World." In S407/08. Brussels, 11 December 2008, p. 4.

13 "A Secure Europe in a Better World: European Security Strategy." Council of the European Union, 15849/03 Brussels, 5 December 2003.

14 Opinion of the European Economic and Social Committee on the Prevention of terrorism and violent radicalisation, OJ C 211, 19 August 2008, para. 3.13.

15 It should be noted that there has been a more positive development of incorporating the multilateral agreements into the EU's legal framework as the case of the Treaty of Prüm shows.

16 In January 2009 UK Foreign Secretary David Miliband officially declared that the "war on terror" was wrong and both a "misleading and mistaken" doctrine that rally extremists against the West (Miliband 2009).

17 New terrorism is often equated "to highly decentralised entities motivated by religious fundamentalism" (Wright 2006: 282).

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Staff News

Maastricht

Dr Beatrix Behrens
Human Resource Management; leadership.

Dr Beatrix Behrens joined EIPA as a Seconded National Expert in the Unit for European Public Management, for a period of six months starting in October 2009. She is Director of the HR-Politics division at the German Bundesagentur für Arbeit (BA) in Nuremberg. Before taking over this position, she was Director of HR-Development, where she ran a project to develop and establish a modern and integrated HR-Management system with a special focus on managing competencies and introducing dialogue-based modern leadership instruments to the organisation. She obtained an MA in Public Administration from the University of Constance and a Doctorate in Business Administration from the University of St. Gallen. In her thesis she examined within the frame of a single case study, the question of why theoretically well founded employee appraisal systems might not work in the practical life of federal organisations (focus on organisational and HR-Development aspects). After working in the USA for several non-profit organisations, Dr Behrens started her career at the BA as a trainee and took over several leadership functions at different levels, focusing on HR management. She has a long experience in staff training and developing strategic concepts (i.e. demographic sensitive HR-Management). She also publishes articles on HR-Management with a current focus on demographic sensitive HR-Policies.

Dr Sabina Kajnč
Decision-making in external relations of the EU; Presidency organisation and conduct.

Dr Sabina Kajnč joined EIPA in June 2009 as Lecturer in the Unit "European Decision-Making". Sabina obtained a BA in International Relations from the University of Ljubljana and a MA in European Studies from the Freie Universität Berlin, as well as a doctoral degree from the University of Ljubljana in 2006. In spring 2008 she was visiting research fellow at the Instituto Universitario de Estudios Europeos in Barcelona, and from autumn 2008 to spring 2009 she was visiting research fellow at the Centre for European Policy Studies. There she conducted research on the cooperation of small and middle sized Member States in European foreign policy, within the European Foreign and Security Policy Studies Programme, which was funded by Compagnia di San Paolo (2007-2009). She has conducted research, including an evaluation study, on the 2008 Slovenian EU Presidency, as well as publishing analysis, expert and academic papers on the subject.

Luxembourg

Sofia Papoutsi
Fundamental EU law and constitutional issues; the internal market and the four freedoms (free movement of capital); EC financial services law.

Sofia Papoutsi joined EIPA's Centre in Luxembourg – the European Centre for Judges and Lawyers – as a Researcher in June 2009. Having completed her undergraduate studies at the Faculty of Law at the Aristotle University of Thessaloniki, Greece, she went on to follow a Master degree in International and European Law at the Montesquieu University in Bordeaux, France. After qualifying as a lawyer at the Bar of Thessaloniki, she worked as a legal trainee at the European Court of Justice and as a legal and administrative officer at a Luxembourg-based investment company.

Igor Dizdarevic
EU Environmental law; general EU constitutional law; activities related to the European Investment Bank.

Igor Dizdarevic joined EIPA's Centre in Luxembourg – the European Centre for Judges and Lawyers – as a Lecturer. He holds a Bachelor and Master degree in International Law, from Jean Moulin Lyon III University. He also holds a bilingual French/Spanish Master degree from the Institut d'Etudes politiques de Paris (Sciences Po, Paris) with a focus on EU affairs and public administration. His professional experience includes positions as parliamentary assistant (French parliament), as well as legal researcher and lobbyist on EU environmental law and policy for a major French environmental company in Brussels. Since 2007, he has worked as a consultant for PricewaterhouseCoopers Luxembourg, preparing proposals for and implementing EU funded projects in the field of Structural Funds, as well as infrastructure projects in environment, energy, transport, water management, etc. He has also provided consultancy services for the European Commission and the European Investment Bank, designing trainings and drafting guides and manuals for national officials in EU Member States and neighbouring countries.

Barcelona

Federica Santuccio
Local and rural development policies; EU agricultural policies; research development issues; international trade analysis.

Federica Santuccio joined EIPA's Centre in Barcelona – the European Centre for the Regions – on 1 October 2009 as a Lecturer. She is an economist, specialising in the analysis and evaluation of agricultural and rural development policies. She graduated from the University La Sapienza (Rome, Italy) in 1998, before obtaining an MA in European Economic Integration from the University of Sussex (UK) and a PhD in Institutions, Environment and Policy for Economic Development from the University of Roma Tre (Rome, Italy). She has extensive research experience and knowledge of issues related to structural funds for the agricultural sector, EU enlargement and neighbourhood policies, local and rural development policies and EU agricultural policies. Before joining EIPA, she worked as an economist for three years at JRC-IPTS within the European Commission, where she provided analysis of EU trade liberalisation policies and coordinated projects. She has also worked in Italy with the Development Researchers Network and Agriconsulting Rome, where she organised and led projects on rural and regional development in the Western Balkan Countries, as well as carrying out an evaluation of regional development plans in Romania. Previous to that, she worked as a research assistant at the University La Sapienza. She is fluent in Italian (mother tongue), English and Spanish.

Institutional News

EIPA's Board Of Governors

At its meeting in Maastricht on 29 and 30 June 2009, the Board of Governors approved the following appointments:

Full Members

Portugal
Ms Carolina FERRA, Director-General of the Directorate for Administration and Public Employment (DGAEP) was appointed as full member, succeeding Ms Teresa NUÑES.

Substitute Members

Portugal
Ms Armanda DA FONSECA, the Deputy Director-General, was appointed, succeeding Mr Rogério PEIXOTO.

Spain
Mr Amadeu RECASENS I BRUNET, General Director for Modernization of Public Administration, was appointed as the substitute member of Ms Teresa ARAGONÈS I PERALES, succeeding Ms Leonor ALONSO I GONZALEZ.

At its meeting in Stockholm on 3 and 4 December 2009, the Board of Governors approved the following appointments:

Full Members

Lithuania
Mr Evaldas GUSTAS, Chancellor of the Ministry of the Interior of the Republic of Lithuania, will succeed Ms Rasa NOREIKIENĖ, who has been a member since June 2006.

The Netherlands
Ms Saskia GÖRTZ, Director for Personnel and Organisation Policy at the Directorate-General for Government Organisation and Management within the Ministry of the Interior and Kingdom Relations has been appointed as successor to Mr Rob KUIPERS, who has been a member since December 2003.

Austria
Ms Angelika FLATZ, Head of Division III (Civil Service and Administrative Reform) within the Federal Chancellery, will replace Ms Elisabeth DEARING, who has been a member since December 2008.

Substitute Members

Lithuania
Ms Rasa Dalia LIUTKEVIČIENĖ, Deputy Director of the Public Department of the Ministry of the Interior, was appointed.

Poland
Mr Pawel PIETRASIEŃSKI, Counsellor to the Prime Minister (International Cooperation Unit, Department of Civil Service, Chancellery of the Prime Minister) has been appointed as the substitute Board member, succeeding Mr Witold KRAJEWSKI, who has been a member since December 2008.

Signing of the cooperation agreement between the Faculty of Arts and Social Sciences (FASoS) - Maastricht University, and EIPA, regarding the Master of Arts programme in European Public Affairs,
Maastricht, 15 July 2009

Prof. Dr R. de Wilde, Dean of FASoS and Prof. Dr Marga Pröhl, Director-General of EIPA

Visit to EIPA Maastricht by His Excellency Mr Zlatin Trapkov, Bulgarian Ambassador to the Netherlands,
Maastricht, 31 August 2009

Prof. Dr Marga Pröhl, His Excellency Mr Zlatin Trapkov and Mr Wim van Helden, Director of Finance and Organisation of EIPA.

Visit to EIPA Maastricht by His Excellency Mr Juan Prat y Coll, Spanish Ambassador to the Netherlands,
Maastricht, 3 September 2009

Prof. Dr Marga Pröhl and His Excellency Mr Juan Prat y Coll

Visit to EIPA Maastricht by Mr Stéphane Lopez, Direction de la langue française, de la diversité culturelle et linguistique, Division de la langue française et des langues partenaires, de l'Organisation internationale de la Francophonie (OIF),
Maastricht, 11 September 2009

(from left to right): Ms Dorina Claessens (Programme Organiser), Prof. Dr Marga Pröhl, Ms Florence Fisette (French Translator, EIPA Linguistic Services), Mr Stéphane Lopez (OIF), Mr Jérôme Boniface (Seconded National Expert) and Mr Frank Lavadoux (Senior Lecturer).

Signing at EIPA Maastricht of the renewal of the Memorandum of Cooperation between the National Centre of Public Administration and Local Government (EKDDA) of the Hellenic Republic and EIPA,
Maastricht, 28 September 2009

Dr Georges Voutsinos, the Secretary-General of EKDDA, and Prof. Dr Marga Pröhl

Editorial Team

Dr Edward Best (UK)
Professor, Head of Unit European Decision-Making
European institutions and decision-making processes; comparative regional cooparation and integration

Cosimo Monda (IT)
Senior Lecturer, Head of Information, Documentation, Publications and Marketing Services
European information management, data protection, EU Agencies and EU law

Dr Phedon Nicolaides (CY)
Professor of Economics, Head of Unit Europan Policies
Economic integration, competition policy, EU enlargement process

Nick Thijs (BE)
Lecturer
Public management reform, comparative public administration, public sector quality management, quality models and techniques (Common Assessment Framework – CAF), consultancy services

Simone Meesters (NL)
Publications Department
Layout-DTP

Eloy Kruijntjens (NL)
Publications Department
Layout-DTP

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European Institute
of Public Administration
P.O. Box 1229,
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Tel.: +31 43 3296 222
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Ms Wytske Veenman
Head of Programme Organisation and Linguistic Services
European Institute of Public Administration
P.O. Box 1229
6201 BE Maastricht
The Netherlands
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EIPA's Headquarters
European Institute of Public Administration
O.L. Vrouweplein 22
P.O. Box 1229
6201 BE MAASTRICHT
THE NETHERLANDS
Tel. +31 43 329 62 22
Fax +31 43 329 62 96
E-mail: info@eipa.eu

Centre Luxembourg
European Centre for Judges and Lawyers
Circuit de la Foire Internationale 2
1347 LUXEMBOURG
LUXEMBOURG
Tel. +352 426 2301
Fax +352 426 237
E-mail: info-lux@eipa.eu

Centre Barcelona
European Centre for the Regions
c/ Girona, 20
08010 BARCELONA
SPAIN
Tel. +34 93 567 24 00
Fax +34 93 567 23 99
E-mail: eipa@eipa-ecr.com

Centre Warsaw
European Centre for Public Financial Management
Zielna 37
00-108 Warsaw
POLAND
Tel. +48 22 570 84 00
Fax +48 22 570 84 07
E-mail: info-warsaw@eipa.eu

EIPA's Representative Office
Egmontstraat 11
1000 BRUSSELS
BELGIUM
E-mail: a.guggenbuhl@eipa.eu

Siège de l'IEAP
Institut européen d'administration publique
O.L. Vrouweplein 22
Boîte Postale 1229
6201 BE MAASTRICHT
PAYS-BAS
Tél. +31 43 329 62 22
Fax +31 43 329 62 96
Courriel: info@eipa.eu

Centre Luxembourg
Centre européen de la magistrature
et des professions juridiques
Circuit de la Foire Internationale 2
1347 LUXEMBOURG
LUXEMBOURG
Tél. +352 426 2301
Fax +352 426 237
Courriel: info-lux@eipa.eu

Centre Barcelone
Centre européen des régions
c/ Girona, 20
08010 BARCELONE
ESPAGNE
Tél. +34 93 567 24 00
Fax +34 93 567 23 99
Courriel: eipa@eipa-ecr.com

Centre Varsovie
Centre européen de gestion financière publique
Zielna 37
00-108 VARSOVIE
POLOGNE
Tél. +48 22 570 84 00
Fax +48 22 570 84 07
Courriel: info-warsaw@eipa.eu

Bureau de représentation de l'IEAP
Rue d'Egmont 11
1000 BRUXELLES
BELGIQUE
Courriel: a.guggenbuhl@eipa.eu

Editorial Team
Dr Edward Best, Cosimo Monda,
Dr Phedon Nicolaides and Nick Thijs

Publications Department
Simone Meesters, lay-out and dtp
Eloy Kruijntjens, lay-out and dtp

For further information contact
Activities
Wytske Veenman, Head of Programme Organisation
and Linguistic Services
E-mail: w.veenman@eipa.eu

Publications
Cosimo Monda, Head of Information, Documentation,
Publications and Marketing Services
E-mail: c.monda@eipa.eu