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## **Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe<sup>1</sup>**

One of the important motives that has inclined many in Central and Eastern Europe (CEE) to favour strongly accession to the EU has been the conviction that, once in the Union, their own states will become more robustly democratic. The hope has been that the EU will provide extra protection against authoritarian or totalitarian temptations, that it will help fight corruption, and that it will improve the quality of public administration and the system of justice – put simply, that accession to the Union will help improve and consolidate democracy, the protection of human rights, and the rule of law.<sup>2</sup> At the very least, it is expected that the accession will make new member states more resilient against crises and potential upheavals; that it will add extra protections against a possible slide into chaos so that, even if it will not add any positive features per se, it will at least help cushion democratic institutions against the worst threats should a crisis situation arise – that it will render democratisation irreversible. *“Even if the accession will not be a panacea for any of the*

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<sup>2</sup> This is confirmed consistently by public opinion polls. For example, a Polish public-opinion expert states: *“Respondents (to public-opinion surveys) expect that our membership in the Union will lead to improvement of the functioning of the political system, strengthen the rule of law, improve the level of knowledge and education of Poles, and improve the protection of the environment”*, E.Bojenko-Izdebska, *Postawy i oczekiwania wobec integracji Polski z Unią Europejską (Attitudes and expectations regarding the integration of Poland within the European Union)*, in: *Prawo i ustrój Rzeczypospolitej polskiej w perspektywie integracji z Unią Europejską*, eds. M.Grzybowski, M.Berdel-Dudzińska, Rzeszów 2002, p.81-92 at 87.

*pathologies of our democracy, it will nevertheless strengthen the stability of the state, so that if there are some major crises..., membership in the EU will reduce their consequences*". This view, expressed recently by the Polish political philosopher Marek Cichocki,<sup>3</sup> echoes a widespread view shared by many proponents of accession.

This, of course, was not the only factor in securing widespread support for accession, and there are those who have not been persuaded by this point of view, but one should not underestimate the strength and salience of the "civilisational" arguments (as they are usually referred to) in influencing the pro-accession preferences.<sup>4</sup> Moreover, of all of the "civilisational" or "raison d'état"-related factors, a concern for the modernisation of the state and consolidation of democracy are generally viewed as being among the most important (with modernisation, in this context, being understood essentially as Europeanisation). Indeed, the strength of this feeling has induced Cichocki to the rather melancholic reflection that, once again, as so many times over the last two hundred years of its history, the process of modernisation has been introduced to Poland from the outside. This is, for him, cause for a certain sadness because "*if we asked why so many people support the accession the answer would have to be: because Poles in fact do not believe in their own state, in their own capacities, in their own elites. They do not believe that their own state can be the principal factor of modernisation and of the transformation for the better. This is what the EU constitutes for Poles*".<sup>5</sup> Another renowned Polish public commentator, Teresa Bogucka, observed, similarly, that the process of accession to the EU has revealed some striking symptoms of the "Polish complex": while the nationalistic and populist opponents of the accession must hold the strength of Polish culture in very low regard because they fear that, within the EU, Poland will immediately lose its cultural identity, the proponents of the accession seem to have a similarly low opinion of their country: "*they believe that the EU will compel us to match the 'norms of civilisation' because we are unable to do so on our own*".<sup>6</sup> I would venture a guess that this combination of hope (that "Europe" will help us acquire and consolidate democratic standards),

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<sup>3</sup> M.Cichocki, *Contribution to a discussion*, "Res Publica Nova", No. 176, Warsaw, 5 May 2003 at 58.

<sup>4</sup> A leading Polish sociologist, Henryk Domański, recently reported that, in 1998-2000, around 40 % respondents defined the benefits of accession in terms of "benefits for Poland" while between 24 and 33 %, as benefits for themselves, H.Domański, *Jak rozumiemy integrację? (How do we understand integration?)*, "Res Publica Nova", No. 176, Warsaw, 5 May 2003, p.61-63.

<sup>5</sup> Cichocki, op.cit., p.51.

<sup>6</sup> T.Bogucka, *Co mamy zrobić, by odzyskać dumę? (What should we do to regain our pride?)*, "Gazeta Wyborcza", Warsaw, 8 August 2003.

and melancholy (that these central factors of overall societal modernisation will come “from the outside”) is not confined to Poland only, but that it reflects a much more widespread condition in Mitteleuropa and the Baltics. This feeling is underwritten by a generalised sense of frustration regarding the state of democracy in the new members states. Public administration is seen as weak, under-resourced, inefficient and prone to corruption, and above all, politicised; civil servants display arrogant attitudes towards the ordinary citizens and undue deference towards party politicians; governmental structures have been captured by political parties, while parliaments are peopled by demagogues and who hide behind the shield of parliamentary immunity. Furthermore, the public media is controlled by the parties in government, while private media is vulnerable to manipulations by the state and big business; the system of justice is seen as slow, arbitrary and corrupt; internal security services are frequently happy to participate in political games and manipulations conducted by their political superiors; and the excessive proliferation of political parties built upon criteria that have little to do with genuine differences in political programmes renders the ideal of electoral choice chimerical. Citizens of CEE do not trust and do not particularly like their own states: fourteen years after the advent of democracy, the belief in their own democratic institutions is very low. This is no doubt largely a legacy of the immediate past; as George Schöpflin notes, “*The state, having been seen as an alien, impenetrable, inauthentic and hostile entity, continues to be regarded with suspicion, and reliance on personal connections is widely preferred, as real*”.<sup>7</sup> In Poland, only 12-16 percent of people declare that they trust the fundamental democratic institutions of their own country, and only seven percent believe that the national political institutions function effectively. In contrast, over fifty percent believe that the European Union institutions work well, even though the general level of knowledge about what they do and how they operate is very low.<sup>8</sup> This trust has therefore a mythical quality, but it nevertheless constitutes an asset that responsible local political elites may use for the benefit of reforming the state. As Polish sociologist Lena Kolarska-Bobinska

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<sup>7</sup> G.Schöpflin, *Post-communism and the Perceptions of Europe*, in: *Post-Communism as a European Problem*, eds. S.Bianchini, G.Schöpflin, P.Schoup, Longo Editore, Ravenna 2002, p.100.

<sup>8</sup> These figures are provided by Kolarska-Bobinska, in an interview with Professor Lena Kolarska-Bobińska, *Unia – szansa na reformę państwa (The Union: an opportunity to reform the state)*, “Gazeta Wyborcza”, Warsaw, 3 August 2003, p.5. The high level of trust in the EU institutions among the citizenry of the candidate states before accession referenda was consistently confirmed by all opinion polls. A Eurobarometer poll of September 2002 showed an average level of 59 % of “trust in the European Union” in 13 “candidate states” (which included also Malta, Cyprus and turkey), with the level of trust within the CEE ranging between 76 % (Hungary) and the lowest, 43 % (Estonia), Eurobarometer 2002, September 2002).

has said: “Such trust [in the EU institutions] represents capital for those who will undertake the reform of the state. If this is not used there may be a disaster, because the trust in EU institutions will be lost while trust in Polish institutions will not be gained”.<sup>9</sup> It may also explain the apparent paradox of why so many people in the candidate states were at the same time partisans of the EU as a union of independent (to the greatest degree possible) states, and also favoured the establishment of strong EU institutions, such as a common government or president.<sup>10</sup>

This mix of distrust in one’s own state and a quasi-mythical trust in “Brussels” (largely derived from the old, Communist-era conviction that anything coming from the West is good, or at least better) offers a socio-psychological background against which the possible contribution of the accession process to the state of democracy in new member states can be assessed. It can be also considered against the background of the contribution already made to the consolidation of liberal democratic rules and institutions by the process of Europeanisation in general, and the specific prospect of accession to the EU in particular. It is this contribution that may, in part at least, account for the generally high level of support that the accession process enjoyed among the citizens of candidate states, despite the uncertain calculus of material costs and benefits. As the Slovak legal scholar Radoslav Procházka observed, “Given the lack of immediate and tangible results of deference to Brussels, it is ironic that support for EU membership has not withered away among the Central European populations as much as it did in relation to the overall post-1989 political development”.<sup>11</sup> The influence that the EU has exerted upon the correction, maintenance and consolidation of democracy in the candidate states may explain this “irony”. CEE candidate states in the period leading up to accession attempted to emulate, with varying degrees of success, the models of liberal-democratic principles in their own institutional design and practice; no doubt a major incentive for such emulation was provided by the prospect of joining the EU, and it acquired the form of political conditionality. Its effectiveness will be discussed in the first part of this paper; more specifically, I will discuss the

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<sup>9</sup> L.Kolarska-Bobińska, op.cit., p.5.

<sup>10</sup> On the eve of the accession referendum in Poland, a leading public-opinion institute showed that 65% of respondents wanted to see the EU heading towards a union of independent states (as opposed to 16% who favored a federal idea), and that 52% favored the establishment within the EU of “an institution playing the role of the common government” (with 23% against); 39% favored establishing within the EU the office of president (with 34% against), *CBOS Polish Public Opinion Newsletter*, March 2003, p.1-2.

<sup>11</sup> R.Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe*, CEU Press, Budapest 2002, p.284.

extent to which the effectiveness of political conditionality is likely to survive after the accession takes place. In the three remaining parts of the paper I will consider in more detail three particular areas of democracy that may be affected by the entry of CEE states into the EU (and that have already been effected, to some degree, by the process leading up to accession): the relationship between the legislatures and the executives, the position of constitutional courts, and the decentralisation through regionalisation of these states.

### **1. Political conditionality before and after accession**

In the years immediately after the fall of Communism, EC conditionality was focused mainly on human rights and on general democratic stability; it was the period in which the CEE states set up their basic institutional frameworks. Conditionality operated through co-operation and association agreements with CEE states and by the major assistance programme, PHARE; already at this very early stage, the European Parliament demanded that “reference to human rights should figure” in those agreements and that it should be mentioned specifically in the negotiating mandates given to the Commission.<sup>12</sup> Fundamentally, however, the role of the EC/EU at this stage consisted in responding to the rapid changes occurring in CEE.

The turning point was the Copenhagen summit of 1993, which established, as the political conditions for the new entrants, the “*stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities*”. Nevertheless, in the period of 1993-1997 the principal focus of conditionality was on the internal market *acquis*, with the main pre-accession strategy in this domain determined at the Essen European Council in 1994. Political conditionality acquired real bite after 1997, when the Commission began evaluating the progress of all candidates in the annual reports, which included sections on “Democracy and the rule of law” (with subsections on the parliament, the executive, the judicial system, and anti-corruption measures) and on “Human rights and the protection of minorities” (with subsections on civil and political rights, economic, social and cultural rights, and minority rights and the protection of minorities). At the start of that monitoring cycle, in 1997, the Commission determined that some countries had already fulfilled the democracy criterion (Estonia, Poland, Hungary, Slovenia and the

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<sup>12</sup> Quoted in: F.Schimmelfennig, S.Engert, H.Knobel, *Basic Europeanization: The Impact of EU Political Conditionality*, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003, p.3 (paper presented at the workshop: “The Europeanization of Eastern Europe: Evaluating the Conditionality Model”).

Czech Republic), others were on they way to meeting this criterion (Bulgaria, Romania, Lithuania and Latvia), while one had not fulfilled this condition (Slovakia) and was therefore excluded from accession negotiations.<sup>13</sup> Those reports included quite specific recommendations for reform, as well as detailed criticisms of matters ranging from the length of court proceedings, through conditions in prisons to laws on conflict of interest. The specificity of these remarks partly offset the vagueness and indeterminate nature of Copenhagen political criteria.

To what extent was the consolidation of democracy in CEE the result of EU conditionality, and was, so to speak, forced upon the candidate states as a fee to be paid for the entry to the club? There has been, lately, a lively scholarly debate among political scientists centring on the characterisation of the nature and relative importance of the transmission of democratic and liberal norms to the candidate states: whether it was largely voluntary or involuntary, driven mainly by external or internal forces; whether the most efficient measures were those that operated through the mechanisms of conditionality (with the coercive element inherent therein), or rather “lesson drawing” and “social learning” by the candidate states, which voluntarily adapted to the models they saw as dominant among EU member states.<sup>14</sup> This is not the place to review this debate, but a few observations may be helpful for the purpose of reflecting upon how membership in the EU will affect the consolidation of democracy, human rights and the rule of law in the future.

First, some of the most important institutional innovations, especially in the first, transitional period of democratic change, were taken predominantly under domestic public pressure, including the pressure from the democratic opposition elites who made their demands heard around the round tables (as in Poland or Hungary) or on the streets (as in Czechoslovakia or Romania), and who had some fundamental templates for liberal democracy in mind without necessarily being affected by any outside persuasion: free elections to the parliament, independence of the judiciary, free press, etc. They coincided with what was perceived as the “norm”, and the elites of the CEE states more often than not

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<sup>13</sup> The Commission’s avis of July 1997 referred to “the instability of Slovakia’s institutions, their lack of rootedness in political life and the shortcomings in the functioning of its democracy”, see: G.Pridham, *The European Union’s Democratic Conditionality and Domestic Politics in Slovakia: the Mečiar and Dzurinda Governments Compared*, “Europe-Asia Studies”, No. 54/2002, p.224. At the Helsinki summit of December 1999 the new government of Dzurinda (elected in 1998) won agreement to open negotiations as from February 2000.

<sup>14</sup> See the papers presented at the workshop convened by Professor Frank Schimmelfennig: *The Europeanization of Eastern Europe: Evaluating the Conditionality Model*, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003.

found it perfectly natural to base their own systems on the models that they saw successfully practised in Western Europe, the emulation often pre-designed by dissident elites before the fall of Communism, and put in place soon after the transitions. Indeed, some institutional innovations preceded the transition and had been installed, though in a carefully limited way, by the old regime, as is the case of the Constitutional Tribunal in Poland. Similarly, the moves towards regionalisation in some of the countries of the region predated the EU interest in this process, which was driven largely by Union's own rules for the management of structural funds.<sup>15</sup> Also, in terms of the self-perception of the motives for reform by the elites in CEE, there has been a strong noblesse oblige type of view under which it was improper to accord too high importance to EU conditionality. This feeling was encapsulated in the statement by the Czech Minister for the Interior: "*If we did the reform of public administration only because the EU wanted this from us ... this would be very poor and would not fulfil what we must consider a priority and what ... democratisation means*".<sup>16</sup> He was right, and it would be presumptuous to attribute a predominant role to external pressures and sanctions.<sup>17</sup> Many institutional changes introduced at a later stage of the 1990s were driven by the locally felt need to introduce corrections to the

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<sup>15</sup> See: M.Brusis, *Instrumentalized conditionality: regionalization in the Czech Republic and Slovakia*, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003, p.9 (paper presented at the workshop: "The Europeanization of Eastern Europe: Evaluating the Conditionality Model").

<sup>16</sup> Statement by Vaclav Grulich in the parliamentary debate on the reform of public administration, 19 May 1999, quoted by Brusis, op.cit., p.8.

<sup>17</sup> Some Western, including some American, observers, clearly overestimate the impact of the prospective accession to the EU upon the institutional design of CEE states. Bruce Ackerman, for one, has suggested that this was the main reason for the strong position of constitutional courts in CEE: "*while parliaments and presidents will predictably resist judicial interventions, they are painfully aware that highly visible confrontations with their domestic constitutional courts will gravely threaten prospects for early entry into the European Union, which is already looking for excuses to defer the heavy economic costs that admission of the East entails*", B.Ackerman, *The Rise of World Constitutionalism*, "Virginia Law Review", No. 83/1997, p.776. This is a very improbably hypothesis, for two reasons. Firstly, most CEE states set up a system of strong judicial review by constitutional court well before the early negotiations on accession began (indeed, Poland had a constitutional court before the transition to democracy). Second, there is no uniformity within the EU states in terms of the model of judicial review, or indeed regarding the very existence thereof: the United Kingdom and the Netherlands have no judicial constitutional review at all, while Denmark, Ireland, Greece and Sweden have adopted systems resembling the US-style model of decentralised judicial review. Hence, "*from the Union's perspective, it is irrelevant whether a candidate country has established a constitutional court or not*", F.Hoffmeister, *Changing Requirements for Enlargement*, in: *Handbook on European Enlargement: Commentary on the Enlargement Process*, eds. A.Ott, K.Inglis, The Hague 2002, p.94.

system as a response to the experiences with lapses in democracy: for instance, the set of reforms introduced by the Slovak Dzurinda government after 1998 were based on the lessons drawn from the authoritarianism of the Mečiar era: decentralisation and regionalisation may serve as examples of this type of action.<sup>18</sup> This is not to say that conditionality was necessarily of lesser importance, but rather that it worked best when it resonated with domestic preferences and political aims; its importance consequently varied from one domain to domain. As one scholar of the policy of regionalisation has noted, with regard to the Czech Republic and Slovakia: “*EU conditionality existed and functioned, but was essentially complementary and instrumental in a process driven by domestic needs and interests. Rule adoption occurred because the ideas underlying these rules resonated with national political discourses...*”<sup>19</sup>

In addition, for CEE local political elites there was often an important legitimacy dividend in proposing and implementing the designs seen as “European”: it distinguished them more sharply from the political establishment of the Soviet era, and it conferred upon them a degree of glamour and credibility; as a Slovak legal scholar has noted: “*the success story of the West was sold to ordinary folk at home in order to legitimise the new path of social development. (...) Not only was adherence to the ‘European criteria warranted by the transition agents’ instrumental considerations; it also proved attractive to, and was supported by, the Central European citizenry...*”<sup>20</sup>

Second, there were a number of outside sources, other than the EU, that provided their advice, inspiration and pressure: Council of Europe and its related bodies and agencies (including the Parliamentary Assembly<sup>21</sup> and the very active and influential Venice Commission),<sup>22</sup> the Organization for Security and Cooperation in Europe (OSCE), NATO (which had made accession subject to the same conditions as the EU),<sup>23</sup> and various NGOs, in particular Open Society Institute, the Helsinki Committee, etc. It is clear that the impact of these sources was the strongest whenever there was a high degree of consistency among those

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<sup>18</sup> Brusis, op.cit., p.11.

<sup>19</sup> Ibidem, p.11-12.

<sup>20</sup> Procházka, op.cit., p.19, footnote omitted.

<sup>21</sup> For an important and very interesting example, consider the Resolution of the Parliamentary Assembly of Council of Europe No. 1096 of 27 June 1996 on measures to dismantle the heritage of former communist totalitarian systems, (<http://stars.coe.fr>), in which the Parliamentary assembly formulated the guidelines to be observed while constructing so-called “lustration” and “decommunisation” laws if they are to be compatible with the principles of democracy and the rule of law.

<sup>22</sup> The full name is the European Commission for Democracy through Law; for a description of activities see: <http://www.venice.coe.int/site/interface/english.htm>

<sup>23</sup> See: Schimmelfennig, op.cit., p.7.



various influences. One good example is the case of Latvia's law and practice regarding its Russian speaking minority: here the EU had followed the policy of the OSCE and its High Commissioner on National Minorities (HCNM). As early as December 1993 the EC made it clear that Latvia would have to change its citizenship law if it wanted to be admitted, and in the 1997 Opinion on the applicant countries, the European Commission reiterated the concerns of the HCNM regarding then position of the Russian-speaking minority in Latvia.<sup>24</sup> As a result of these combined pressures, Latvia kept gradually changing its naturalisation and state language laws, initially in a way judged unsatisfactory by the West, but eventually in conformity with EU demands, thus opening the way to accession negotiations.

Third, the influence of conditionality was rarely in the form of suggesting very specific institutional solutions and devices – perhaps for the simple reason that there is no single model of democracy and rights-protection in the EU itself, much less in the “West”. The absence of a common political-constitutional blueprint has recently been recently expressed most emphatically in the principle of constitutional autonomy announced in the draft Constitutional Treaty for the EU: “*The Union shall respect the national identities of the member states, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government...*”<sup>25</sup> This merely makes explicit what has been obvious all along, throughout the process of European integration. Consequently, the influence of conditionality upon the candidate states was often more about general templates or thresholds, in the form of certain minimal conditions to be fulfilled, rather than of specific institutional designs to be installed. The very fact, however, of the generality of these templates or the minimalistic nature of the thresholds renders it very difficult to trace the “emulation” to one specific source – or even to determine whether it was indeed emulation in the first place. To be sure, the degree of specificity of EU political conditionality varies from one domain to another, and so political conditionality might have been much more effective where there was a determinate set of rules that the candidate states were expected to observe, rather than in cases in which the criteria laid down could at best be characterised as a vague template.<sup>26</sup> In

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<sup>24</sup> See: Ibidem, p.20.

<sup>25</sup> Art. 5.1. of the Draft Constitution.

<sup>26</sup> Compare, for example, the conclusions by Dimitrova who found high effectiveness of conditionality in the area of civil service reform (A.L.Dimitrova, *Conditionality meets post communism: Europeanisation and administrative reform in Central and Eastern Europe*, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003, p.33, paper presented at the workshop: “The Europeanization of Eastern Europe: Evaluating the Conditionality Model”) with the conclusions by Brusis who claims that if conditionality had been

addition, the legitimacy of the conditionality demands varied depending upon whether they corresponded to the seriousness and determination with which the EU has held its own member states to those standards: when the EU set certain political conditions that are not part of the EU legal system and in addition are not actually shared by the current members states themselves (such as minority rights), the credibility and hence effectiveness of this area of conditionality must have been suspect. Apart from the legitimacy and “double standards” problems, candidate states, even when acting in good faith, could not know what, exactly, was expected from them, because neither the current practice of member states nor the *acquis* provided any clear guidance.

Fourth, most importantly though perhaps also most banally, the effectiveness of importation of institutions and rules was the highest where there existed significant domestic factors in the “importing” states that favoured the importation, adoption and the maintenance of these mechanisms.<sup>27</sup> These domestic factors came in different shapes and sizes. One major factor has been the extent to which an imported rule or institution resonated with the public opinion and the widely shared values within a given community: the relative ineffectiveness of measures aimed at protecting the Roma minority throughout the region may be largely traced to a broad social hostility towards and prejudice against this group in CEE; thus, to the absence of resonance between the externally required anti-discrimination measures and the local consensus. Another factor was the “density” of the previously established rules, practices and institutions in any given area in each candidate state: the more entrenched these practices were, the higher the resistance to the rules imported from the EU.<sup>28</sup> Yet another factor, obviously related to the former two, was the magnitude of social costs incurred by the domestic political elites in adopting a rule advocated (or imposed, in the form of “conditionality”) from the outside. In a series of case studies, Schimmelfennig and his collaborators have shown how

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an important factor, we would not be able to explain the significant differences in the regionalisation policies between the Czech Republic and Slovakia (Brusis, op.cit., p.13-14).

<sup>27</sup> For a subtle discussion, see: M.A.Vachudova, *The Leverage of International Institutions on Democratizing States: Eastern Europe and the European Union*, Robert Schuman Centre at the European University Institute Discussion Paper, 29 March 2001.

<sup>28</sup> This factor is emphasized by W.Jacoby, *Conditionality and Lesson Drawing: Two Modes of Institutional Emulation*, The Robert Schuman Centre for Advanced Studies at the European University Institute, 4-5 July 2003, p.7 (paper presented at the workshop “The Europeanization of Eastern Europe: Evaluating the Conditionality Model”). He sees this factor as equally important to the density of the EU practice in a given field, and having discussed a number of case studies, including that of medical insurance, concludes, among other things, that “*the light acquis and density of established actors meant emulation took the form of a process of continuously negotiated inspiration in the Hungarian and Czech health care systems*”.

changes in the socio-political setting in different countries at different times can affect crucially the effectiveness of rule adoption. For example, under the Dzurinda government in Slovakia, the costs of rule adoption significantly declined in comparison with the former government, that of Mečiar: this is, among other things, because the governing coalition under Dzurinda had made EU accession its overarching, uniting policy goal. In contrast, for Mečiar the costs of adoption of EU rules were high, because acceding to the requirements EU political conditionality, in particular those pertaining to the position of Hungarian minority, would have endangered Mečiar party's (Movement for a Democratic Slovakia, HZDS) coalition with the nationalist Slovak National Party SNS.<sup>29</sup> As a result of the change of government in 1998, Slovakia quickly set about adopting the rules dictated by political conditionality, starting with a new law on national minority languages.<sup>30</sup> As Schimmelfennig et al. conclude about this particular case study, the transition in government "can itself be partially attributed to a credible policy of conditionality, which caused a pro-Western and pro-democratic electorate to reassess the costs of having a government, which had proved to be an obstacle to the Western integration of their country".<sup>31</sup>

Once the decision concerning the admission of candidate states has been taken, the formal measures of conditionality have, of course, expired: there is no more political *acquis*, no more annual Commission Reports, no more scrutiny for membership eligibility towards new member states. A rich body of expertise and advice stored in, among other things, the Commission Reports will ostensibly retain a historical value only.<sup>32</sup> New member states will be judged – alongside the others – on their continued compliance with the existing EU rules rather than on their suitability to join. This will mean a dramatic reduction in the harshness of the standards by which they will be judged, and so will radically transform the pattern of incentives for adopting and preserving the rules of democracy, human rights and the rule of law. The huge carrot of conditionality

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<sup>29</sup> Schimmelfennig, op.cit., p.12.

<sup>30</sup> Ibidem, p.13.

<sup>31</sup> Ibidem, p.14.

<sup>32</sup> On this basis, Bruno de Witte comes to a "paradoxical conclusion" that "*accession will lead to a reduction of the European human rights standards for the candidate countries, and could therefore lead to a reduction of their actual respect for human rights. This may be the case in particular for those matters which, although duly examined in the human rights sections of the pre-accession reports, are not evidently within the scope of EC internal competence, such as: the rights of children, prison conditions, and minority protection*", B.de Witte, *The Impact of Enlargement on the Constitution of the European Union*, in: *The Enlargement of the European Union*, ed. M.Cremona, Oxford 2003, p.240.

(with an extremely desired prize in the form of invitation to the club) will be replaced by the not-too-threatening stick of Article 7 TEU, further enhanced by a Treaty of Nice (the “lex Austria” clause), sanctions – or rather, its equivalent in the future Constitution[al Treaty] of the EU.<sup>33</sup> According to this provision as it now exists, a member State found to be in “serious and persistent breach” (or, after Nice, when there is “a clear risk of a serious breach”) of the values of the Union (which include democracy, the rule of law and respect for human rights) will risk having its Union membership rights suspended. Otherwise, the performance in the field of human rights will be subject only to a very skeletal review by the ECJ, in those narrow domains in which it has a competence to review the action of Member States in the field of EC law. Unless there is a significant increase in the human rights competence of the EU – for instance, through extending the scope of application of the Charter of Rights to the institutions of Member States even beyond the implementation of Union law, which seems very unlikely, or if the European Court of Justice reverses its restrictive understanding of the grounds of review of Member States’ law when it falls within the scope of Community law<sup>34</sup> – the scrutiny of domestic human-rights performance in new member states will be largely toothless. As there is no comprehensive human-rights monitoring in place in the EU at the moment, any hopes for an ongoing, serious scrutiny of the performance of democratic institutions and of the human-rights protection in new Member States by the EU must be, of necessity, based only on the speculation that the EU competence in this field will substantially grow in future.<sup>35</sup>

But absent such a transformation within the EU, will such a decline in the EU’s effect upon the institutional, non-*acquis* related structures and norms in new member states really happen? This is unlikely. For one thing, while formally speaking all member states are equal, in fact some are more equal than others, and the inequalities vary from one domain to another. New member states will be for some time tainted by their relatively recent past, and the awareness that the democratic institutions and the rule of law are of rather new pedigree will surely affect the way in which they will be perceived by more

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<sup>33</sup> Art. I-58 of the Draft Treaty establishing Constitution for Europe.

<sup>34</sup> For a survey of ECJ’s approach towards its own human rights jurisdiction over Member State law, see: B.de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in: *The EU and Human Rights*, ed. P.Alston, Oxford 1999, p.870-873; P.Craig, G.de Búrca, *EU Law: Text, Cases, and Materials*, Oxford 2003, 3rd ed., p.345-349; for a possible impact of the EU Charter upon the scope of this jurisdiction, see: *ibidem*, p.347-849.

<sup>35</sup> For an outline of trends towards such an increase of the EU’s relevance for human rights protection in member states, see: G.de Búrca, *Enlarging the Human Rights Policy of the European Union* (unpublished draft paper on file with the author, 2003).

established democracies. It may well turn out that the elections in Slovakia or Latvia will be, whether we like it or not, more critically scrutinised than those in Austria or Italy, and that the “troikas” of wise men or women will be dispatched more eagerly to the Eastern parts of the Union than elsewhere. After all, the annual Commission Reports will not be simply erased from the institutional memory of the Union, and its critical comments will be able to be revisited at will. Secondly, the membership of the Union will be a powerful strategic and rhetorical asset in the domestic politics of new member states. Both the governing and opposition parties (as well as various “veto players”, such as disgruntled trade unions, NGOs, extra-parliamentary opposition, etc.) will be able to use the argument from membership in their political actions. Some of these actions will have the form of demands for constitutional and other institutional changes. The argument: “*We need to adopt the rule X because our membership in the Union so requires*” admittedly has a different force than the argument “*We need to adopt rule X because this is a condition of our accession*”. The answer: “*So much the worse for the accession decision*” applies to the latter but not to the former argument. One can, of course, reply: “*We told you so; we should not have acceded*”, but this will ring increasingly hollow with time, and will sound more like a grumbling loser’s complaint – not a good rhetorical device for any political actor to adopt.

This suggests that there will be still important domestic factors affecting the adoption and maintenance of rules, standards and institutions of liberal democracy and yet the calculus of benefits and burdens, or the pattern of incentives, will be altered compared to the pre-accession circumstances. One may speculate that these changes will have at least two forms, leading in two opposite directions. On one hand, the burden of argument will shift even more to those seeking to resist the adoption of the rules or institutions presented as in compliance with EU standards: if such a characterisation of a particular measure is credible, there will be a strong presumption in favour of its adoption, and resistance to this will be more difficult. On the other hand, however, those supporting the adoption of such a rule or institution will not benefit from the argument about the other benefits of accession to the EU: the argument: “*We have to adopt this rule, otherwise we will not be admitted*” will no longer be valid. In the situation of lowered sanctions for non-adoption, what could have been, up until the point of accession, represented as part of a non-negotiable package that on balance is good for the candidate state, will from that moment on take on a much more discretionary character for each new member state. Stated in abstract terms, these two effects may well cancel each other out; which one will prevail in fact is a matter that can be only speculated on.

Naturally, the alteration of the pattern of incentives and of the calculi of costs and benefits will affect much more than the discursive assets on both sides

of any future domestic controversy over rule adoption. There will be also a very substantial alteration of control in terms of knowledge of the relevant facts, of which the most important will be: to what extent a proposed rule or an institution is indeed part of the EU *acquis*, part of the “EU model”, part of the “common constitutional traditions” of EU member states, or part of any other such formula that suggests that membership in the EU commits a member state to adopt a given rule or institution. Once in the EU, some elites in new Member States will be able to claim a better expertise in what the EU really requires than others: they will be able to gain public and political support for their knowledge-claims based on proximity to the EU centres of power, due to the much higher level of interaction between national governing elites and the “Eurocracy” than was the case during the accession negotiations. One can speculate that the governing parties, which will all have extra incentives to be “pro-European” regardless of their official positions pre-2003, will acquire this asset of inside knowledge and be able to use it more effectively against the “anti-European” oppositions,<sup>36</sup> with the knowledge-claims of the latter suffering from lower credibility, and thus less potency in resisting the claims for the adoption of any given rule.

All this, however, does not negate the fundamental point that the effectiveness of the transplant to and maintenance of liberal-democratic rules in the new member states of CEE will largely depend upon the interaction between the EU institutions and the local, domestic factors in new member states, and, in particular, upon the resonance between the rule in question and the political calculus conducted in the domestic settings; that governing elites decide that the costs of adoption are lower than the costs of the resistance. Naturally, different political forces in new member states will come up with different calculi of costs and benefits for themselves. The degree to which the EU as a whole will be able to rely upon those domestic forces that most resonate with the liberal-democratic rules in question, and the credibility of the claim that a rule indeed constitutes part of the EU *acquis*, the EU model, or of a common constitutional tradition – these seem to be the two crucial factors influencing the effectiveness of the accession-related democracy dividend in new member states.

## **2. The role of parliaments**

Both the very process of managing the preparations for accession by a candidate state, and the dynamic of participation in the EU decision-making process by a member state, inevitably strengthen the powers of the executive

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<sup>36</sup> I am not implying that parliamentary oppositions will consist mainly of the “anti-European” forces, or that all of the governing coalitions will be necessarily “pro-European”.

branch of government to the detriment of the legislature. The former phenomenon has already left its imprint upon the government-parliamentary relationships in CEE, and with good reason; with only minor exaggeration it has been stated that conditionality “*can be seen as the functional equivalent of war: it gives the executive more power to by-pass parliament and to justify the lack of consultation with the public by the need to avoid economic crisis*”.<sup>37</sup> The latter phenomenon evokes the familiar spectre of the EU’s democratic deficit. As Peter Mair observes: “*It is now commonplace to refer to the irony that is involved in the EU’s setting standards for democracy for new entrants while at the same time failing to meet those standards itself... There is an even sharper irony that now becomes evident, however. Little more than ten years after celebrating their escape from communist control and their return to, or discovery of, democracy, the accession polities are likely to find themselves becoming encased in a system in which popular democracy has little or no role*”.<sup>38</sup>

Is the picture so unambiguously bleak? I will discuss these two aspects of the weakening of the role of parliaments and, correspondingly, of the strengthening of the executive, in turn. But one rather obvious caveat must be made at the outset: not all strengthening of the executive necessarily implies a correlative weakening of the parliament (as long as the parliament retains the effective means of controlling the executive), and not every weakening of the parliament to the benefit of the executive is necessarily a damage to democracy. As long as the executive remains electorally accountable and responsive to the parliament between the elections, strengthening it is not per se anathema to the principles of representative democracy. Hence, to describe a transfer of power from the legislative to the executive (provided that such transfer does occur) is not necessarily to condemn it: the purpose of this paper is more to give an account of the implications of accession rather than to formulate a judgement thereon. To begin with the accession negotiation process, it is clear that it inevitably increases the power of the executive, as the relationship with the EU (being “foreign affairs” from the perspective of a candidate state) is within its competence. Even the formal institutional set-up emphasised the primacy of the respective executives in the whole strategy of adjusting each legal system to EU requirements: Europe Agreements established Association Councils (or Association Committees) composed of the representatives of the EU and of the

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<sup>37</sup> Report of the Reflection Group chaired by J.L.Dehaene, *The Political Dimension of EU Enlargement: Looking Towards Post-Accession*, Florence 2001, p.63 ([http://www.iue.it/RSCAS/e-texts/Dehaene\\_report.pdf](http://www.iue.it/RSCAS/e-texts/Dehaene_report.pdf)).

<sup>38</sup> P.Mair, *Popular Democracy and EU Enlargement*, “East European Politics and Societies”, No. 17/2003, p.63.

candidate country concerned (usually, members of the government),<sup>39</sup> with formidable powers to take legally binding decisions taking precedence over national law.<sup>40</sup> However, the dominance of the executive was not merely evident in the institutional design of the pre-accession process; as Heather Grabbe concludes, the executive was “*privileged over the legislature and judiciary in terms of political attention and commitment of resources, both human and financial*”.<sup>41</sup> Indeed, the chief negotiators and key ministers and officials (those relating to enlargement) formed a kind of “core executive” responsible for progress, or the lack thereof, in accession. The EU’s demand for managerial competence encouraged the creation of this core, as did its requirement of clear documentation as to how aid money was spent, and tight financial controls over this process. It should be added that, within the executive, civil servants acquired an awesome power because the politicians change frequently (due to frequent changes in government) while they remain.<sup>42</sup> In addition, the negotiations, due to their delicate nature, were largely conducted in secret, thus further reducing the potential of the parliament to balance the power of the executive;<sup>43</sup> moreover, a good deal depended upon informal contacts among the negotiators on both sides, not easily subjected to formal control.<sup>44</sup>

This focus on the executive meant that parliamentarians often lacked sufficient knowledge as to the details of the laws being passed in conformity with the *acquis*. Grabbe states that, in interviews she conducted, parliamentarians complained of a deficiency both in the amount of information being provided to them by the executive, and in their access to the relevant technical expertise.<sup>45</sup> The task was overwhelming, and some shortcuts had to be taken that reduced the parliaments’ opportunity to deliberate on these laws. The sheer volume of the *acquis* meant that parliaments had to adopt fast-track procedures for passing the related laws, and this inevitably lowered the importance of parliaments *vis-a-vis* the governments.<sup>46</sup> Although some countries

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<sup>39</sup> For details, see: A.Evans, *Institutions*, in: A.Ott, K.Inglis, op.cit., p.1045-1048.

<sup>40</sup> Ibidem, p.1043.

<sup>41</sup> H.Grabbe, *How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity*, “Journal of European Public Policy”, No. 8/2001, p.1016.

<sup>42</sup> Grabbe, p.1017.

<sup>43</sup> A.Albi, *Central and Eastern European Constitutions and EU Integration: In a decade from ‘souverinism’ to ‘federalism’?* (Ph.D. Thesis), European University Institute, April 2003, p.86.

<sup>44</sup> Evans, op.cit., p.1062.

<sup>45</sup> Grabbe, op.cit., p.1017.

<sup>46</sup> See: P.Kopecky, *Structure of Representation: The New Parliaments of Central and Eastern Europe*, in: *Developments in Central and East European Politics*, eds. S.White, J.Batt, P.G.Lewis, Houndmills 2003, p.147.



have resisted this move to speed up the legislative process (for example, the Slovenian parliament rejected a proposal to introduce a faster and less thorough legislative process for *acquis*-related law)<sup>47</sup> the Commission put pressure on them to co-operate in this way. Thus, the 1999 Commission Report on Slovenia (before the above-noted rejection by parliament) stated that the legislative process there was too slow.<sup>48</sup> There have been some efforts, on the part of some of the parliaments, to find institutional compromises between the need for a fast track and the imperatives of parliamentary scrutiny of legislation. In Bulgaria, a Council on European Integration, consisting of three members of each of the five parliamentary groups, was formed to discuss the relevant laws. If this Council accepts a law, it can then go through a speedier parliamentary voting procedure. If, however, one of the five groups in the Council disagrees, the normal legislative procedures are followed. A similar approach was adopted in the Czech Republic, where the Committee for European Integration discusses laws before they go to the Parliament. In some cases, the parliamentary route was side-stepped altogether: in Slovakia, the constitution was amended in 2001 and the new Art 120(2) allowed the government to issue decrees in execution of the Europe Agreement. In Romania, the government has adopted *acquis* into national law through the use of extraordinary governmental decrees, which require only retrospective approval by parliament.<sup>49</sup>

All of this meant that there was in fact very little parliamentary involvement in the legislative process: “*The speedy procedures for the acquis-related legislation run the risk of reducing parliaments to little more than rubber stamps and may undermine the overall institutionalisation of parliaments and weaken their legitimacy*”.<sup>50</sup> The executive acquired a larger role as government teams scrutinised draft laws for compliance with EU standards, and attached their opinion to the law before it was sent to Parliament, thus reducing the Parliaments’ room for manoeuvre. It shows that there was “*a paradox at the heart of the accession conditionality: the EU’s efforts to promote democratic development are at odds with the incentives created by the accession process, where the EU gives priority to efficiency over legitimacy*”.<sup>51</sup>

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<sup>47</sup> D.Malov, T.Haughton, *Making Institutions in Central and Eastern Europe, and the Impact of Europe*, in: *The Enlarged European Union: Diversity and Application*, eds. P.Mair, J.Zielonka, London 2002, p.111-112.

<sup>48</sup> European Commission Regular Report 2000 on Slovenia.

<sup>49</sup> D.Malov, T.Haughton, op.cit., p.111-112.

<sup>50</sup> Ibidem, p.112.

<sup>51</sup> H.Grabbe, *Will EU membership improve governance and the quality of democracy in central and eastern Europe?*, “East European Constitutional Review”, Spring 2003.

The reduction in the parliament's power was sharpened by the fact that the EU presented the *acquis* as a non-negotiable package: implementation was portrayed as an administrative rather than political task.<sup>52</sup> This obviously eroded the room for constructive deliberation at the parliamentary level, as the only available options were "take it" or "leave it". There has been little debate about alternatives to the EU model, and, as all of the main policy issues were pre-determined by the EU's *acquis*, the only way for politicians to compete with one another was moved from the sphere of policy choices to that of personal attacks relating to emotive issues. This exacerbated an already strong lack of respect for politicians, and helped to further alienate the public from the debate on the accession process.<sup>53</sup>

However, the picture is not as one-sided as presented thus far. Whilst there has undoubtedly been a shift of power to the executive, there have been influences in the other direction. For one thing, the EU has on occasion acted to control abuses by the executive in candidate states. Thus, the *démarche* against Slovakia during the Mečiar regime "*included a concern over the growing power of the executive in Slovak politics, attempts to undermine parliamentary control and the opposition parties...*".<sup>54</sup> It managed to prevent the worst abuses of the parliamentary system, such as the expulsion from Parliament of a democratically-elected party. More importantly, however, the EU has played a role in consolidating democracy, which has increased parliamentary power by creating a platform on which democrats in those countries could base their arguments and on which parties opposed to authoritarian tendencies could campaign, and also, more actively, by concretising the general political conditionality in the Commission's Regular Reports, which included references to the position of parliaments. The sections on parliaments in these Reports were often quite deferential towards these institutions but, at times, they pointed out negative phenomena, such as the lowering of parliament's ability to effectively scrutinise legislation as a result of the increased volume of legislation combined with tighter deadlines and limited resources;<sup>55</sup> the disconcerting growth of legislation through ordinances, adversely affecting the importance of parliament

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<sup>52</sup> Grabbe, *op.cit.*, p.1016-1017.

<sup>53</sup> A.Grzymała-Busse, A.Innes, *Great Expectations: The EU and domestic Political Competition in East Central Europe*, "East European Politics and Societies", No. 17/2003, p.66-67.

<sup>54</sup> G.Pridham, *The European Union's Democratic Conditionality and Domestic Politics in Slovakia: the Mečiar and Dzurinda Governments Compared*, "Europe-Asia Studies", No. 54/2002, p.212.

<sup>55</sup> 2002 Regular report on Romania Part B.1.1, see:  
([http://europa.eu.int/comm/enlargement/report2002/ro\\_en.pdf](http://europa.eu.int/comm/enlargement/report2002/ro_en.pdf))

*vis-a-vis* the executive;<sup>56</sup> the malfunctioning of certain parliamentary committees resulting from the unwillingness of some parliamentary parties to take seats in them;<sup>57</sup> the failure to fulfil a constitutional obligation to ensure the direct parliamentary representation of minorities;<sup>58</sup> doubts as to the adequate staffing of the parliamentary administration responsible for EU integration,<sup>59</sup> etc. However, even when a section of the Report devoted to the parliament opened with a sacramental: “*The Parliament continues to function properly...*” and further contained no critical remarks, the very fact that the parliaments themselves were placed under the spotlight emphasised the existence of critical, careful scrutiny. Once in the EU, the political dynamic of a member state renders the executive the most powerful body in relation to the Union. Indeed, very few member states’ parliaments can control or veto the position of their government in the Council; the power of national parliaments is therefore curtailed as the EU’s growing competencies reduces the exclusive sphere of national competence.<sup>60</sup> The European Centre for Parliamentary Research and Documentation notes that recently the power of national parliaments has actually been reduced in the EU due to the increase in intergovernmental actions and the rise of comitology.<sup>61</sup> A French legal scholar, Eric Carpano, concluded his survey of the effects of Europeanisation upon parliamentary systems by stating that parliaments have by and large adapted themselves to some extent to the new EU arena, and that they have not transformed themselves to deal with the issue of the reduction in power *vis-a-vis* the executive.<sup>62</sup>

There have been, on the part of current member states, some brave attempts aimed at countering this trend, and also, since the Maastricht Treaty, there has been a tendency within the EU to emphasise, through various declarations and protocols, “the role of national parliaments in the European Union”. These call for an increase in the role of national parliaments in the works of the EU (to offset the inevitable weakening of their role resulting from the transfer of

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<sup>56</sup> Ibidem.

<sup>57</sup> 2002 Regular Report on Slovakia Part B.1.1., see:  
([http://europa.eu.int/comm/enlargement/report2002/sk\\_en.pdf](http://europa.eu.int/comm/enlargement/report2002/sk_en.pdf))

<sup>58</sup> 2002 Regular Report on Hungary, Part B.1.1., see:  
([http://europa.eu.int/comm/enlargement/report2002/hu\\_en.pdf](http://europa.eu.int/comm/enlargement/report2002/hu_en.pdf)).

<sup>59</sup> 2002 Regular Report on Bulgaria, Part B.1.1., see:  
([http://europa.eu.int/comm/enlargement/report2002/bu\\_en.pdf](http://europa.eu.int/comm/enlargement/report2002/bu_en.pdf))

<sup>60</sup> E.Carpano, *La transformation des régimes parlementaires: des réalités dans les Etats membres aux perspectives ouvertes par la constitution pour l’Europe*, in: *The Europeanisation of Constitutional Law in the Light of the Constitution of Europe*, ed. J.Ziller, 2003, p.164.

<sup>61</sup> <http://www.ecprd.org/Doc/publics/OTH/European%20Affairs%20Committees.pdf>

<sup>62</sup> Carpano, op.cit., p.170.

competencies from the national to the EU level), in order to strengthen the co-operation between the parliaments of various member states themselves, and also between each and the European Parliament. Some remedial action has been taken at the level of member states; for example, the German, Finnish, Portuguese, Austrian, Swedish, French and Belgian Constitutions were all amended to ensure parliamentary participation in EU affairs.<sup>63</sup> In Denmark, the executive is controlled by the opinion of parliament; this is, however, the only example of such strong parliamentary role. The Austrian and German parliamentary resolutions are stronger in effect than those of France, Italy and Portugal, which do not constrain the government at all in any legal sense but which may, nevertheless, have a political effect. The possibility for parliament to provide even non-binding resolutions, as in France, does give it a larger role. However, in practice, of the 181 propositions received in 1999, the French parliament adopted only 11 resolutions. The problem is that parliamentarians are not very much interested in European affairs, and also that the lack of any clear party split along pro/anti-EU lines has meant that there is unlikely to be any strong criticism of the government by parliament for not having respected the views of the latter on EU matters.<sup>64</sup>

What will be the likely involvement of the parliaments of new member states in EU affairs? The most probable institutional mechanism will be that of non-binding resolutions to the governments regarding their positions in the Council.<sup>65</sup> Looking at the constitutional amendments undertaken in this regard, it can be seen that parliaments have not been given a strong post-accession role. Although experts in the Czech Republic suggested that the Parliament should be able to bind the government with its resolutions regarding EU issues, when the Constitution was actually amended it only allowed for the parliament to express its opinion – this in no way being binding on the executive.<sup>66</sup> The Hungarian constitutional amendment provides that, in matters related to European integration, parliamentary “supervision” and harmonisation (understood as consultation) between Parliament and the government is to be determined by a law adopted by two thirds majority”. This seems to have weakened the level of parliamentary supervision that had been envisaged in an earlier draft, which stated that the government should act “in cognisance” of the parliament’s position when participating in the decision-making procedures of the EU

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<sup>63</sup> See: Albi, *op.cit.*, p.199.

<sup>64</sup> Carpano, p.165.

<sup>65</sup> For a similar opinion, see: Albi, p.199-200.

<sup>66</sup> A.Sajó, *Accession's Impact on Constitutionalism in the New Member States*, New York, 4-5 April 2003, p.25 (paper presented to the conference on: “Law and Governance in an Enlarged Europe”).

institutions.<sup>67</sup> The draft amendment (of February 2003) to the Lithuanian Constitution does, however, provide for a stronger role for Parliament, as it states that the executive shall 'take into account' the parliament's views.<sup>68</sup> In other new member states, including Poland, no constitutional provisions have been introduced aimed at including the respective parliaments in the European policy-making. At present, the only formal mechanism that most MPs have at their disposal regarding their government's European policy is a routine question to a minister within the framework of parliamentary question time.

It is not, however, the absence of formal instruments, but rather low capacity in terms of comprehension and access to expertise that will be real obstacles to greater national parliamentary involvement in the EU. As Marek Cichocki, an already cited Polish scholar, has observed with regard to the Sejm (the Polish Parliament): "*soon it will be flooded by EU legislative proposals, but it does not have the technical or intellectual capabilities to deal with them and to take the decisions that would correspond to its legislative and controlling role*". Cichocki goes on to recount: "*One MP told me (...) openly: please, let us not confer upon the parliament any additional oversight functions with regard to our accession to the EU, because this Sejm is incapable of performing even the most rudimentary oversight functions in internal policy*".<sup>69</sup> It seems likely that the perceptions of the qualities of members of other parliaments in new member states are not much more positive.

It has to be said, however, that the new member states will join the EU at the time when awareness is growing of the need to strengthen the role of national parliaments in the EU process; the parliaments of the new MSs may benefit from this dynamic. The role of national parliaments was discussed at the Laeken Summit meeting on the Convention on the Future of Europe, in 2001, at the Convention Working Group on National Parliaments and also at the Conference of European Affairs Committees (COSAC).<sup>70</sup> Proposals to strengthen parliaments

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<sup>67</sup> Ibidem, p.25.

<sup>68</sup> Ibidem, p.25-26.

<sup>69</sup> Cichocki, op.cit., p.54-55.

<sup>70</sup> COSAC was established in 1989 with the aim of reinforcing the role of national parliaments. It creates a forum for all of the European Affairs Committees of the various Member States, and the European Parliament, to come together twice a year and exchange information and discuss pertinent issues. The European Parliament and each of the national parliaments can send a maximum of 6 representatives. Since 1994, accession countries whose negotiations to enter the EU had been officially opened have been able to each send three observers to these COSAC meetings; see generally: ([http://www.europarl.eu.int/natparl/cosac/history\\_en.htm](http://www.europarl.eu.int/natparl/cosac/history_en.htm)). It must be added, however, that according to the observers COSAC has so far hardly been effective, partly because of the lack of clear competencies, and partly because the absence of administrative support, see: R.Grzeszczak, *Progress in European Integration Process and its Consequences for Parliamentary*

and thus democracy include the simplification (through reclassification) of the number of legal instruments that the EU produces, aiding the comprehension thereof by parliaments and the public, and the improvement of the consultation process with parliaments.<sup>71</sup> In the context of the new European Constitution, the Draft Protocol on the Role of National Parliaments in the European Union should also be mentioned. This suggests a number of methods to “*encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on legislative proposals...*”.<sup>72</sup> This proposes various means of informing the national parliaments about EU legislative proposals, such as sending to them Commission consultation documents, the annual legislative programme, policy strategy documents, legislative proposals, agendas and minutes of Council meetings, and the Court of Auditor’s annual report.<sup>73</sup> It then states that national parliaments would have the right to send their opinion to the relevant EU organs as to whether a particular legislative proposal contravenes the principle of subsidiarity. To facilitate this, legislative proposals would have to be sent (except in cases of urgency) to the national parliaments at least six weeks before they are to be adopted.<sup>74</sup> Finally, the draft suggests that the European Parliament and the national parliaments should work out together how to more effectively implement interparliamentary co-operation. The COSAC can contribute to this dialogue and can submit information to any of the organs of the EU.<sup>75</sup>

If these proposals are fully implemented, this would go some way towards redressing the shift of power in favour of the executive. The core problem of lack of information would be partly remedied (also through the simplification of procedures) and the possibility of sending opinions to EU bodies could potentially both increase the number of parliamentary debates on EU issues, and also galvanise public opinion, encouraging more, better-informed debate in that sphere. The parliaments of new member states are likely to join the bandwagon – especially given that participation in European affairs is seen as a prestigious and lucrative role for MPs, and that only very few of them can count on being elected to the European Parliament. They will, therefore, have incentives to keep parliamentary involvement in European policy lively, and in this way to send the

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*Democracy*, in: *The Emerging Constitutional Law of the European Union*, eds. A.Bodnar, M.Kowalski, K.Raible, F.Schorkopf, Berlin 2003, p.130.

<sup>71</sup> <http://www.ecprd.org/Doc/publics/OTH/European%20Affairs%20Committees.pdf>

<sup>72</sup> Preamble to the Draft Protocol on the Role of National Parliaments in the European Union, CONV 797/1/03 REV 1, Annex 1.

<sup>73</sup> Art. 1,2,5 and 7.

<sup>74</sup> Art. 3 and 4.

<sup>75</sup> Art. 9 and 10.

message to their electorates and party leaders about their “European” credentials and competence. Some of them have already had an opportunity to do just this, even at the pre-accession stage: in joint parliamentary committees between the EU and each of the candidate states;<sup>76</sup> in COSAC, which accepted observers from the candidate states (three from each) at its half-yearly meetings since 1989;<sup>77</sup> in the context of the European Parliament debates on enlargement;<sup>78</sup> and by acting as observers in the European Parliament immediately after the signing of the Accession Treaty on the 16th of April 2003.<sup>79</sup> These various forms of involvement created a mechanism of “socialisation” of the MPs from candidate states into European affairs, and it is likely that those MPs and their colleagues will have an interest in maintaining this link. This will not, of course, remedy the continuing transfer and consolidation of power to the executive after accession, and one can easily imagine the situation in which the national parliaments from CEE will happily and actively participate in the European for a while maintaining a rather meek position *vis-a-vis* the governments of their own states in terms of EU law and policy. In the end, some observers may conclude that this will be a natural correction of these parliaments’ perhaps unduly inflated role in the first years after the collapse of Communism.

### 3. Constitutional Courts

Constitutional courts in CEE have played a very important role, often becoming an independent and active player in the law- and policy-making processes; it may be expected that accession to the EU will, if anything, create the opportunity for these courts to assume an even more powerful role. At present, the design of these constitutional courts, their aspirations, the high prestige that they quickly acquired and the relative weakness of political branches of government – mainly, the parliaments – all created an environment in which the courts gained a significant role in law-making: not merely by striking down the provisions that conflicted with the value choices shared by the majority of judges, as opposed to the majority of MPs, but also by “putting the parliaments on notice” that they should change specific laws, by indicating the directions of these changes, and even, at times, by “rewriting” the laws

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<sup>76</sup> See: [http://www.europarl.eu.int/delegations/europe/jpc/default\\_en.htm](http://www.europarl.eu.int/delegations/europe/jpc/default_en.htm)

<sup>77</sup> See: [http://www.europarl.eu.int/natpar/cosac/history\\_en.htm](http://www.europarl.eu.int/natpar/cosac/history_en.htm)

<sup>78</sup> *The European Parliament in the Enlargement Process: An Overview*, March 2003, at 4 ([http://www.europarl.eu.int/enlargement\\_new/positionep/pdf/ep\\_role\\_en.pdf](http://www.europarl.eu.int/enlargement_new/positionep/pdf/ep_role_en.pdf)).

<sup>79</sup> [http://www.europarl.eu.int/observers/information\\_en.htm](http://www.europarl.eu.int/observers/information_en.htm)

themselves.<sup>80</sup> This, naturally, placed these courts on a collision course with the legislatures, or rather, with the political majorities, as parliamentary minorities often found courts useful allies in their struggle to overturn the laws on which they were outvoted. Both the strength of the clash and the alliance between the courts and political oppositions largely depended on specific local factors: the strength of court-legislature conflict decreases with the fragmentation of the law-making process within the parliamentary system (in bi-cameral parliaments), and with the introduction of presidential powers of veto over proposed legislation. The lack of these institutional mechanisms moved the most dynamic and powerful of the courts in the region – especially those in Hungary, Poland, the Czech Republic and Slovenia, to a lesser degree in Slovakia and Lithuania, and to an even lesser degree in Latvia<sup>81</sup> and Estonia<sup>82</sup> – in the direction of a marked judicial activism, understood as willingness to strike down important laws even if, under the available valid conventions of judicial reasoning, an upholding decision was a real option to the courts. This is clear not just in virtue of the significance of some laws being struck down by the constitutional courts in the region, but also from the type of arguments used: appeals to very vague, indeterminate constitutional ideals and values (such as human dignity or *Rechtsstaat*) and proclivity for constitutional balancing in which controversial judgements of policy figure prominently. As a result, the difficult question of the democratic legitimacy of those quasi-legislative bodies arises: the issue of how to reconcile their position within the system of parliamentary democracy has been never satisfactorily answered. Moreover, while on balance the courts have performed a beneficial role in protecting the integrity of democratic process

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<sup>80</sup> This is a very sweeping statement, as are all of the others in this paragraph. I have discussed the role of constitutional courts in CEE in some detail elsewhere and here is not the place to elaborate, vindicate, and – where necessary – qualify some of the statements made in this opening paragraph of this part of my paper. See: W.Sadurski, *Postcommunist Constitutional Courts in Search of Political Legitimacy*, “European University Institute Working Paper”, No. 11/2001, Florence 2001; W.Sadurski, *Rights-Based Constitutional Review in Central and Eastern Europe*, in: *Sceptical Approaches to Entrenched Human Rights*, eds. T.Campbell, K.Ewing, A.Tomkins, Oxford 2001, p.315-334.

<sup>81</sup> Partly because of its newness: the Constitutional Court in Latvia was set up only in late 1996, and so far has handed down relatively few decisions.

<sup>82</sup> The Constitutional Court of Estonia is a special case compared to all its counterparts in CEE: it is not a separate body but is, formally speaking, a chamber of the National Court (equivalent to the Supreme Court) and its formal name is Constitutional Review Chamber (CRC); its judges have life tenure (until retirement at 68) rather than being appointed for a limited term; their appointment is more judicial than political (they are all professional judges and while they are appointed by the parliament, just like all other judges of the National Court, they are proposed by the President of the National Court), and – most importantly for court/legislature relations – members of parliament have no standing to challenge a new law before the CRC.



against self-serving or corrupt attempts by political parties to capture it for their own benefit, the elevated position of constitutional courts has led to certain pathologies in the operation of the law-making process: it had produced to some extent perverse incentives of legislative apathy or (and worse) irresponsibility often characteristic of law-making operating “in the shadow of judicial review”.<sup>83</sup>

Although, of course, at this stage we may only speculate about the likely effect of accession upon the position of Constitutional Courts in the system of separation of powers of new member states, this speculation may be informed by analyses of the experience of constitutional courts in existing member states, and also by the behaviour of these courts in candidate states related to the accession process and, in particular, their perception of the relationship between EU law and national constitutional law. The point is to try to gauge the likelihood that the constitutional courts of the region will attempt to carve out for themselves an important and independent role as an actor that has to be reckoned with by other branches of government in the context of their European policy.

Indeed, whether they want it or not, these courts will probably face an obligation to sort out the constitutional position of new member states *vis-a-vis* EU law, and, in particular, the position regarding “direct effect” and the supremacy of EU law over national constitutions. This task will not be made easy by the strong pro-sovereignty orientation of most of the constitutions of new member states, combined with a pragmatic, minimalist approach to constitutional amendments as accession approaches. As is well known, there is no such thing as a “constitutional *acquis*”: the EU does not prescribe whether and how the relevant countries’ constitutions should be changed to make them fit for accession. Significantly, the Regular reports from the EU Commission on progress towards accession did not mention any required constitutional changes. When one considers the experience gained from for previous accession processes, it is readily evident that the candidate states at the time did not follow the same constitutional model for entry to the EU (and this is true also of the six original member states):<sup>84</sup> some opted for allowing a limitation of national sovereignty, although without mentioning the EU directly,<sup>85</sup> while others opted for allowing entry specifically into the EU.<sup>86</sup> Regarding the domestic effect of

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<sup>83</sup> See: M.Tushnet, *Taking the Constitution Away from the Courts*, Princeton 1999.

<sup>84</sup> B.de Witte, *Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?* in: *EU Enlargement: the Constitutional Impact at EU and National Level*, eds. A.E.Kellermann, J.W.de Zwann, J.Czuczai, The Hague 2001, p.65-80.

<sup>85</sup> *E.g.* the first six member states and Denmark, Greece, Spain and Portugal.

<sup>86</sup> *E.g.* Ireland, Austria, Finland and Sweden.

EU law, some member states did not mention this at all in their amended constitutions,<sup>87</sup> while others stated that EU laws are binding at a national level,<sup>88</sup> or that Parliament must ensure compliance with them.<sup>89</sup> Judging by the experience thus far, one may expect that the constitutional courts of new member states will be invited – or tempted – to pronounce on questions such as whether EU laws should take precedence over the national constitution, who should adjudicate in cases in which it is claimed that the EU acted *ultra vires*, and what to do about specific constitutional provisions that are in conflict with the EU treaties. So far, the constitutional position of the EU *vis-a-vis* the current member states has been shaped both by the ECJ and by the constitutional courts of member states, with at least some national courts reacting against the ECJ's view that EU law has supremacy over national constitutions. Constitutional Courts in Germany (the *Solange I*,<sup>90</sup> *Solange II*<sup>91</sup> and *Maastricht*<sup>92</sup> cases), Italy (the *Granital*<sup>93</sup> and *Frontini*<sup>94</sup> cases) and Denmark (the *Maastricht*<sup>95</sup> case) have all stated that they can declare EU law unconstitutional if it contradicts the fundamental aspects of their own Constitution, or exceeds the bounds of the authority granted to the EU. The German *Maastricht* decision announced that the constitutionally entrenched principles of democracy (and in particular, the constitutional right to vote, which at this stage is best exercised through election to the federal Parliament) dictate the limits on the extension of the functions and powers of the EU. The French *Maastricht* decision<sup>96</sup> went further, though in narrower domains: the *Conseil constitutionnel* declared squarely the *Maastricht* Treaty unconstitutional in three specific areas (Union citizenship, a single European currency and the right of non-French nationals to vote in French municipal elections), and it was only after France amended its Constitution to eliminate these conflicts that the *Conseil* determined that the Treaty could be

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<sup>87</sup> *E.g.* the first six member states.

<sup>88</sup> Ireland.

<sup>89</sup> Spain and Portugal.

<sup>90</sup> [1974] 37 BverfGE 271.

<sup>91</sup> [1974] 73 BverfGE 378.

<sup>92</sup> German Constitutional Court Decision Concerning the *Maastricht* Treaty [October 12, 1993], (1994) 33 ILM, pp.388-444.

<sup>93</sup> Decision No. 170, 1984.

<sup>94</sup> Decision No. 183, 1973.

<sup>95</sup> Danish Supreme Court's Judgement of 06.04.1998, I 361/1997.

<sup>96</sup> 92-308 DC of 9 April 1992.

ratified.<sup>97</sup> The same sequence was repeated in France with respect to the 1997 Treaty of Amsterdam.<sup>98</sup>

This shows that there is significant space for the activism of constitutional courts at the intersection of the EU and national constitutional legal systems, including for identifying the outer parameters beyond which EU law must not infringe upon the national constitutional legal order (as in German Solange cases where the absolutely entrenched constitutional rights of German Basic Law were erected as insurmountable limits to the expansion of EU competence),<sup>99</sup> and for mandating national constitutional amendments in order to remove the inconsistencies between these orders (as in the French Maastricht decision). How does it augur for the role of constitutional courts in new member states? At first blush, there would be certain irony if those courts were to replicate, at today's stage of the development of EU law, the Solange-I doctrine of the German Constitutional Court of 1974, based upon a concern for the standards of protection in EC law of domestic constitutional rights – a doctrine now rendered obsolete by developments in EC law since that time. However, there are other grounds that can be used by constitutional courts in new member states to mark their activism. As a foretaste of what may follow one can consider the Hungarian Constitutional Court's decision of 1998 regarding the Europe Agreement, in which it held that the *acquis* had no direct effect before accession or its explicit implementation by national statutes, and in which it, in effect, dictated the need for constitutional amendment preceding accession. The Court found unconstitutional a provision of the Implementing Rules to the Europe Agreement with Hungary (stating that the Hungarian Office of Economic Competition had to take into account Article 81 and 82 of the EC Treaty when making their decisions).<sup>100</sup> The Court stated that "*the constitutional issue is whether the norms of the domestic law of another subject of international law, another independent system of public power and autonomous legal order (...) can be applied directly by the Hungarian competition authority without these*

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<sup>97</sup> 92-312 DC of 2 September 1992.

<sup>98</sup> See: Conseil Constitutionnel decision 97-394 of 31 December 1997, in which some provisions of the Treaty of Amsterdam were found inconsistent with the French Constitution, after which the French Constitution was amended.

<sup>99</sup> In Solange I, of 1974, the German Federal Constitutional Court found that the standard of fundamental rights under Community law did not yet show the level of legal certainty to satisfy the fundamental rights standards of the German Constitution, and this limited the transfer of sovereign rights from federal Republic to the Community. In Solange II, of 1986, the same Court expressed its satisfaction that the EC by this time ensured an effective protection of fundamental rights, and therefore the Court would no longer review secondary Community legislation by the standards of fundamental rights as contained in German Constitution.

<sup>100</sup> Decision 30/1998 (VI.25)AB 25 June 1998

*foreign norms of public law having [first] become part of Hungarian law*".<sup>101</sup> The Court held the provision of the Rules (but not of the Europe Agreement itself) to be unconstitutional (although it delayed a decision on annulment). It did this on the basis of Art 2 of the Constitution, which declares Hungary to be a sovereign and a democratic state based on the rule of law. The Court thus suggested in this judgment that a constitutional change allowing for the transfer of sovereignty to an international organisation was necessary, and indeed such change was made on 17 December 2002.

We have to be cautious about drawing any conclusions from this decision: the Hungarian Court did not suggest that it would not accept the notion of direct effect after accession: its decision related to the lack of direct effect prior to accession (and in the absence of a relevant constitutional amendment). And yet it may suggest that the Hungarian Court – and other constitutional courts of the region – could follow the path of the German Court's Maastricht decision. Indeed, in its earlier decision – the Preliminary Issues Judgement<sup>102</sup> – the Hungarian Constitutional Court declared that it has the competence to conduct ex-post review of international treaties (or rather, the national law that promulgates the treaty); in doing so, it made explicit reference to the Maastricht decision of the German Constitutional Court, and stated that national constitutional courts have the power of review over the constitutionality of EU laws that have direct effect in the relevant country.<sup>103</sup> At least one Hungarian legal scholar, Janos Volkai, has argued that the Hungarian Constitutional Court's decisions allow one to tentatively predict how the Court will act after Hungary's accession to the EU, and he has suggested that it may well continue to imitate the German Constitutional Court, and "*thereby develop a conflictual relationship with the Community legal system after accession*".<sup>104</sup> However, Andras Sajó cautions us that not too much should be read into the Hungarian Court's position because "with similar rhetoric of national supremacy of constitutional law other constitutional courts have managed to find ways to avoid confrontation with EU law".<sup>105</sup>

Be that as it may, it may be anticipated that, immediately after accession, the constitutional courts of new member states will adopt an activist stance towards

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<sup>101</sup> Decision 30/1998 (VI.25) 25 June 1998 III.I. quoted in: J.Volkai, *The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions*, "Harvard Jean Monnet Working Paper", No. 8/99, (<http://www.JeanMonnetProgram.org/papers/99/990801.html>).

<sup>102</sup> Hungarian Constitutional Court Decision 4/ 1997 (I.22) AB. 22nd January 1997.

<sup>103</sup> Sajó, op.cit., p.22.

<sup>104</sup> Volkai, op.cit., p.31.

<sup>105</sup> Sajó, op.cit., p.23.

the relationship between EU law and the respective national constitutions, and to the questions of the direct effect and supremacy of EU law. They have some useful constitutional instruments for this purpose. Firstly, almost all constitutions of new member states contain provisions to the effect that the constitution is the supreme source of law in the country, or (which comes to the same thing) that any law that violates the constitution is invalid;<sup>106</sup> on this basis, some top constitutional justices in these countries have already announced their hostility towards the primacy of Community law towards the domestic order, in particular, toward the constitutional rules of their states.<sup>107</sup> Second, all of these courts have the power of preliminary review of the constitutionality of treaties (or rather, of the instruments of ratification), and, in addition, the constitutional courts of Hungary, Poland and Estonia have the power of *ex post* review of treaties. Therefore, even though national law is subject to international agreements entered into by the State, such agreements are still themselves subject to the national Constitution.<sup>108</sup> Third, as the above-mentioned decision of the Hungarian Constitutional Court indicates, these courts will adamantly insist that Parliament must not change the Constitution “by the back door”, for example by ratifying a Treaty containing provisions conflicting that conflict with it, but rather that any change to the Constitution can be only made by using the proper amendment procedures.<sup>109</sup> By adopting the position of supervisor over whether a legislative or constitutional amendment path should be adopted (a position that was described, in a different context and with reference to the French Conseil Constitutionnel, as *théorie de l'aiguilleur* by Louis Favoreu, who argued that the role of constitutional judges was to indicate the way that ought to be followed at an unclear juncture: either legislative or constitutional procedure),<sup>110</sup> the constitutional courts may become significant players in the European policy of new member states.

The argument is not that the constitutional courts in these states will in any way be a hindrance towards adopting the principles of direct effect and the supremacy of EU law, or that they will be obstacles to the process of legal

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<sup>106</sup> Poland Art. 8, Hungary Art. 77(1), Lithuania Art. 7, Estonia Art. 15 and 153, Slovenia Art. 153 (1).

<sup>107</sup> See e.g.: M.Safjan, *Konstytucja a członkostwo Polski w Unii Europejskiej*, „Państwo i Prawo”, No. 3/2001, p.9-10. Professor Safjan is President of the Constitutional Tribunal of Poland.

<sup>108</sup> See: Albi, *op.cit.*, p.244, for a discussion of the relevant court decisions (in Bulgaria, Latvia, Slovakia and Slovenia) establishing this principle.

<sup>109</sup> See: Albi, *op.cit.*, p.243-244.

<sup>110</sup> The theory has been fully developed in: L.Favoreu, *Le Conseil constitutionnel et la cohabitation*, *Regards sur l'actualité*, No. 135/1987, p.3; see also his remarks in: *La politique saisie par le droit*, Paris 1988, p.30.

integration of the new member states within the Union. To the contrary, it seems that most of the judges on these courts are strongly “pro-European”: this is what their social and educational background, aspirations and political views incline them to. Some of the courts have been even eager to make use of EU law and EU legal principles well before accession.<sup>111</sup> The Estonian Constitutional Review Chamber was so enthusiastic that, as early as 1994, it referred to the general principles of the Council of Europe and EU law as sources of Estonian law, even though, according to the Estonian Constitution, the courts should administer justice in accordance with the Constitution and the laws.<sup>112</sup> The point here, rather, is that accession will provide these courts with an extra opportunity to herald their importance as significant political and legislative players.

#### **4. Regionalisation**

The relationship between regionalisation and democratic consolidation is not self-evident:<sup>113</sup> there is no necessary truth in the statement that the more decentralised and “regionalised” the state, the more democratic it is. But it is a reasonably plausible contingent truth: all else being equal, decentralised states, especially when the local or regional units have responsive, elected institutions, tend to provide more spaces for spontaneous political actions of citizens, and, by establishing multiple focal points of power, spread the capacity for political action more widely within the community. Regions and local units are also attractive political alternatives to those “insular” minorities that may be voiceless nationally (due to small numbers, or traditional prejudices) and yet numerous and powerful enough to organise themselves at a sub-national level.

The EU has effected decentralisation in the current Member States, although the impact has varied between different states depending on their size, governmental traditions and existing arrangements, with small or highly-centralised countries experiencing change in this regard. What impact there has been was registered at the level of constitutional law; thus, in Germany and Austria the constitutional law on regions changed due to Treaty changes or

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<sup>111</sup> For examples taken from the Baltic states and a discussion, see: Albi, *op.cit.*, p.65-67; for Estonia, see also: J.Laffranque, *Co-existence of the Estonian Constitution and European Law*, “*Juridica International*”, No. 7/2002, p.12-22.

<sup>112</sup> Decision II-4/A-5/94 of 30 September 1994 discussed in Laffranque, *op.cit.*, p.16.

<sup>113</sup> See: I.B.Neumann, *Regionalization and Democratic Consolidation*, in: *Democratic Consolidation in Eastern Europe: International and Transnational Factors*, eds. J.Zielonka, A.Pravda, vol. 2, Oxford 2001.

accession.<sup>114</sup> There are clear incentives in the Treaty for a degree of local or regional democracy; since the Nice Treaty, membership in the Committee of the Regions is conditional upon its members having been elected to a regional or local authority, or their being accountable to an elected assembly.<sup>115</sup> It is also interesting that most recently, when stating the principle of constitutional autonomy of member states, the Draft Constitutional Treaty of the EU provides that the Union “*shall respect the national identities of its member states, inherent in their fundamental structures, (...) including for regional and local self government*”,<sup>116</sup> thus apparently assuming the fact of there being regional and local self government (rather than any form of local administration) in the first place. On this basis, one can anticipate that accession will also have a decentralising effect upon new member states from CEE; indeed, if anything, that this effect will be stronger than it has proved regarding current member states. This is due to the centralising legacy of Communism, and the relatively weak domestic demands for regionalisation soon after the transition to a democratic rule.

The Commission has shown a preference for democratically elected regional self-governments with significant financial and legal autonomy. The aspiration for this type of multi-level governance is due to the EU's desire, firstly, for democratic stability (the promotion of cohesion with the EU and reducing economic disparities is seen to be a good way of consolidating democracy), and, secondly, for the effective management of the EU Structural Funds: regional and local authorities are considered as “partners” of the central government in managing those funds. However, before 1997, the Commission did not express a preference or demand for regionalisation in CEE. For example, whilst talking of administrative reform, the Commission's 1995 White Paper did not refer to regionalisation. This was based on the prevailing idea that aiding regions would help particularly backward regions at the expense of the better-off ones which, in turn, would slow down economic growth in the CEE countries.<sup>117</sup> It was only

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<sup>114</sup> F.Domínguez-García, *The Draft Constitution for Europe and the Role of Regions: Another Step in the Europeanisation of the Constitutional Law Relating to Regions?*, in: *The Europeanisation of Constitutional Law in the Light of the Constitution of Europe*, ed. J.Ziller, 2003, p.261.

<sup>115</sup> Art. 263 TEC, see: Domínguez-García, op.cit., p.260. This requirement has now been enshrined in the Draft Constitutional Treaty of the EU, Art. 31.2.

<sup>116</sup> Art. 5.1, emphasis added.

<sup>117</sup> M.Brusis, *Between EU Requirements, Competitive Politics, and National Traditions: Re-creating Regions in the Accession Countries of Central and Eastern Europe*, “Governance”, No. 15/2002, p.541, referring to M.Hallet, *National and Regional Development in Central and Eastern Europe: Implications for EU Structural Assistance*, European, Commission/DG for Economic and Financial Affairs, Brussels 1997, p.25.

after 1997 that the Commission did push for regionalisation, as by then it had been decided that the candidate states would have to implement all of the *acquis* before accession, and this “*implied that the accession countries needed to improve their administrative capacities at the regional level in order to manage Structural Funds*”.<sup>118</sup> In addition to the Accession Partnerships – for example those of Bulgaria, the Czech Republic and Slovakia in March 1998 – that explicitly stated that the countries in question should set up regional administrative structures in order to be able to take advantage of the structural funds, the Commission’s pressure was also based on the direction of PHARE resources towards regional assistance, and the setting up of twinning programmes. The Commission’s Regular Reports made remarks on the extent of administrative reforms in the relevant states, though there is a very clear emphasis on the administrative capacity for the management of structural and cohesion funds, and on effective monitoring, financial management and control at regional level rather than on democratic self-government and autonomy.

The *acquis* includes (in chapter 21) the requirements of regional administrative capacity, inter-ministerial co-ordination of regional policy and means for monitoring structural programmes. The candidate states must also organise their territory to fit within the so-called NUTS (la Nomenclature des Unités Territoriales Statistiques) classification system used to implement the Structural Funds.<sup>119</sup> Regarding these, the regions need to be autonomous enough to be credible partners to the Commission in the Structural Fund partnership process: the principle behind the co-management of the Structural Funds is to create policy not just for the regions, but also by them – that is, to ensure that local governments and NGOs, etc., are involved in the administration and management of the funds, within a collaborative process.<sup>120</sup> The Structural Funds implement over 90% of all EU structural funding, the most important objective of which is the promotion of development in economically backward regions with GDP *per capita* of less than 75% of the EU average.

When evaluating the importance of the EU accession factor in the decentralisation of CEE states, it should be emphasised that a high degree of regionalisation in the countries of the region could well have occurred anyway, without any such pressure from the EU. Brusis has shown that much of the impetus towards regionalisation came about due to the traditions of the countries and their move away from Communism, and also due to the preferences of the

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<sup>118</sup> Ibidem, p.542.

<sup>119</sup> See: D.Marek, M.Baun, *The EU as a Regional Actor: The Case of the Czech Republic*, “JCMS”, No. 40/2002, p.897-898.

<sup>120</sup> Ibidem, p.898.



political actors on the scene in the 1990s.<sup>121</sup> Thus, for example, “Solidarność” in Poland and reformers and intellectuals in Hungary had traditionally seen local self-government as a way of building democracy and civil society. Also, in Czechoslovakia, the existing regional administrations were quickly abolished because they were seen as a stronghold of the Communist Party, and thus the creation of new regional authorities had considerable support in the domestic arena. Indeed, in relation to local government, many CEE states introduced reform well before the Commission or other EU bodies became active in promoting regionalisation. For example, Poland did so in 1990 and then introduced another programme for reform in 1993, the Czech Republic did so in 1990, with Hungary starting from 1991. It is true that, with the exception of Hungary, the reform of regional government (in which there were more vested interests and disinterest in reform) did not take place until after the 1997 watershed, when the Commission began to pressure explicitly for regionalisation. Could it be said that the EU directly influenced these moves? Whilst it certainly may be true that the agenda for reform came about due to EU pressure, the actual formation of the new regions did not always correspond to NUTS areas. The general picture is that regions were created in the country (the real regions) and then amalgamated to form administrative regions only for NUTS purposes. This occurred in Bulgaria, the Czech Republic, and in Hungarian and Romanian regions (with the larger regions being formed to comply with NUTS II). The Polish regions were created, in 1999, to comply with NUTS, but they are “*managerial and administrative rather than political entities*”.<sup>122</sup> It is not clear how effectively the NUTS-created units will interact with the original “real” regions. Of the examples mentioned above, all but Poland have weak institutionalisation of the NUTS areas (being merely administrative concepts created for the purpose of the Structural Funds), which “*indicates that they constitute artificial elements in the traditional (and re-created) territorial-administrative structure*”.<sup>123</sup> Indeed, in the Czech Republic, the artificiality of the NUTS areas created “*a potentially awkward situation by grouping together, in some of the NUTS II units, regions that have not always historically co-operated, and in some cases have even been rivals*”.<sup>124</sup>

The evaluation of the EU factor is also difficult because the pressure from the EU – in the Reports and through PHARE funding – was not towards any specific, detailed model for the construction of regions; rather their size, form of

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<sup>121</sup> Brusis, op.cit., p.546-548.

<sup>122</sup> Report of the Reflection Group, op.cit., p.120.

<sup>123</sup> Brusis, op.cit., p.553.

<sup>124</sup> D.Marek, M.Baun, op.cit., p.903.

funding, exact capabilities, and level of fiscal autonomy were largely left open. The Commission has been very cautious in dispensing its advice; it merely required “*that <appropriate> systems of regional administration and governance be in place by the time of accession, without trying to define these in any concrete way*”.<sup>125</sup> Consequently, there are big differences between the regional structures in the various countries of CEE: between Bulgaria, the Czech Republic, Hungary, Poland and Slovakia, the size of the regional units varies, as does the level of integration between territorial state administration and regional self-governments.<sup>126</sup> The form that regionalisation takes is a function of geographical and political contexts; thus such differences are not surprising, given that the CEE states have different population densities and sizes.

There is some evidence, however, that the Commission Reports made a difference to the trend towards regionalisation. Most fundamentally, the influence of the EU institutions was crucial in putting the very issue of regionalisation on the agenda; as the authors of the “Dehaene Report” observed, “*with the exception of Poland, where regional reform was recognised early on as an essential part of the transition process, regionalisation only became an issue following pressure from the Commission which directly or indirectly shaped the process in a number of CEECs*”.<sup>127</sup> The pressure was also effective sometimes in remedying specific, detailed problems. Taking the Czech Republic as an example, after it was criticised in 1997 because higher units of territorial administration were lacking, it had remedied the situation by 2001.<sup>128</sup> Furthermore, other aspects of regionalisation that were criticised in the Reports (such as financial management) were also at least partially remedied, with the Commission noting substantial progress in its 2002 Report. As Marek and Baun observe, EU pressure and the prospect of accession “*probably accelerated the process of regionalization in the Czech Republic*”.<sup>129</sup> In addition, to fulfil the requirements of decentralisation contained in the PHARE cross-border co-operation programme, the Czech Republic established Euroregions – cross-border structures along the Czech borders with its neighbours – and even more decentralised regional bodies used for administering the small projects fund, investing in

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<sup>125</sup> Ibidem, p.898.

<sup>126</sup> Brusiš, op.cit., p.538-539.

<sup>127</sup> Report of the Reflection Group, op.cit., p.121, referring to J.Hughes, G.Sasse, C.Gordon, *The Regional Deficit in Eastward Enlargement of the European Union: Top Down Policies and Bottom Up Reactions*, “ESRC Working paper”, No. 29/2001.

<sup>128</sup> Brusiš, op.cit., p.543.

<sup>129</sup> D.Marek, M.Baun, op.cit., p.903.

border areas. These were, however, seen as a big success by the Commission and recommended to other countries of CEE.<sup>130</sup>

At the end of the day, the effect of EU accession upon regionalisation in the candidate states has been positive though indirect, diffuse and not particularly strong. This is for a number of reasons. Firstly, there is no single West European model to imitate in this respect, and consequently there is no specific *acquis* regarding the details of the organisation and status of regional governments. Although Professor Alessandro Pizzorusso may be right when he notes that recognition of a form of regional autonomy belongs to the common constitutional traditions in Europe,<sup>131</sup> he nevertheless himself acknowledges the existence of a great variety of forms of such recognition, ranging from a federal design (as in Germany, Austria and more recently in Belgium) to unitary states in which autonomy is “purely administrative” (as in France, the Netherlands or the Scandinavian states).<sup>132</sup> As one expert in the regionalisation of EU member states has observed, if we look at the policy functions of European regions, “*it is (...) impossible to find a concrete competence common to all regions or even common to all regions with legislative powers*”.<sup>133</sup> Hence, it is understandable that the pressure from the Commission was only by “*indirect and underformalized methods*”.<sup>134</sup> Secondly, the societal pressure from below was relatively weak in the states of CEE, perhaps with the exception of Poland. This is due to a number of factors: the smallness of many of the candidate states, the newness of these states, the relative frequency of boundary shifts in the past – all of these contributed to the relatively low intensity of the sense of regional identity, with the regions created being more “*artificial creations rather than historically and culturally anchored regional units*”.<sup>135</sup> The demands for strong regional autonomy based on historical identity in those few cases in which they occurred – in Silesia in Poland, or in Moravia in the Czech Republic – were quickly marginalised and rejected by all major parties in these countries. As Brusis explains, the relative weakness of regionalism in CEE can be explained by lack of correlation between ethnic and historical regionalism: significant national minorities do not have traditions of regional units (as is the case in Estonia, Lithuania or Slovakia), while historically entrenched regions lack separate ethnic identity (as is the case of Czech Republic; Poland is an exception but the ethnic German minority in Silesia represents less than one percent of the

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<sup>130</sup> Ibidem, p.906.

<sup>131</sup> A.Pizzorusso, *Il patrimonio costituzionale europeo*, Bologna 2002, p.151.

<sup>132</sup> Ibidem, p.150.

<sup>133</sup> Domínguez-García, op.cit., p.271.

<sup>134</sup> Brusis, op.cit., p.535.

<sup>135</sup> Report of the Reflection Group, op.cit., p.123.

population).<sup>136</sup> However, this weakness of indigenous support for regionalisation at the same time indicates that, without the external pressure, there would have been no attempt to regionalise at all; that the matter would not even have made it on to the political agenda. As Iver Neumann claims, “*region building in East Central Europe after the end of the Cold War has been almost exclusively a reactive phenomenon*”, in the sense of reacting to the expectations of “the West”, including the EU and NATO.<sup>137</sup> Thirdly, the EU push towards regionalisation has been largely offset by the by-and-large technocratic nature of the accession process, which has inevitably led to centralisation: the EU demand for speedy implementation of the *acquis* and efficient use of resources strengthened national actors to the detriment of regional ones.<sup>138</sup>

Nevertheless, accession is likely to consolidate and deepen the push towards regionalisation. If we look to the lessons of history in this regard, there have been some examples in the EU of regional identities being created – or at least, greatly fostered - within regions set up initially for administrative reasons, as is the case of North-Rhine-Westphalia; a consensus seems to exist among many scholars that the EU cohesion policy has mobilised support for regions in the existing member states and strengthened their political position.<sup>139</sup> There is no reason to believe that a similar effect will not occur in CEE. The example of some Polish regions having established their own interest groups to lobby in Brussels on their behalf may suggest that the EU exerts some pull towards increasing regional awareness, if not in terms of cultural or political identity, then at least at the level of economic and political interests. It also renders realistic a speculation by Marek and Baun that, after accession “*regional interests could begin to mobilize within and around new but increasingly familiar regional structures*”.<sup>140</sup>

## 5. Conclusions

Since the fall of Communist rule, the countries of CEE have profoundly transformed themselves into constitutional, liberal democracies. To a large extent, these changes have been driven by the internal domestic pressures for “normalcy” (or “democracy without adjectives”), “normalcy” being shaped both by pre-Communist traditions, local views on the requirements of democracy, and by the perception of what democracy has produced in successful and “normal”

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<sup>136</sup> Brusis, op.cit., p.550-551.

<sup>137</sup> Neumann, op.cit., p.62.

<sup>138</sup> D.Marek, M.Baun, op.cit., p.896 and p.913-914.

<sup>139</sup> See: Brusis, op.cit., p.1, referring to the literature of the subject.

<sup>140</sup> D.Marek, M.Baun, op.cit., p.914.

systems, both in Western Europe and the US. Much of the transformation has therefore been by imitation, emulation and transplant of Western (including Western European) templates of democratic institutions. Since the early 1990s, the transformations have been also dictated by “conditionality”: a set of more or less vague requirements that had to be met if a state were to qualify for membership in the EC/EU. The combination of the relative inflexibility and rigor of principle of conditionality, on one hand, with the relative malleability, open-endedness and speed of the political transformations in post-communist states, on the other, contributed to the high degree of effectiveness of the attempt to transplant the rules of the “club” to the “applicants”. The EC/EU could dictate the terms because the candidates have more interest in joining than the Union does in enlarging; the democratic forces in the CEE states could bravely design new institutions because the forces of the ancien regime were demoralised, traumatised and easily embarrassed. The constellation of external and internal conditions was therefore favourable to rapid and thorough democratisation, though the specific parameters varied from country to country and from issue to issue. In general, the interaction between the “external” factors of conditionality and the domestic calculus of the costs and benefits of transforming an institution (or adopting a rule) provides the best lens through which to evaluate the impact of “conditionality” upon the speed, depth and resilience of adoption and maintenance of particular democratic rules or institutions in the candidate states.

This explanatory lens will maintain its validity also after accession, although the patterns of incentives will change somewhat, as was suggested in Part 1 of this paper. The three specific areas in which accession is likely to make a difference for the institutional set-up in the new member states are the relationship between the executive and legislative branches, the position of constitutional courts, and the significance of regional and local administration and self-government, discussed in Parts 1-4 of this paper. In all of these three areas the changes will not be qualitative in character, but will instead continue the trends already set in motion by the process of accession negotiations and preparations. Their overall significance for democracy in general is difficult to assess; from my point of view, the strengthening of constitutional courts and the weakening of the legislatures both give cause for concern, while the decentralising tendencies should be applauded. Others will attach different values to these trends. What is important is to realise that accession will not leave the political systems in new member states untouched, and that a prudent strategy at this point for these countries would be to anticipate and attempt to limit the possible negative effects of accession (say, by strengthening the legislatures through providing them with better expert infrastructure, or to introduce constitutional amendments in order to prevent constitutional courts from “dictating” legislative changes to parliaments), while at the same time taking advantage to the greatest degree possible of the positive effects.

In the end, the most fundamental positive effect will be at a macro-rather a micro-level: by providing the democratic forces within the postcommunist states with additional support, encouragement and discursive assets against the threats from authoritarian, populist, nationalistic forces, the democratic transition itself has been safeguarded. In this sense, the position of democratic elites in new member states will not be all that different from the position of liberal and democratic forces in, say, Italy or Austria, where those with authoritarian tendencies invariably find themselves in the “anti-European” corner, because the institutional and ideological structure of the European Union tends to support liberal and democratic arguments. Thus, the EU increasingly becomes a community of values, not merely a community of interests, and the values that these days predominate within the Union resemble closely the values of civic liberal-democrats in the post-communist area of Europe. The anxiety that the leaders of most of the EU member states (led at that time by French president Jacques Chirac) displayed in response to the likelihood – and then, the reality – of a coalition government including a nationalistic, xenophobic, authoritarian party in one of its member states (I have in mind, of course, the Austrian debacle of 2000) illustrates clearly that the EU can be mobilised against such trends, and that there is a degree of transnational solidarity on the part of liberal-democratic forces that can count on the political resources of the Union (especially now that the “lex Austria” procedures have been enhanced in the Nice Treaty and in the draft Constitution of the EU). When the awareness that a possible lapse into a nationalist-authoritarian option in new member states in the CEE is not merely an “internal domestic affair” but rather becomes immediately a “European” problem penetrates the public opinion in these states, the political mechanisms for preventing and countering such collapses will themselves become more resilient. Accession to the EU may not be a panacea for all of the problems of political democracy but it may well be a reasonably good protection against possible future disasters.

This will be a principal democracy dividend stemming from the reconfiguration of traditional focal points of identity and sovereignty that will necessarily follow upon the accession to the EU. That reconfiguration – a process of “transnational articulation of societies”<sup>141</sup> – has already begun to occur, but it will be greatly accelerated after the actual accession. Many social forces in the new member states – political parties, NGOs, women and environmental organisations, etc – will find their counterparts in the other members states to be the most logical, obvious partners for co-operation and common action. (Indeed,

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<sup>141</sup> S.Bianchini, *Post Communism, Post-Westfalianism. Overcoming the Nation-State*, in: *Post-Communism as a European Problem*, eds. S.Bianchini, G.Schöpflin, P.Schoup, Ravenna 2002, p.197.

the process of transnational party co-operation, with CEE parties included within EU party federations and various political internationals, has already begun, and the introduction of parliamentarians from CEE into the European Parliament will be a powerful additional stimulus to such political transnationalisation).<sup>142</sup> Traditional lines of loyalty will be altered: as “local” matters become, by definition, “European”, the notion of “washing one’s dirty linen at home” will lose its persuasive force. Just as the appeal to the Strasbourg Court has established – and legitimated – a route outside the state to make grievances heard, so will the EU-based institutions, procedures and organisations erode the trumping power of “state sovereignty”, once capable of silencing the voices raised in defence of democratic and liberal values. The identity of the polities will also undergo significant changes: for example, the extension of the right to vote in elections to the European Parliament to any EU citizen regardless of where they happen to be, and also in local elections for resident non-citizens of member states (a measure that will call for appropriate constitutional amendments in new member states, as it has already in the current member states) will drive home to many people the contingency of citizenship and the weakness of ethno-national criteria in defining the membership of a polity. The understanding of who is part of the demos will inevitably be transformed: traditional loyalties and the ethnic and cultural sense of belonging will need to give way to something more akin to “constitutional patriotism”, under which the polity is bounded by common civic rights and duties rather than by tradition and ethnic identity. The same will apply to an increasing knowledge of foreign languages, and the consequent evaporation of the “monopoly over language” by the nation states,<sup>143</sup> as to the EU-driven removal of legal prohibitions upon the purchase of real property by non-citizens.<sup>144</sup> In a longer-term perspective, the adhesion to the Euro-zone will undercut another traditional symbol of national identity: a local currency and the dominant position of a central bank. All of this will put the nationalistic forces (who also happen to be, more often than not, authoritarian and illiberal) on the defensive. Attempts to re-establish identity along the lines of national, ethnic or religious patterns will no doubt be undertaken, but, with the growing integration of the new member states in the EU, those doing so will be facing increasingly uphill battle. Accession will reconfigure political and discursive assets and incentives in ways that help the liberal-democratic and

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<sup>142</sup> See: G.Pridham, *External Causes of Democratisation in Postcommunist Europe: Problems of Theory and Application*, “Central European Political Science Review”, No. 2/2001, p.16-17.

<sup>143</sup> See: Bianchini, op.cit., p.197.

<sup>144</sup> See: A.Nikodém, *Constitutional Impact of the Eastward Enlargement in Central-Eastern Europe. Report on Session III*, in: Kellerman, op.cit., p.383.

hinder the authoritarian political forces in new member states. This is perhaps the best thing about democracy dividend of the EU accession process.